SUPREME COURT OF QUEENSLAND

CITATION:	*Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road (No 2)* [2012] QSC 339
PARTIES:	**FAMESTOCK PTY LTD (ACN 010 499 989)** (plaintiff) v **THE BODY CORPORATE FOR NO 9 PORT DOUGLAS ROAD COMMUNITY TITLE SCHEME 24368** (defendant)
FILE NO/S:	48 of 2008
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	26 October 2012
DELIVERED AT:	Cairns
HEARING DATES:	8-10 May 2012; 23-25 July 2012
JUDGE:	Henry J
ORDER:	**1. Judgment for the plaintiff in the sum of $37,632.53 plus any interest ordered pursuant to s 58 *Civil Proceedings Act* 2011.** **2. I will hear the parties as to interest and costs.**
CATCHWORDS:	HOME AND COMMERCIAL UNITS – BODY CORPOARTE – LETTING AGREEMENT – where the plaintiff was the manger of caretaking and letting at a residential unit complex – where the plaintiff was not licensed – where the plaintiff's application for a new licence failed – where the committee of the body corporate attempted to terminate the agreement CONTRACT – IMPLIED TERMS – BREACH – DUTY TO CO-OPERATE – DUTY OF GOOD FAITH – where the defendant did not support the plaintiff's application to obtain a new licence – whether there was an implied duty to co-operate or an implied duty of good faith – whether any implied duty was breached CONTRACT – REPUDIATION – BREACH – where the committee of the defendant purported to terminate the agreement with the plaintiff – where the committee did not have the authority to terminate – whether that termination

amounted to a repudiation of the agreement

CONTRACT – BREACH – DAMAGES – QUANTUM - whether the breach caused any loss – the quantum of that loss

Butt v M'Donald (1896) 7 QLJ 68
Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304
Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road Community Title Scheme 24368 [2012] QSC 129
H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd [1957] 1 QB 159
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596

COUNSEL: DA Savage SC for the plaintiff
CJ Ryall for the defendant

SOLICITORS: Alexander Law for the plaintiff
Williams Graham Carman for the defendant

[1] The plaintiff, the former manager of caretaking and letting at a residential unit complex at 9 Port Douglas Road, Port Douglas, claims $544,230 in damages for breach of contract against the defendant, the body corporate for the unit complex.

[2] The contract between the parties was a caretaking and letting agreement ("the agreement"). Subsequent to the commencement of the contract the plaintiff failed to renew its real estate agent's licence. It continued to act as a letting agent for the complex, which was both unlawful and contrary to the letting agreement.

[3] The genesis of the old dispute with which this case is concerned lies in the events that unfolded after the discovery that the plaintiff had long been operating without a licence. In short, the plaintiff complains it suffered loss because of the defendant's failure to support the plaintiff's application to obtain a restricted letting agent's licence and because of the defendant's ultra vires determination of the agreement.

The plaintiff's claim and the evolution of its pleaded basis for liability

[4] The plaintiff's claim is for:

> "1. Damages for breach of contract.
> 2. A declaration that the Notices to Terminate issued by the Defendant on 7 February 2002 were invalid and of no effect and did not terminate the Agreement. …"[1]

[5] As initially pleaded, the claim for damages for breach of contract simply relied on a breach of an alleged implied term of the contract flowing from the allegation[2] that,

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1 It also claims interest and costs.

2 Original Statement of Claim [21], retained in the Further Again Further Amended Statement of Claim ("SOC").

despite the plaintiff's request, the defendant "refused and/or failed to provide to the Auctioneers and Agents Committee a letter notifying the Auctioneers and Agents Commission that the Agreement was still in existence".[3]

[6] The utility of the declaration sought was always doubtful given the age of the events and the lack of a claimed or pleaded connection between it and any claim to damages. Ironically, the strongest part of the plaintiff's case was its allegation that the purported termination was invalid.

[7] I determined and declared, on an application within the trial of this proceeding, that 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.[4]

[8] Following the entry into the case of a new counsel shortly before trial, various applications to amend the pleadings were made at the outset of the trial with the obvious intention of linking the invalid termination, the subject of the proposed declaration, with the breach of contract. The initial lack of success of the applications flowed in part from their lack of connection with the pursuit of damages for breach of contract. One of the applications was eventually allowed.

[9] In the upshot it was pleaded:

> "33. The Plaintiff has suffered loss and damage because:
>
> (a) Of the breach of the implied term referred to at paragraph 23 [sic 21] above; and
>
> (b) In consequence of the ultra vires determination of the Agreement referred to at paragraph 29(b) above;
>
> (c) Alternatively to 33(b) in breach of the Agreement the defendant purported to determine it ultra vires and thus:
>
> the plaintiff was denied its entitlements to obtain a restricted letting licence and to earn caretaking remuneration and to conduct a profitable letting business…"

[10] Sub-paragraph (b) of the above pleading does not expressly refer to a breach, however, it must be read in light of the fact that the only damages claimed are for breach of contract. If any damages are to be awarded in consequence of the ultra vires determination they can only flow from the determination being a breach of contract, that being the cause of action under which damages are claimed. In allowing the amendment which inserted sub-paras (a), (b) and (c) above, I observed sub-para (b) was a relic of the evolution of the application before me and that the irrelevance of the ultra vires determination to which it referred as a pathway to liability for the monetary relief claimed was only overcome by the inclusion of sub-para (c).[5]

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[3] Original Statement of Claim [19].

