QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Group Five Pty Ltd v Body Corporate for Cairns Golden Sands* [2019] QCAT 133
PARTIES:	**GROUP FIVE PTY LTD ATF AL ZAHRA TRUST** (applicant) v **BODY CORPORATE FOR CAIRNS GOLDEN SANDS CTS 17890** (respondent)
APPLICATION NO/S:	OCL074-18
MATTER TYPE:	Other civil dispute matters
DELIVERED ON:	13 May 2019
HEARING DATE:	4 March 2019
HEARD AT:	Brisbane
DECISION OF:	Senior Member Brown
ORDERS:	**The parties are to file and exchange submissions on the form of orders to be made within seven (7) days.**
CATCHWORDS:	
APPEARANCES & REPRESENTATION:	
Applicant:	Mr Kidston instructed by Mahoneys
Respondent:	Mr Strangman instructed by Grace Lawyers

REASONS FOR DECISION

[1] Group Five Pty Ltd ('Group Five') is the caretaker and letting agent of Golden Sands Resort, a scheme comprising 32 lots, pursuant to a management and letting agreement ('the agreement')[1]. The respondent is the body corporate for the scheme. The Body Corporate purported to terminate the agreement as a result of what it said was Group Five's failure to comply with three remedial action notices (RANs).

[2] Group Five has filed an Application to resolve a complex dispute claiming relief in respect of the RANs. Specifically, Group Five seeks, inter alia, declarations that the

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1 Management Engagement & Letting Authorisation Agreement dated 2 June 2014.

RANs are invalid and of no effect and that the purported termination of the agreement by the Body Corporate is invalid and of no effect.

[3] On 21 November 2018 the Tribunal granted an interim injunction prohibiting the Body Corporate from terminating or attempting to terminate the agreement in reliance upon the RANs. The interim injunction was continued by further order of the Tribunal on 18 December 2018.

Preliminary issue

[4] The interim injunction granted by the Tribunal on 21 November 2018 and continued on 18 December 2018 was made 'until further order'. It was raised with counsel for the parties at the hearing whether, the previous orders having been made, it was now for the Body Corporate to seek an order dissolving the injunction. Counsel agreed that the present application should proceed as a determination of the substantive interim injunction application. It is appropriate to proceed on this basis noting that the previous orders of the Tribunal were not made after a hearing and determination on the merits. I will therefore decide whether the interim injunction should be continued.

Interim injunctions

[5] The tribunal may grant an injunction, including an interim injunction, in a proceeding if it is just and convenient to do so.[2] An interim injunction is an injunction that has effect for the duration of a proceeding or a shorter period.[3] In granting an interim injunction, the tribunal may require an undertaking, including an undertaking as to damages, that it considers appropriate and may assess such damages.[4]

[6] A party seeking an interim injunction must establish:

(a) That there is a serious question to be tried and a sufficient likelihood of success to justify the preservation of the status quo pending trial;

(b) That the balance of convenience favours the grant of the injunction.[5]

[7] In considering the balance of convenience, it is necessary to determine whether damages would, if the interim injunction is not granted, be an adequate remedy.

[8] What constitutes a 'serious question' to be tried was addressed by the High Court in *ABC v O'Neill*:

> The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*. This Court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued:

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2 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act'), s 59(1).
3 Ibid, s 59(9).
4 QCAT Act, s 59(6), s 59(7).
5 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

> 'The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief ... The second inquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.'

By using the phrase 'prima facie case', their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the Court was referring to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument. With reference to the first inquiry, the Court continued, in a statement of central importance for this appeal:

> 'How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks.'[6]

The background to the dispute

[9] Group Five entered into the agreement with the Body Corporate for the provision of caretaking and related duties at the scheme. The agreement also provided for Group Five to provide a letting agent's business for the benefit of lot owners and occupiers in the scheme. The agreement is for a term of 25 years ending on 30 June 2039. The agreement sets out the caretaking duties. The duties are identified in the agreement as 'general duties' and 'specific duties'. The 'specific duties' are, in turn, identified by reference to 'cleaning grounds and maintenance – daily routine', 'cleaning grounds and maintenance – weekly routine' 'cleaning grounds and maintenance – monthly routine', and 'cleaning grounds and maintenance – six monthly routine.'