[4] *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road Community Title Scheme 24368* [2012] QSC 129, 3. That judgment during trial was delivered 10 May 2012.

[5] Ruling made during trial on 9 May 2012, pp 4, 5.

The position of the plaintiff

[11] The plaintiff is in essence the company of Mrs and McEvoy. Mr McEvoy, a shareholder and director of the plaintiff,[6] was the plaintiff's main witness.

[12] The plaintiff and other McEvoy entities owned eight units in the complex, including the manager's unit, during the relevant time. Those were units one, two, eight, nine, 11, 12, 16 and 18.[7]

The agreement

[13] The plaintiff entered into a written agreement with the defendant to perform caretaking and management duties and obligations in respect of the unit complex in February 1998.[8] The agreement included a letting agreement, separate from the balance of the agreement by virtue of special condition 1(a), for the plaintiff to conduct the business of letting units "for such owners as shall require that service".[9]

[14] The term of the agreement was 10 years[10] and there was an option to extend that period.[11]

[15] Particularly important to these proceedings was cl 8.1.5 which required:

> "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."[12]

[16] Further, cl 8.1.6 required:

> "The Manager shall conduct such business in accordance with all statutes, regulations, by-laws or ordinances in any way relating to such business …"[13]

[17] Termination by the body corporate was dealt with by cl 10 which relevantly provided:

> "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.

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6 T4-11, L12-L13.

7 T4-37, L57 to T4-38, L2; T4-38, L19-L20; T4-39, L51-L52; T4-40, L3-L4; T4-40,L18; T4-40, L39-L40; T4-42, L4-L5; T4-42, L21.

8 Ex 4. There was some confusion as to whether the agreement was dated 12 or 27 February 1998: see, eg, SOC [3], Again Further Amended Defence ("DEF") [1].

9 Ex 4, cl 8.1.

10 Ibid, cl 3.1.

11 Ibid, cl 3.2.

12 Ex 4. The agreement referred to the plaintiff as "the Manager" and referred to the parcel of land in which the unit complex was located as "the Parcel".

13 Ex 4.

> 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."

[18] The agreement also contained a special condition that:

> "In relation to the said Letting Agreement, the Manager hereby confirms that it has as a fundamental condition of this Agreement contemporaneously herewith entered into a Licence Agreement with Transmetro Corporation Limited trading as Metro Inns for the period of this Management Agreement and undertakes to carry out all of its duties and fulfil all of its obligations under that Licence Agreement."[14]

[19] The plaintiff did in fact enter into an agreement with TransMetro Corporation Ltd which effectively meant that the unit complex was branded as a "Metro Inn".[15] Eighty-five per cent of the shares in TransMetro was owned by Mr McEvoy's brother.

The facts

[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),[16] 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.[17] 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[18] 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.[19]

[23] Subsequently, on 27 June 2001, the AAC requested the plaintiff provide evidence of the body corporate approval to conduct the letting business.[20] 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 2012.[21]

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14 Ibid, special condition 2.
15 Ex 14.
16 Since replaced by the *Property Agents and Motor Dealers Act* 2000 (Qld).
17 Ex 37, p 103.
18 There was also a charge of failing to have trust accounts audited.
19 Ex 37, p 103.
20 Ibid, p 41.
21 Ibid, p 58.

[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."[22]

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 2012 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."[23]

[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."[24]

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

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22 Ibid, p 74.
23 Ibid, p 76.
24 Ibid, p 85.

> "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.[25]

[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."[26]

[31] On 19 October the defendant served two default notices on the plaintiff pursuant to cl 10.1.5.[27] 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.[28]

[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.[29]

[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.[30] 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

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25 Ibid, p 87.

26 Ibid, p 89.

27 SOC [24]; DEF [1].

28 Ex 22.

29 DEF [24]. In reply the plaintiff says "the notice was given upon instruction from the department of Fair Trading in consequence of the Defendant's breach of contract alleged in Statement of Claim and for so long only as that breach continued": Reply [17].

30 Ex 8. In Ex 24(b) (plaintiff's expert report), p 5 it says in Feb 2002 all of those units plus units 3 and 6 were lost from the letting pool, then in Sept 02 unit 6 returned to the pool and that in May 2003 units 3 and 13 returned to the pool.

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,[31] the fact that the plaintiff was falling behind on its payments to TransMetro[32] and the frequency of errors in their accounts.[33] Apparently some owners also thought that it would be preferable to have a steady income from a permanent tenant.[34] 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.[35] 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.[36]

[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,[37] another to cl 10.1.3 and the other on the basis that it was a fundamental breach of cl 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 cl 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 cl 10.1.2 for the failure to remedy the breaches as contained in the October 2001 default notices.

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31 See T5-12, L38-L43; T5-20, L48-L57; T5-21, L5-L21; T5-32, L45-L49. See also Ex 18; Ex 20.

32 See T5-11, L53 to T5-12, L9; T5-32, L51 to T5-33, L4. See also Ex 21. There was some dispute about whether the plaintiff made a payment of approximately $50,000 in September 2001 on Bartercard to TransMetro, however this is ultimately of little relevance. The fact was that Mr McEvoy did fall behind on his payments at times.