[10] Mr Syed Ali is the sole director and the secretary of Group Five. Mr Ali is also the nominee of the caretaker under the agreement.

[11] On 17 May 2018 the Body Corporate issued three RANs. By way of background, prior to issuing the RANs, the Body Corporate engaged Diverse FMX ('the consultant') to undertake a review of Group Five's performance of its duties. The initial review was undertaken on 26 February 2018 and a report prepared by the consultant ('the 1st report').[7] A further review was undertaken on 23 April 2018. Following the further review the consultant prepared a report, referred to in the RANs as the Follow-Up Inspection Report ('the 2nd report').[8]

[12] Following the issuing of the 2nd report, the RANs were served by the Body Corporate. Thereafter the consultant conducted an on-site inspection on 20 June 2018 and prepared a further report ('the 3rd report').[9] On 23 July 2018 the consultant issued a further report ('the 4th report'). The 4th report addressed the various items identified in the RANs and whether they had been complied with.

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6 Ibid, 81-82 [65] (citations omitted).
7 Affidavit of Linda Kypriadakis sworn 12 December 2018, Exh LK-1.
8 Ibid.
9 Ibid.

[13] On 9 October 2018 an Extraordinary General Meeting of the Body Corporate was held at which it was resolved to terminate the agreement. Subsequently the Body Corporate gave notice to Group Five's financier of the right of the Body Corporate to terminate the agreement.[10] On 16 November 2018 the Body Corporate wrote to Group Five terminating the agreement with the termination to take effect from 22 November 2018.

[14] On 4 December 2018, following an inspection of the scheme to report on whether the caretaking duties were being performed, the consultant issued a final report ('the 5th report').[11]

Is there a serious issue to be tried?

[15] As is often the case in such disputes before the Tribunal, the issues for final determination in the present matter relate, in large part, to the validity of the RANs, whether the RANs were complied with by the applicant, and the reasonableness of the actions of the Body Corporate in issuing the RANs and in terminating the agreement.

[16] Two of the RANs relied upon by the Body Corporate attach a copy of the 2nd report. The first RAN ('RAN 1') relates principally to what were said to be failures by Group Five to, inter alia, display compliance/classification certificates relating to building and equipment, undertake periodic testing of electrical appliances, arrange for the conduct of thermographic surveys of electrical wiring, comply with a WHS plan developed for the Body Corporate and keep records of programmed maintenance of common property infrastructure. The second RAN ('RAN 2') relates to the alleged non-performance by Group Five of a range of maintenance duties including equipment repairs, repairs of pavers, repairing water leaks, cleaning duties, removal of weeds and other gardening duties including the removal of plant foliage, general garden maintenance and the watering of gardens. The third RAN ('RAN 3') relates to a single issue, being the failure by Group Five to attend to weed control by using a weed wand and hand pulling weeds rather than by the use of weed spray.

[17] RAN 1 identifies the action required to be performed by Group Five to remedy each of the alleged breaches of the agreement (as do RAN 2 and RAN 3). The action identified includes compliance by Group Five with the 'Body Corporate's WHS Plan'. This is a reference to a document titled '2018 Work Health & Safety Compliance Management Plan' prepared by the consultant ('WHS Plan'). In the introduction to the document it states:

> The Body Corporate … has created policies and procedures to ensure that all measures are undertaken to protect … from any risk or hazard. These policies and procedures will be implemented by the Building Manager under a Supervisory Caretaking Agreement as per this WHS Plan.
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> …

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10 As required by s 126(1) of the *Body Corporate and Community Management Act* 1997 (Qld).