33 See T5-21, L52 to T5-22, L13; T5-33, L14-L19.

34 See T5-17, L45-L47; T5-27, L43-L49; T5-45, L34-L43; T5-49, L24-L28.

35 See Ex 10 for the committee meeting minutes; Ex 6 is the termination notices.

36 Ex 10.

37 Which provides that a body corporate may terminate a person's engagement as a body corporate manager or services contractor or a person's authorisation as a letting person if the person engages in misconduct or is grossly negligent in carrying out, or failing to carry out, functions required under the engagement or any obligations under the authorisation.

[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.[38].

[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."[39]

[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."[40]

[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 plaintiff's application that the corporation had body corporate approval and that a director of the corporation was a restricted letting agent were not met[41] 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.[42]

[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.[43]

[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.[44]

[48] With Mr McEvoy as chairman of the committee, the plaintiff entered into new caretaking and letting agreements with the defendant in May 2003.[45]

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

39 Ex 37, p 92. "A/R refers to audited reports: see T5-41, L8-L10.

40 Ex 37, p 96.

41 Ibid, p 93. See also Ex 5, last document. The applications were refused on the grounds of ss 35(1)(c)(i), s 35(3)(a) and s 35(3)(b) of *PAMDA*.

42 Ex 37, Item 43, pp 102-104.

43 Ex 33.

44 Ex 32.

45 Ex 17(a) is the new caretaking agreement and Ex 17(b) is the new letting agreement.

[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.[46]

The plaintiff's case

[50] There are essentially two limbs to the plaintiff's case. The first, in summary, is that the defendant was in breach of an implied term by not informing the licensing authority that the plaintiff had letting approval.

[51] The second limb of the plaintiff's case is that the defendant repudiated and thus breached the agreement by purporting to terminate without the authority of a general meeting.

The first limb: the implied term

[52] The plaintiff pleaded at para 6 of the Further Again Further Amended Statement of Claim ("SOC") that:

> "6. Further, it was an implied term of the Agreement that each party would do all such things as are necessary on its part to enable the other party to have the benefit of the contract, or, alternatively, that each party would refrain from actively taking steps to prevent the other party from complying with its obligations under the contract."

[53] This implied term, should it exist, is said to have been breached in two ways.

The alleged breaches

[54] The first part of the breach was allegedly caused by the communications of the now deceased Chairman of the defendant, Ross Hurst, with the licensing authority. Mr Hurst's communications, are pleaded at paragraph 16 of the Further Again Further Amended Statement of Claim and the capacity in which he made the communications at paragraph 17:

> "16. On or about 6 August 2001 and again on or about 20 August 2001 the Chairman of the defendant, Mr Ross Hurst telephoned the Office of Fair Trading and advised a Ms Gwen Pusztay of the Auctioneers and Agents Committee that the view of the Defendant was that the Agreement was no longer valid and that the Defendant would subsequently be voting not to approve the Plaintiff as the caretaking and letting agent.
>
> 17. In the circumstances the Chairman was acting as the agent of the Defendant."

[55] The pleading of para 16 puts the factual position as high as the evidence, identified above at [26] and [27] permits. That evidence shows there was an expression of an apparently honestly held opinion as to the view of the committee and a foreshadowing of what would likely occur in the future.[47] It was hardly a surprising opinion,

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[46] SOC [32].

particularly given the plaintiff's longstanding operation without a licence in breach of cl 8.1.5 and cl 8.1.6 of the letting agreement.

[56] The plaintiff contends Mr Hurst effectively misled the authority by saying the approval was not current but that does not fairly reflect the much more qualified nature of what Mr Hurst actually said. He said the body corporate considered the agreement was not now current or valid in consideration of the fact that the above clauses were breached but alluded to the taking of legal advice on the point. In short, what he told the authority was not an assertion of fact that the approval was not current.

[57] Mr Hurst also told the licensing authority on 20 August 2001 that the committee of the defendant would be meeting the following day and would be voting to not approve the plaintiff as letting agent. The fact that meeting did not occur prompted the plaintiff to submit Mr Hurst had told an untruth, however, there was no evidence to suggest Mr Hurst's representation of his understanding the meeting was going to occur was false at the time it was made.

[58] The plaintiff's characterisation of Mr Hurst's communications as misleading is unsustainable.

[59] The second alleged breach, which is that the defendant did not comply with an alleged request by the plaintiff for the defendant to provide the AAC with a letter notifying that the agreement was still in existence, is pleaded at para 21 of the SOC:

> "21. Despite such request to the Defendant, the Defendant refused and/or failed to provide to the Auctioneers and Agents Committee a letter notifying the Auctioneers and Agents Commission that the Agreement was still in existence."

[60] The defendant admitted it did not provide such a letter although as earlier mentioned the defendant's manager did provide a copy of the agreement by fax to the Office of Fair Trading, which was previously the AAC, on 3 August 2001.[48]

[61] The defendant did not admit the pleaded request for the letter. The request for a letter was further particularised in the reply, the plaintiff pleading that "there were verbal request [sic] made from Mr Mike McEvoy of the Plaintiff to Mr Ross Hurst of the Defendant confirmed via an email from Mr Ross Hurst to Mr Mike McEvoy dated 22nd October 2001".[49]

[62] The email there referred to was not lead in evidence at the trial. Mr McEvoy's evidence in chief about his request to the defendant for a letter was as follows:

> "...Then in December 14th, I called Ron Hurst - Ross Hurst and asked him if he would give us the letter that I've pleaded.
>
> Now, what letter is that?-- The letter for the Fair Trading so that we could get our licence. And I did say to him that if he - if we couldn't get the letter, we may not be able to continue to carry on.

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[48] Ex 37, p 58.

[49] Reply to DEF [9].

> Now, why was that of a concern?-- Because Mr Ken Cant had told us that we could no longer operate unless we got the letter and the licence approval.
>
> ...
>
> All right. Now, you mentioned your request of Mr Hurst for the letter. Did you ever receive a letter or did-----?-- No. The closest I got was that 'there's one in the mail and I'll give it to you tomorrow.'"[50]

[63] Mr McEvoy's evidence of his request for the letter occurring on 14 December is plainly wrong. It is at odds with the plaintiff's pleading and inherently unlikely to be correct given the stage matters were at by December.

[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.
>
> 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."[51]

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50 T4-17, L40 to T4-18, L17.

51 T4-52, L21-L49. The letter sent from Mr Hurst to Mr McEvoy referred to is Ex 23.

[66] The letter there referred to, of 26 October 2001[52] 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.

Duty to co-operate

[69] In addition to the above evidentiary problems, which of themselves are fatal to this limb of the plaintiff's case, the case also confronts obvious difficulty in establishing how the two categories of alleged conduct could be breaches of the implied term.

[70] The parties' submissions characterised the alleged implied term interchangeably as a duty to co-operate and a duty of good faith. However, whilst these two types of implied duties overlap to a significant extent, they remain separate concepts.

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[52] Ex 5, the sixth document.

[71] The duty to co-operate was explained by Griffith CJ in *Butt v M'Donald* in the following way:[53]

> "It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract."

[72] This statement was endorsed by Mason J, as his Honour then was, in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*:[54]

> "It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract."

[73] The concept of an implied duty of good faith is relatively more recent in Australia. Priestly JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[55] articulated that:

> "people generally, including judges and other lawyers, from all strands of the community, have grown used to courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community standards."

[74] It would appear that a broad duty of good faith has not yet been implied by Queensland courts or for that matter the High Court.[56]

[75] The uncertainty surrounding the implication of a duty of good faith is of no consequence in this case. The breach alleged by the plaintiff is more accurately described as a breach of the duty to co-operate. There is no allegation that the defendant acted in bad faith.[57] Even if there were, the allegation would be unsustainable in that the above mentioned conduct allegedly constituting the breaches involved no evidence of bad faith.

[76] I proceed on the basis that there was an implied term obligating the parties to co-operate.

[77] Did the conduct complained of (if it had been proved) amount to a breach of the implied term?

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53 (1896) 7 QLJ 68, 70-71.

54 (1979) 144 CLR 596, 607-608. The principle has also been applied by the High Court in other cases, including *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, [168]; *Park v Brothers* (2005) 80 ALJR 317, [37]-[38]; *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126, 142; *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215, 219, 226; *Nullagine Investments Pty Ltd v West Australian Club Inc* (1993) 177 CLR 635, 659.

55 (1992) 26 NSWLR 234, 268.

56 However, has been implied by the Federal Court (see, eg, *Garry Rogers Motors Aust Pty Ltd v Suburu (Aust) Pty Ltd* (1999) ATPR 41-703, [34]) and courts in New South Wales (see, eg, *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349), Victoria (see, eg, *Edensor Nominees Pty Ltd v Anaconda Nickel Ltd* [2001] VSC 502) and Western Australia (*Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211; *Acton Real Estate Pty Ltd v Shemiran Pty Ltd* [2011] WASCA 33). In *Re Kendells (NSW) Pty Ltd (in liq); Kendell v Sweeney & ors* [2005] QSC 064 Muir J queried the desirability of introducing such a flexible implied term but expressed no concluded view as to whether the interstate line of authority should be followed in Queensland.

57 T6-28, L5.

[78] The plaintiff submitted the implied term was "to allow one to apply to renew or to keep one's licence during the term"[58] and "to keep people licensed".[59] 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.

[81] In *Campbell v Backoffice Investments Pty Ltd*[60] the plurality endorsed the observation of Young CJ in Equity below that:

> "…care must be exercised in identifying both the content and operation of an implied obligation to co-operate lest it be at odds with the terms upon which the parties have expressly agreed."

[82] That observation is apposite here. The defendant was the author of its own misfortune. Its act of operating unlicensed was in breach of cl 8.1.5 and cl 8.1.6, giving the defendant the right to terminate the agreement.[61] It would be at odds with this right to imply an obligation on the defendant to assist the defaulting plaintiff in the way contended for.

[83] As already mentioned the plaintiff has not proved the pleaded request occurred. However, even if there had been a request in those terms there was for the above reasons no obligation on the defendant to provide it.

[84] As to Mr Hurst's communications, as already discussed, they did not amount to an assertion of fact that the approval was not current. The mere expression of apparently

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58 T6-22 L29.

59 T6-26 L32.

60 (2009) 238 CLR 304, 358.

61 Clause 10.1 appears to have expressly conferred such a right but it existed as a matter of law in any event.

honestly held opinion as to what would likely occur in the circumstances then prevailing was not a breach of an implied duty.

[85] In all of the circumstances there was no breach of implied duty and the first limb of the plaintiff's case must fail.

The second limb: repudiation by purporting to terminate ultra vires

[86] The second limb of the plaintiff's case seeking damages for breach of contract is that the defendant breached the agreement by purporting to determine it ultra vires by serving the termination notices of 7 February 2002, which notices had only been authorised by the committee. It will be recalled this novel aspect of the case evolved through the last minute adoption of the unauthorised termination notices as another alleged breach of the contract allegedly causative of loss.