11 Affidavit of Linda Kypriadakis sworn 12 December 2018, Exh LK-1.

> In order to properly fulfil its obligations under the WHS Act 2011 … the Building Manager is required to follow the processes developed herewith under consultation, in the following Work Health & Safety Plan.[12]

[18] The parties have filed a number of lengthy statements of evidence. Group Five relies upon two affidavits by Mr Ali.[13] Mr Ali says that Group Five complied with the RANs by performing the necessary remedial actions. He says that he has had an ongoing disagreement with the Body Corporate regarding the refusal to pay invoices rendered by Group Five and the refusal to approve quotes for specialist works. Mr Ali says that Group Five continues to perform the duties required of it under the agreement.[14]

[19] Group Five says that while the Body Corporate has issued three RANs, they should together be treated as one RAN.

[20] Group Five also says that the RANs purport to mandate how it was required to remediate the alleged breaches and that the RANs are thereby arguably invalid. The regulations[15] identify what must be stated in a RAN.[16] In *The Sands Gold Coast Pty Ltd v The Body Corporate for the Sands*[17] the QCAT Appeal Tribunal held:

> [48] … notwithstanding the terms of an engagement or authorisation, where a purported ground of termination falls within the scope of s 131 (or s 130) of the Standard Module the requirements of that regulation must be followed in order to validly terminate the engagement or authorisation.
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> …
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> [56] While, in terms, s 131 is not expressed to be a mandatory code excluding rights that may exist under a service contract, it does impose mandatory requirements to be satisfied in the event of a body corporate seeking to terminate on one of the grounds set out in subsection 131(1).

[21] The regulation does not provide that a RAN state how an identified breach is to be remedied. Arguably a RAN that does set out, or purports in some way to prescribe, how breaches are to be remedied is not compliant with the regulation. It is a matter for the service contractor to determine the manner in which any identified breaches are remedied. It is then a matter for a body corporate to consider whether the breaches have been remedied.

[22] It is neither appropriate nor possible in an application such as this, where there is clearly a dispute on the facts, to make factual determinations. Without descending

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12 Affidavit of Robert Charles Dowdell sworn 5 December 2018, exh. RCD-1.

13 Affidavit of Syed Ali sworn 21 November 2018; Affidavit of Syed Ali sworn 2 March 2019.

14 Affidavit of Syed Ali sworn 2 March 2019, [13].

15 *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) ('Accommodation Module'), s 129(4); *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) ('Commercial Module'), s 90(4); *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld) ('Small Schemes Module'), s 68(3); *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (Qld) ('Specified Two-lot Schemes Module'), s 18(3); *Body Corporate and Community Management (Standard Module) Regulation 2011* (Qld) ('Standard Module'), s 131(4).

16 There is no evidence before the Tribunal regarding the applicable module however the requirements for what is stated in a RAN are identical in the Accommodation Module, Commercial Module, Small Schemes Module, Specified Two-lot Schemes Module and Standard Module.

17 [2018] QCATA 160.

into a detailed discussion of what each party says and an analysis of the evidence filed by the parties, it is appropriate to refer to some specific aspects of the RANs and what Group Five has to say:

(a) RAN 1 identifies a failure by Group Five to take steps to have the Certificate of Classification displayed. In response, Group Five says that this is a non-delegable obligation imposed upon the Body Corporate and not a duty required to be performed by Group Five.

(b) RAN 1 identifies that Group Five must be able to advise on the systems and mechanical equipment installed in the scheme and to arrange for necessary maintenance. Group Five says that this is not a remedial action.

(c) RAN 1 identifies a failure by Group Five to remedy non-compliance with the WHS Plan. Group Five says that it has no obligation under the agreement to comply with the WHS Plan.

(d) RAN 3 identifies a failure by Group Five to use a weed wand and the manual extraction of weeds to control weeds rather than using a spray.

[23] Group Five says that the Body Corporate is relying upon the opinion of the consultant about what the caretaking and management duties are and how they should be delivered, whereas what is relevant is what the agreement specifies as the duties Group Five is required to perform. Group Five says that it is not obligated to regulate the way it conducts its business based upon the opinion of the consultant.

[24] In relation to RAN 3, Group Five says that the complaint by the Body Corporate is pedantic. Group Five highlights the difference between a contract for services and a contract of service, the former being the contractual arrangement between the parties in the present case. Group Five says that it is a matter for it as to how it discharges its duties.

[25] In relation to the various complaints contained in the RANs relating to the alleged failure by Group Five to undertake maintenance duties, Group Five says that the photographs appended to the 2nd report are evidence only of what pertained at a particular point in time and are not evidence of a breach by Group Five of its obligations under the agreement.

[26] The Body Corporate says that the statement of claim attached to the originating application is not adequately particularised and does not identify a prima facie case by Group Five. In relation to the complaint that three RANs were delivered rather than one, the Body Corporate says that this was necessary in order to enable Group Five to deal with different issues within different time frames. RAN 1 and RAN 2 each specified a period of 28 days to remedy the identified breaches. RAN 3 (relating to the use of the weed wand) specified a 14 day remediation period. RANs 2 and 3, says the Body Corporate, required Group Five to undertake ‘tangible’ duties.

[27] The Body Corporate says that the only evidence from Group Five that the duties the subject of the RANs was performed is contained in the affidavit of Mr Ali which is expressed in the most general of terms.

[28] Insofar as RAN 2 is concerned, it is clear that there are factual disputes about whether the alleged breaches were, in fact, breaches of the agreement and whether, and to what extent, Group Five remedied the breaches within the time specified in the RANs. I accept that the evidence relied upon by Group Five regarding remediation of the breaches is limited. But in an application such as this, and assuming Group Five had filed evidence of when, and how, it said the breaches had been remedied, it would still be that the factual disputes about any such remediation could not be resolved without a final hearing at which the evidence could be tested. Having said this, paucity or otherwise of evidence may be a relevant consideration in assessing the strength of the applicant's case and in addressing the balance of consideration.

[29] The Body Corporate relies upon the 3rd report as evidence of the failure by Group Five to remedy the breaches identified in the RANs. It is appropriate to make a number of observations about the 3rd report, and the subsequent reports, prepared by the consultant. There is a dispute about whether all of the matters identified in the RANs relate to duties Group Five was contractually required to perform. The 3rd report refers to a number of the same matters referred to in the RANs and in the 2nd report, including compliance with the requirements set out in the WHS Plan. The 3rd report then identifies whether these matters have, in the opinion of the consultant, been remedied. The opinions expressed by the consultant in the 3rd report cannot be conclusive evidence of whether or not Group Five remedied the non-compliance identified in the RANs or indeed whether Group Give continues to discharge its duties under the agreement. The 3rd report also contains, in numerous respects, the expressed opinion of the consultant about the appearance of the scheme at a point in time.

[30] There is a dispute about whether, and to what extent, the Body Corporate was entitled to specify the manner in which Group Five discharged its duties under the agreement. The reference in RAN 1 to the WHS Plan and the direction for the use of a weed wand in RAN 3 are two examples. RAN 3 refers to the 'reasonable written direction' by the Body Corporate for Group Five to use a weed wand as opposed to spray to control and eradicate weeks. Whether the direction by the Body Corporate was reasonable is in dispute, as is the extent to which a contractor under a contract for services can be directed to provide the services in a specified manner where alternative ways of providing the services may be reasonable and appropriate. Whether a RAN requiring remedial work to be performed in a particular way renders a RAN non-compliant with the regulation and thereby cannot be relied upon by the Body Corporate is also in dispute.

[31] As I have observed, there is also a dispute about whether, and to what extent, the breaches identified in RAN 1 relate to duties Group Five was contractually required to perform and the extent to which the RAN relied upon Group Five's non-compliance with the WHS Plan which did not form part of the agreement.