[87] As earlier mentioned, I decided and declared, on an application within the trial of this proceeding, that 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.[62]

[88] The declaration actually sought in the claim is that the notices to terminate "were invalid and of no effect and did not terminate the Agreement".[63] While it follows from my decision and declaration during the trial that the notices were invalid and of no effect the question whether they "did not terminate the Agreement" was not decided by the declaration. However, such a conclusion would logically flow from my decision, assuming the defendant had not already terminated the agreement. If the agreement had already been terminated the second limb of the plaintiff's case in contract would fail at the threshold.

Had the agreement already been terminated?

[89] The defendant effectively contended the agreement had already been terminated by pleading that the plaintiff had repudiated the agreement by evincing an intention not to be bound by the agreement and that the defendant accepted the repudiation.[64]

[90] It may seem curious that the defendant takes recourse in arguing a breach based on repudiation when there exists such clear evidence of a breach of an essential condition in that the plaintiff was not licensed. Its argument is presumably borne of necessity because of the principle that a breach of contract by one party, whether by repudiation or breach of an essential term or condition, will not of itself terminate a contract and for termination to occur there must be an acceptance of the repudiation or breach, that is, an election to terminate, by the other party.[65] While the plaintiff had breached an essential condition of the agreement by not holding a licence, thus grounding a right to terminate for breach, the conundrum for the defendant is that the termination notices of 7 February were of no effect.

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

63 Claim.

64 DEF [21].

65 See eg, *Poort v Development Underwriting (Victoria) Pty Ltd (No 2)* [1977] VR 454, 459.

[91] The defendant attempted to maintain that the termination notices were of legal effect. It submitted that the restrictions on the power of the committee were designed to protect the defendant and its members, not those parties dealing with it. However the obvious purpose of the restriction was to protect the rights of owners of lots included in the scheme and the plaintiff was such an owner.[66] Further the statutory restriction on a committee's powers did not suggest any variation in power depending upon whether the person affected is affected in the capacity of a party dealing with the body corporate as distinct from a party in whose interests the body corporate is acting. The defendant also submitted the unauthorised purported termination had legal effect because it was not required by the agreement that a lawful method of the defendant exercising its right to terminate would be used. However the agreement did not exclude the operation of the statutory restriction. It is an inevitable consequence of my ruling during the trial that the notices of termination were unauthorised and did not effect termination.

[92] Returning then to the defendant's argument that the agreement had been terminated earlier, the repudiatory conduct relied on by the defendant as evincing an intention not to be bound is the plaintiff's giving of notice to the unit owners on 26 October 2001 that it would cease letting units from that day[67] and its indication on or about 14 December 2001 that it would cease acting as letting agent for the unit owners. These actions were obviously a product of the unresolved problem that it did not have but was trying to procure a licence and did not have the support of the defendant in doing so. Against that background its actions did not evince an intention not to be bound. The plaintiff's intention, however unrealistic, was that these were interim measures to protect its position until such time as it could secure a licence.

[93] There is however a fundamental difficulty with the defendant's pleaded acceptance of the repudiation, namely its timing. It pleads it gave notice of its acceptance of the repudiation by refusing to pay management fees due after 13 February 2002 and by opposing the plaintiff obtaining an adjudication order that the termination of the agreement was void. These events were subsequent to the unauthorised termination notices of 7 February 2002.

[94] It follows that as at 7 February 2002 the agreement had not already been terminated.

Did the unauthorised termination notices breach the agreement?

[95] The critical question with this second limb of the plaintiff's case is whether the unauthorised issue of the termination notices breached the agreement. The plaintiff submits it was a breach by way of repudiation. It contends in effect that the notices evinced an intention on the part of the plaintiff that it would no longer be bound by the agreement and thus amounted to repudiation.

[96] The defendant's key submission on this aspect of the case was, in effect, that because the issue of the termination notices was unauthorised it was not an act of the body corporate and thus did not manifest any intention on the body corporate's part not to perform the contract and thus did not amount to repudiation.

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66 *Body Corporate and Community Management (Accommodation Module) Regulation* 1997 (Qld), Reprint 2, reg 24(b). This regulation was discussed in *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road Community Title Scheme 24368* [2012] QSC 129.

67 Ex 22.

[97] It is not disputed that the content of the termination notices communicated an intention on the part of their author(s) that the body corporate was no longer bound to perform the agreement. The critical issue is whether the issue of the termination notices evinced an intention of the body corporate not to be bound by the agreement, notwithstanding that the issue of the notices was unauthorised.

[98] The parties referred to a number of decisions illustrating that a corporate entity can potentially be liable for the ultra vires acts of its committee.[68] However the present question is not concerned with the vicarious liability of a company or principal for the unauthorised act of its committee or agent. The real question here is whether the ultra vires act of the committee can manifest an intention that is attributable to the body corporate.

[99] In a human being an intention not to be further bound by a contract or unwillingness to further perform a contract are effectively states of mind. What though of a corporate entity such as a body corporate? Can its intention be gleaned from the conduct of its committee?

[100] The governing body of a corporation has long been regarded as representing a corporation's state of mind. In *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd*[69] Denning LJ explained:

> "A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."[70]

[101] In the present case the committee represented the mind of the body corporate. The committee's issue of the termination notices had the effect of representing the company's intention not to be further bound by the agreement.

[102] The fact that the issue of the termination notices was unauthorised meant the purported termination was legally ineffective but it did not negate the factual inference as to the body corporate's intention, which flowed from its committee's intention. The issue of the notices by the committee – the representative mind of the body corporate - manifested the intention of the body corporate that it would no longer be bound by the agreement.

[103] It follows the unauthorised issue of the termination notices was a repudiation on the part of the defendant.

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68 *Vine v National Dock Labour Board* [1956] 3 All ER 939; *Francis v Municipal Councillors of Kuala Lumpur* [1962] 3 All ER 633.

69 [1957] 1 QB 159.

70 At 172 (emphasis added). The principle extends to potentially imposing criminal liability on a company for unlawful conduct by its officers or agents on the basis its state of mind is synonymous with that possessed by its officers or agents: see, eg, *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 514.

[104] However, it by no means follows from that conclusion that the breach was causative of loss or loss in the quantum of that claimed.

What loss does the plaintiff claim?

[105] The plaintiff claims that it lost the following:

> "(i) From February 2002 to November 2004 the Plaintiff lost commissions in the amount of $235,787.
> (ii) From February 2002 until May 2003 the Plaintiff lost management fees in the amount of $46,443.
> (iii) Loss of value of the business in the amount of $262,000."[71]

[106] These three categories of claimed loss can be described as loss of commissions, loss of management fees and loss of value of the business.

[107] In the light of the failure of the first limb of the defendant's case, the loss, if any, which falls to be assessed is only the loss caused by the breach by the ultra vires purported termination of 7 February 2002. As will become apparent a significant component of the claimed loss was predicated upon the success of the first limb of the plaintiff's claim and the causative effect of events well before February 2002.

Loss of commissions

[108] The plaintiff's financial expert estimated the quantum of lost commissions from February 2002 to October 2004 was $270,349.[72]

[109] However, the expert's report was premised on the assumption that the letting pool reduced in December 2001 because of the alleged breach upon which the first limb of the plaintiff's case was predicated. The first limb of the plaintiff's case has failed. The reality is that this component of the claim for damages was doomed to fail if the first limb of the plaintiff's case failed.

[110] By the time of the breach that has been established by the second limb of the plaintiff's case, namely the ultra vires issue of termination notices of 7 February 2002, the plaintiff was no longer conducting the business of letting units as contemplated at cl 8 of the agreement (the letting agreement). As earlier mentioned 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 the plaintiff would cease acting as the letting agent for the unit holders. 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.

[111] Moreover, there was no evidence of a loss in the character of a loss of commission occurring after the repudiation of February 2002.

[112] Before the repudiation, the letting pool had reduced effectively to three units in addition to those owned by the plaintiff/the McEvoys.

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71 SOC [33].
72 Ex 24(b), p 13.

[113] There were 18 units in the complex. Seven of these had left the letting pool in December 2001. A further eight units (one of which was the manager's unit) were owned by the plaintiff or the McEvoys. That therefore leaves three units other than the McEvoys' from which the plaintiff could earn letting commission. These three units were units three, six and 15.

[114] There is some suggestion that the plaintiff continued to earn some commission from these units. The following exchange occurred in cross-examination:

> "RYALL: And did Famestock ever recover any of the - that is, ever enter into any new agreements with lot owners other than the ones that it or you and your wife were-----?-- We - we mostly-----
>
> -----interested in?-- -----anyone that wanted to we leased a couple of units where we just paid a fixed rental, and I think there was one other unofficial arrangement with unit 3."[73]

[115] There can be no loss where the plaintiff continued some form of "unofficial arrangement". The plaintiff would only be able to prove loss if it was receiving a reduced rate of commission. There was no such evidence.

[116] I conclude that the plaintiff suffered no loss of commission from unit three.

[117] What then of unit six? In relation to that unit the following part of Mr McEvoy's cross-examination was relevant:

> "RYALL: Lot 6 was owned by David Ryland again?-- Yes.
>
> And then it was transferred to a company called BL Marine Pty Limited?-- Yes.
>
> And that was under your management through 2002 to 2003 under a leaseback arrangement?-- Yes."[74]

[118] The detail of the leaseback arrangement was not explored but it obviously was not a letting on commission arrangement.

[119] The fate of unit 15 is unclear. There was no evidence about that unit which shed any light on whether the plaintiff lost commissions from it.[75]

[120] I note for completeness that there were three units that the plaintiff/ McEvoys sold during the relevant period between February 2002 and May 2003. These units were units 11, 12 and 18.[76] The plaintiff continued to manage each of these units on a leaseback arrangement and apparently suffered no loss.

[121] In the circumstances, the plaintiff has not proved any loss of commission resulting from the defendant's repudiation.

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73 T4-23, L57 to T4-24, L6.

74 T4-39, L15-L21.

75 The only interchange relating to unit 15 occurred at about T4-41, L43-L53.

76 Unit 13 also changed ownership but in September 2003 which is outside the relevant period.

Loss of management fees

[122] The agreement in its schedule provided for the payment of monthly remuneration to the manager for the performance of its duties under the agreement. It appears no such remuneration was paid after the purported ultra vires termination. There may have been more than one cause for this but that breach was obviously a cause, with the defendant wrongly treating the agreement as terminated.