[32] There is a dispute about whether the Body Corporate acted reasonably in issuing three RANs rather than a single RAN. RAN 1 does not relate to the performance of regular maintenance such as cleaning, garden maintenance and the like. RAN 1 relates to, inter alia, the failure by Group Five to advise the Body Corporate on systems and mechanical equipment, the failure to keep and maintain infrastructure maintenance records, the failure to display certificates of classification and registration and the failure (either by Group Five or by a contractor) to undertake

testing of electrical wires, leads and appliances. RAN 2 relates in large part to regular maintenance duties including the spraying of weeds. RAN 3 is limited to the issue of the use of a weed wand. There are some apparent inconsistences both within and between RAN 2 and RAN 3. In RAN 2, the Body Corporate identifies the requirement for Group Five to 'spray and remove weeds'. According to RAN 2 this is to be achieved using a weed wand which is not a 'spray'. RAN 3 identifies essentially the same issue, although the complaint of the Body Corporate appears to also relate to the failure by Group Five to comply with a reasonable direction by the Body Corporate.

[33] I am satisfied that Group Five has established a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the hearing.

Balance of convenience

[34] I will address firstly the issue of the nature of the injunctive relief sought by Group Five.

[35] The Body Corporate says that Group Five is seeking to prevent it from proceeding with the termination of a contract for personal services in circumstances where the Body Corporate has lost confidence in Group Five to perform the duties under the agreement. The Body Corporate relies upon the decision in *Dickson Property Management Pty Ltd v Centro Property Management (Vic) Pty Ltd*[18] where it was found that the maintenance by the applicant of an appropriate standard of cleaning (pursuant to a commercial cleaning contract between the parties) had the potential to involve, to an unacceptable extent, the court in supervising the performance of the contract where the respondent asserted a loss of confidence in the applicant.

[36] In *Tymbook Pty Ltd v Victoria; Bradto Pty Ltd v Victoria* (*Tymbrook*')[19] the Victorian Court of Appeal held that an injunction to restrain a party from terminating a service agreement is properly characterised as mandatory in substance. In *Tymbrook* the Court held that whether injunctive relief sought is prohibitory or mandatory, the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong", in the sense of granting an injunction to a party who fails to establish his or her right at the trial, or in failing to grant an injunction to a party who succeeds at trial.

[37] In *Bingham v 7-Eleven Stores Pty Ltd*[20] the Queensland Court of Appeal considered circumstances where an injunction was sought prohibiting the termination of a franchise agreement. Muir J held: [21]

> I do not accept the appellant's submission that the injunctions, although framed in prohibitive language, should be regarded as mandatory orders "for the continuation of the (franchise agreements) pending" trial. The orders are directed only to reliance by the appellant on the contested notices. They do not alter the status quo, as the appellant's arguments suggest. On the contrary, they seek to maintain it…

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18 [2000] FCA 1742.
19 (2006) 15 VR 65.
20 [2003] QCA 402.
21 Ibid, [103]-[104] ('citations omitted').

> Furthermore, the granting of the injunctions is supported by the desirability of preserving the agreements and, through their continual existence, the respondents' two businesses, until trial.

[38] Muir J went on to consider whether, if the injunction sought was mandatory in nature, it was necessary for the applicant to satisfy the 'high degree of assurance of success' test propounded in *State of Queensland v Australian Telecommunications Commission*.[22] Without finally determining the matter, Muir J cited[23] the following passage from "Equity: Doctrines and Remedies", 4th ed at paragraph 21-395 —

> In truth, a judge hearing an application for an interlocutory mandatory injunction must apply exactly the same tests as he would in the case of an application for an interlocutory prohibitory injunction, not some different or more exacting test; nor is the fact that the relief sought is mandatory a ground for refusing relief; but in the application of the normal tests, often, but not always, the fact that the relief sought is mandatory will tilt the balance of convenience in the defendant's favour.

[39] There has been divergence in judicial approach to the principles to be applied in considering prohibitory and mandatory injunctions.

[40] In *Businessworld Computers Pty Ltd v Australian Telecommunications Commission*[24] Gummow J considered a submission that a court asked to grant a mandatory interlocutory injunction should only do so if the court felt a high degree of assurance that at the trial it would appear that the injunction was rightly granted, and that the degree of assurance involved a higher standard than is required for a prohibitory injunction. His Honour held:[25]

> In contrast, the present case offers none of those special features which reflect equity's reluctance to compel the continuation of contractual or other associations requiring personal trust and confidence between the parties to the litigation or between the defendant and third parties, particularly where the question of satisfactory performance is one of taste, opinion and degree... Nor is there any difficulty in framing the terms of mandatory relief so that there is sufficient definition of what will have to be done to comply with the order...