[123] Clause 2 of the schedule provided for the calculation of the remuneration:

> "2. The monthly remuneration payable to the Manager for the performance of its duties hereunder shall be calculated in accordance with the following formula:-
>
> L multiplied by BR
>
> WHERE:
> L = The total number Lots at the conclusion of the calendar month
> BR = The base remuneration payable to the Manager, calculated in accordance with Clause 3 of this Schedule"

[124] Clause 3 of the schedule provided that the base remuneration payable would be calculated in the following way:

> "3.1 In the first year of the term of this Agreement, the monthly base remuneration payable to the Manager shall be the sum of ONE HUNDRED AND SIXTY TWO DOLLARS AND FIFTY CENTS ($162.50).
>
> 3.2 Thereafter the monthly base remuneration payable to the Manager shall be reviewed annually for each next ensuing twelve (12) month period during the currency of this Agreement and any extension or renewal thereof and shall be the sum calculated at the commencement of each such annual period in accordance with the following formula:-
>
> A multiplied by C2 divided by C1
>
> WHERE:
> A = The sum stipulated in sub-paragraph 3.1 of this Schedule
> C1 = The Consumer Price Index (All Groups) for the City of Brisbane as published by the Commonwealth Statistician ("the said Index") for the quarter ending immediately prior to the date of commencement of this Agreement.
> C2 = The said Index for the quarter ending immediately preceding the commencement of the particular period for which the remuneration is to be calculated."

[125] Each side in these proceedings engaged an expert to calculate loss. There was some minor disagreement in the reports about the correct rate of indexation. Originally, the

experts had agreed on the rate of indexation, however the plaintiff's expert, Mr Cadman, subsequently amended his report, adopting indexed remuneration rates apparently supplied to the McEvoys by the accounting firm Connole Carlisle for the years 1998 to 2001. Mr Cadman then used the CPI (All Groups) Brisbane rates for the following years.

[126] I prefer the rate adopted by the defendant, that is, the Consumer Price Index (CPI) (All Groups) for the City of Brisbane. This is the CPI named by the contract. Further, there are problems with the Connole Carlisle rates in that they do not name a source or basis of calculation or even the CPI figure used. Ms Eagle in her supplementary report noted the CPI used appeared to be the Commonwealth figure.[77]

[127] Mr Cadman lists the CPI (All Groups) for Brisbane as:[78]

Quarter	**CPI (all groups) Brisbane**
December 1997	121.4
December 1998	123.0
December 1999	124.1
December 2000	131.6
December 2001	135.8
December 2002	139.9
December 2003	144.2
December 2004	148.0
December 2005	152.1

[128] I will use these rates when calculating the management fees which would have been payable.

[129] What then were the management fees payable?

[130] Under the agreement the monthly base remuneration payable to the manager was to be reviewed annually for each next 12 month period. That is, the base remuneration was reviewed on 12 February each year.

[131] Adopting the agreement's formula using known fixed amounts, the new monthly base remuneration amount is calculated using the following formula:

$162.50 x CPI for period ending immediately prior / 121.4

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77 Ex 38(b), p 5.

78 Ex 24(b), p 8.

[132] Using that formula, the monthly remuneration for the period ending 11 February 2002 would have been:

$162.50 x 131.6 / 121.4 = $176.15

[133] I have found that the defendant repudiated the contract on 7 February 2002. That means that the plaintiff would have been entitled to four days (8, 9, 10 and 11 February 2002) at $176.15/month.[79] Adopting an average month of say 30 days, the rate for the four days would be:

4 days x $176.15 / 30 days = $23.49

For the 18 units that yields a sum of $422.82 ($23.49 x 18 units) for the period 8-11 February 2002.

[134] The new monthly remuneration from 12 February 2002 would have been calculated using the December 2001 CPI from the table above:

$162.5 x 135.8 / 121.4 = $181.78

This therefore is the rate which would have applied from 12 February 2002 to 11 February 2003.

[135] That means the amount which would have been payable in that 12 month period was:

12 months x 18 units x $181.78 = $39,264.48

[136] From 12 February 2003 the new rate would have been:

$162.5 x 139.9 / 121.4 = $187.26

[137] There were approximately three months until the new agreements were entered into in May 2003. This is the cut-off for the relevant period. I have approximated this at three months because there is some uncertainty on which date in May 2003 the new agreement was entered into.[80] The management fees payable for those three months would have been:

3 months x 18 units x $187.26 = $10,112.04

[138] In total this means that the management fees which would have been payable from 9 February 2002 to May 2003 are:

$422.82 + $39,264.48 + $10,112.04 = **$49,799.34**

[139] In evidence in chief Mr McEvoy claimed that the plaintiff maintained the common property of the unit complex without reimbursement:

> "MR SAVAGE: And who, after early February 2002, maintained the common property of the body corporate that Famestock had done under the caretaking agreement?-- Well, we had to, to keep the hotel operating.

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79 It may be that on 1 March 2002 the plaintiff was paid management fees up to and including 8 February, see Ex 9 and T4-22, L1-L4. However, the distinction is inconsequential.