[41] In *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* ('*Kellogg Brown*')[26] it was held:

> On the matter of the approach to the grant of an injunction pending the hearing and determination of a proceeding, in *Bradto Pty Ltd v State of Victoria* [2006] VSCA 89 at [35] the Court of Appeal in this State, constituted by Maxwell P and Charles JA, stated that: whether the relief sought is prohibitory or mandatory, the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong', in the sense of granting an injunction to a party who fails to establish his right at the trial, or in failing to grant an injunction to a party who succeeds at trial.

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22 (1985) 59 ALJR 562, 563.
23 [2003] QCA 402, [106].
24 (1988) 82 ALR 499.
25 Ibid, 501-2.
26 [2007] VSC 200, [45].

[42] I will approach the determination of the application on the basis outlined in *Kellogg Brown*. It is not absolutely clear to me, in any event, that the injunction is mandatory in nature. Rather, the injunction seeks to prohibit the Body Corporate from acting upon the resolution to terminate the agreement. In this regard, the injunction may be seen as prohibitory, maintaining the status quo between the parties and thus of a similar nature to that considered in *Bingham*. The fact that the continuation of the injunction may have a mandatory effect in requiring the parties to continue to work within the contractual framework of the agreement is a relevant matter I will consider as part of the overall balance of convenience.

Adequacy of damages as a remedy

[43] Group Five says that a number of things will happen if the injunction is not continued: it will lose the ability to assign its rights under the agreement to a new caretaker with a consequential financial loss in the order of $310,000; it will no longer receive the remuneration under the agreement; it will no longer have the financial resources to maintain these proceedings; it will be unable to service the loan to the ANZ Bank which will almost certainly take enforcement action to recover amounts due to it; the agreement will be terminated with the result that the financier will call in the loan; the lot in the Scheme in which Mr Ali and his family reside will be sold; and Group Five will be wound up in insolvency.

[44] Group Five is the registered owner of a lot in the scheme.[27] A title search of the lot, annexed to Mr Ali's affidavit, records that ANZ Bank has a registered mortgage over the title to the lot.[28]

[45] Group Five says that the lot in the scheme is a unique asset, the family home of Mr Ali and that if the injunction is not continued, the lot will be sold. Damages will not be an adequate remedy for the loss of the lot says Group Five.

[46] Real property is generally considered a unique asset. I accept that the lot in the scheme is Mr Ali's family home. It does not appear to be in dispute that he remains in possession of the lot. This is not a case, for example, where the applicant is a mortgagor out of possession.[29]

[47] Damages need not be impossible to quantify before an injunction might be ordered, merely that quantum is not "instantly obvious".[30] Damages may not be an adequate remedy because of the complexity in assessing them on the particular facts of the case.[31]

[48] If not otherwise brought to an early end, the agreement will run until 30 June 2039, some 20 years hence. Whilst I accept that Group Five has recently taken steps to attempt to sell the rights under the agreement, it is by no means certain that any future efforts in this regard will be immediately successful. It may be that the rights will not be sold for some years. When that might occur, what the value of the rights

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27 Affidavit of Syed Ali sworn 21 November 2018, exh AS-1; the 'Manager's Lot' under the agreement.

28 Ibid.

29 *Heartwood Nominees Pty Ltd v Oakleigh Acquisitions Pty Ltd (In Liq)* [2003] WASC 12.

30 *Longtom Pty Ltd v Oberon Shire Council* [1996] NSWSC 381.

31 *Ashton Manufacturing Pty Ltd v Express Sign Labs Pty Ltd* [2015] FCA 975; *Bestjet Travel Pty Ltd v The Australian Federation of Travel Agents Ltd* [2016] QSC 81; *Highvic Pty Ltd & Ors v Quarterback Group Pty Ltd & Anor* [2012] QSC 8.

might be at that time and the income that might be derived in the intervening period is all uncertain.

[49] I accept that some, if not all, of the events said by Group Five to be foreseeable may come to fruition if the injunction is not continued. I accept that the lot in the scheme owned by Group Five is unique. I accept that, while perhaps not impossible, the assessment of damages would be complex on the facts.

[50] Taking all of these matters into consideration I conclude that damages would not be adequate remedy.

Other balance of convenience considerations

[51] I turn now to the other balance of convenience considerations. As I have observed, Mr Ali says that if the injunction is lifted and the agreement is terminated a number of things will happen including the financier calling in the loan. While there is no direct evidence of this, I have accepted that some or all of these events are likely to occur. Group Five says that this will ultimately lead to it being liquidated. On the one hand, if the refusal to continue the injunction were to lead to the receivership or liquidation of Group Five, the receiver or liquidator could still pursue the claim.[32] However the relevance of a threat of liquidation and the weight to be given to such a threat varies from case to case.[33] I consider it relevant that Group Five faces the possibility of liquidation. Group Five is the vehicle by which Mr Ali operates his business and the liquidation of the company will have immediate and significant impact upon him and his family. Whilst I acknowledge that these proceedings are not Mr Ali's but Group Five's, I accept that the liquidation of the company would have grave consequences for Group Five and thereby Mr Ali and his family.

[52] Mr Ali says that Group Five continues to discharge its duties under the agreement. The Body Corporate disputes this. I do not propose to address in detail the submissions by each side regarding this issue. The Body Corporate relies upon the 5th report as evidence of Group Five's failure to perform its duties. The Body Corporate says that if the injunction is continued it will suffer detriment as a result of the failure by Group Five to perform its duties. The 5th report contains various statements to the effect that the consultant was told by Mr Ali at the time of the inspection that he did not intend to continue undertaking cleaning or maintenance services as the 'new manager' would perform these duties. In her affidavit the consultant, Ms Kypriadakis, says that Mr Ali 'freely admitted' to her that he had no intention of remedying the unresolved breaches, that the management rights had been sold and that the 'new manager' would be performing all of the caretaking and gardening duties.[34] The 'new manager' is clearly a reference to the proposed purchaser under a contract for the sale of the caretaking and letting rights under the agreement. The evidence indicates that after the contract of sale was entered into and before the date of completion of the contract, the Body Corporate purported to terminate the agreement. Suffice it to say that Mr Ali denies having made the statements to Ms Kypriadakis and says that he told her that he would continue to

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32 *Cook's Construction P/L v Stork Food Systems Aust P/L* [2008] QCA 322.

33 *Challenge Charter Pty Ltd v Curtain Bros (Qld) Pty Ltd* (2004) 9 VR 382 at 387 (in the context of an application to stay a decision under appeal).

34 Affidavit of Lynda Kipriadakis sworn 12 December 2018.

perform the duties under the agreement until the management rights were assigned. As events transpired the assignment was not effected.

[53] In the 5th report the consultant identifies what are said to be a number of ongoing breaches by Group Five of its duties under the agreement. In some respects they reflect the same breaches, or the same type of breaches, identified in RAN 1 and RAN 2. Photographs contained in the 5th report show images of gardens and foliage. Whether the photographs depict the same alleged breaches as identified in the 2nd report is not a matter upon which I can form a conclusion. I would observe that a number of the complaints in the 5th report relate to general cleaning and gardening duties none of which would lead me to conclude that the identified breaches place at immediate risk the health and safety of persons at the scheme or place at immediate risk the common property or infrastructure. I cannot be satisfied that Group Five is not performing its duties under the agreement.

[54] The Body Corporate says that it has incurred expenses in engaging persons to undertake duties which the Body Corporate says Group Five has not, and should have, been performing. These costs are in the order of $4,000. The Body Corporate also says that the cost of engaging a relief onsite manager to perform the caretaking duties and to 'bring the scheme back into good condition' would be in the order of $185 to $220 per day. It is difficult however to apprehend why this expense will be incurred if Group Five continues to discharge its duties under the agreement. If the Body Corporate is ultimately successful in the proceedings it may look to Group Five in damages in respect of costs it incurs in having external contractors undertake duties not performed by Group Five. Even if the cost is incurred by the Body Corporate, the amount involved does not appear to be a significant one.