80 The new agreements are undated, see Ex 17(a) and Ex 17(b).

> And at whose expense was that?-- It was all at our expense.
>
> And was any of that expense reimbursed to you?-- No."[81]

[140] Mr McEvoy later gave similar evidence:

> "MR SAVAGE: Was, prior to that demand being received and after 7 February 2002, Famestock in fact carrying out its caretaking activities?-- Yes.
>
> Was it being - you told me before it wasn't receiving payment for it?-- That's correct.
>
> After that letter, and before you told me you became chairman of the body corporate, did Famestock receive moneys for carrying out caretaking agreements, either-----?-- No.
>
> -----the caretaking activities, either pursuant to that demand or pursuant to the agreement?-- No."[82]

[141] However, it emerged during Mr McEvoy's cross-examination that there might have been some payment of management fees:

> "MR RYALL: Right. Mr McEvoy, you told us that after a payment in February 2002, you didn't get any payment for caretaking services for the period after 7 February 2002 up until the time you got a new management agreement in May 2003?-- No. In August 2002 we were back-paid - I think it was a month and a half or two months of duties that were asked by the chairman to perform. The 30th of April June 2002 he asked us to continue to manage the building."[83]

[142] A tax invoice of the plaintiff dated 4 April 2003 was then admitted into evidence. It recorded:

> "Management Salary 7th February 2002 to 28th February 2002 = 22 days
> Management Salary 1st March 2002 to 31st March 2002 = 31 days
> Management Salary 1st April 2002 to 30th April 2002 = 30 days
> Management Salary 1st May 2002 to 28th May 2002 = 28 days
> Total 111 days @ $40,008 Per annum (365 days) = $12,166.81"[84]

[143] Mr McEvoy was reluctant to concede that the plaintiff was paid that amount. He was shown a copy of the minutes of the committee meeting, of which he was by then chairman, of 4 April 2003 where a motion was passed that the amount of $12,166.81 would be paid as per the above invoice.[85] When asked whether the payment was received, Mr McEvoy replied:

> "...I'm not sure. I'm sure it would be in the body corporate records.
>
> Yes. Well, at that stage you were the chairman-----?-- I was.

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81 T4-21, L34-L41.
82 T4-30, L18-L30.
83 T4-36, L46-L53.
84 Ex 15.
85 T about 4-36 and ex 16 for the mins of the meeting.

> -----of the body corporate and-----?-- There was a dispute resolution on - based on this."[86]

[144] The dispute resolution seemingly related to the extraordinary general meeting of 22 August 2002.[87] When Mr McEvoy expressed uncertainty about whether the payment was made, based on the fact he believed it was the subject of a dispute resolution, I find that he was referring to the back payment made following the EGM of 22 August 2002. I conclude on the balance of probabilities the plaintiff was paid for the period 7 February 2002 to 28 May 2002 the amount of $12,166.81.

[145] There is no other evidence contradicting Mr McEvoy's evidence that the plaintiff was not paid during the applicable period.[88] I note here that the experts recorded some payments for the period. However, the source documents appear to use a cash accounting method, rather than an accrual method. For example, Mr Cadman's report listed the amount of $23,745 as having been paid in 2002. The source document referred to is the defendant's Statement of Financial Performance for 1 December 2001 to 30 November 2002.[89] In that document "Caretaker Fees" are listed as $23,744.90. On the evidence this exact amount was paid on 1 March 2002, however, it related to the period July 2001 to 8 February 2002. It would therefore be inaccurate to deduct this amount as having been paid, given that it relates to a different period. The financial records of the defendant used by the experts are of limited assistance without further evidence because it is unclear what period the payments listed relate to.

[146] The best approach is therefore to deduct the amount of $12,166.81 from the amount it is known was payable, a calculation which yields:

$$\$49,799.34 - \$12,166.81 = \underline{\$37,632.53}^{90}$$

[147] The plaintiff should be awarded damages for loss of management fees in the amount of $37,632.53.

Loss of value of the business

[148] As with the plaintiff's claim for loss of commission the defendant effectively premised its claim for damages for loss of value of the business on a presumption that the letting pool reduced because of the breach it alleged in the first limb of its case. I have found there was no such breach.

[149] No evidence has been advanced to suggest there was any loss in the value of the business caused by the defendant's repudiation of 7 February 2002.

[150] This component of the damages claim must fail.

[151] It follows the only award of damages is that relating to the loss of management fees.

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86 T4-37, L20-L27.

87 See ex 34.

88 The defendant's expert apparently had regard to some records indicating other payments were made but these records were not annexed to the report or tendered and the reasoning based on them was not properly explained.

89 Ex 24(b), appendix G.

90 I have conducted my own calculation to arrive at this figure which is marginally higher than the $35,264 calculated by Mr Cadman.

Other matters

Failure to mitigate loss

[152] The defendant pleaded a failure to mitigate loss. The pleading is irrelevant to the only successful component of the damages claim.

Inevitability of valid termination?

[153] The defendant argued that even if there was an ineffective ultra vires determination there would very likely have been a valid termination such that no substantial losses could be seen to flow from the unsuccessful attempt to terminate. However, on the known evidence I would not draw the inference that the committee's view would inevitably have prevailed at a general meeting called to authorise termination.

Declaration

[154] As mentioned earlier the declaration I made in the course of the trial was not quite in the terms sought in the claim. However, its underlying effect is the same in the light of my conclusion the agreement had not been terminated by the time of the purported termination of the agreement on 7 February 2002. In the circumstances there exists no utility in articulating in my orders a further declaration in the terms which were sought in the claim.

Orders

[155] My orders are:

1. Judgment for the plaintiff in the sum of $37,632.53 plus any interest ordered pursuant to s 58 *Civil Proceedings Act* 2011.
2. I will hear the parties as to interest and costs.