[55] This latter observation leads me to a consideration of the value of the undertaking given by Group Five.

[56] The Body Corporate says that Group Five does not have any substantial assets with which to satisfy the undertaking as to damages. Mr Ali deposes to Group Five not having 'substantial assets that it can liquidate.'[35] In his subsequent affidavit, Mr Ali addresses in a more detailed fashion the financial position of Group Five. Mr Ali says that the lot in the scheme owned by Group Five was valued in 2017 at $390,000.[36] In September 2018 Group Five entered into contracts for the sale of the lot and the rights for $340,000 and $310,000 respectively.[37] Mr Ali deposes to owning a half share in a property in the Northern Territory (with a nett equity of $60,000 in respect of the half share).[38] There are loans to the ANZ bank in the total amount of approximately $401,000 in respect of a mortgage over the lot in the scheme and a business loan associated with the operation of the management rights.

[57] Notwithstanding that the financier has not exercised rights it may have under s 126(2) of the *Body Corporate and Community Management Act* 1997 (Qld), it may

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35 Affidavit of Syed Ali sworn 21 November 2018, [26].
36 Affidavit of Syed Ali sworn 2 March 2019, [17]
37 Ibid, [18]
38 Ibid, [19] - [20].

yet do so. If the financier appoints a receiver or receiver and manager it may take steps to sell the rights.[39]

[58] Weighing the financial position of Group Five and the likely quantum of any damages to which the Body Corporate may be entitled if the injunction is continued, I am of the view that the undertaking by Group Five has adequate value.

[59] I do not accept the submission by the Body Corporate that continuing the injunction will result in the Tribunal being required to supervise the conduct of the parties under the agreement. As I have observed, the continuation of the injunction has the effect of maintaining the status quo under the agreement. Even if it could be said that the injunction is mandatory in effect, the matter will proceed in the usual manner which will involve, as civil dispute proceedings in the tribunal generally do, active case management by the tribunal. The injunction will continue only until the final determination of the matter, not beyond. If it becomes apparent at any time before a final determination that Group Five is not performing its duties, the Body Corporate may apply for further orders including an order dissolving the injunction.

[60] I am satisfied that, taking all of these matters into consideration, the balance of convenience favours the continuation of the injunction until the final determination of the matter. It is, in my view, reasonably readily apparent that the adverse consequences for Group Five if the injunction is not continued are far more significant than, and outweigh, the adverse consequences for the Body Corporate if the injunction is continued.

[61] Finally, I address the issue of delay. The Body Corporate says that Group Five delayed in bringing the application for an injunction and that this tells against the injunction being continued. Delay may be relevant where it has caused a material alteration in the position of the other party.[40] As was observed by Redlich J in *Imac Security Services Pty Ltd v Tyco Australia Pty Ltd*:[41]

> It has been established in proceedings for interlocutory injunctions, the plaintiff must establish a risk of imminent irreparable injury, such that in the circumstances, the court should intercede at once on their behalf. Hence the delay of the plaintiff in seeking interlocutory injunctions may be calculated to throw considerable doubt upon the reality of the alleged injury, and it may be of importance in the balance of convenience being assessed.

[62] Group Five was given notice of the termination of the agreement by the Body Corporate on 16 November 2018. The present proceedings were commenced on 20 November 2018. The Application to resolve a complex dispute sought the injunctive relief the subject of the present application. I am not satisfied that there has been delay on the part of Group Five. Even if I was so satisfied, I would not be persuaded that the Body Corporate's position has materially altered as a result of any delay on the part of Group Five in bringing the present application.

[63] The interim injunction should continue.

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39 By clause 17.1(e) of the agreement, the Body Corporate may agree to the appointment of a receiver or manager.

40 *Wickham v Associated Pool Builders Pty Ltd* (1986) 7 IPR 392

41 [2002] VSC 592, [44].

[64] I will direct the parties to file and exchange submissions on the form of orders to be made.