QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	*Vie Management Pty Ltd (Receivers and Managers Appointed) (In Liquidation) v Body Corporate for Gallery Vie CTS 37760* [2015] QCAT 164
PARTIES:	Vie Management Pty Ltd (Receivers and Managers Appointed) (In Liquidation) (Applicant) v Body Corporate for Gallery Vie CTS 37760 (Respondent)
APPLICATION NUMBER:	OCL010-15
MATTER TYPE:	Other civil dispute matters
HEARD AT:	Brisbane
HEARING DATE:	**24 April 2015**
DECISION OF:	**Member Lumb**
DELIVERED ON:	13 May 2015
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. It is declared that the making of the order, by order of the Supreme Court of Queensland dated 19 December 2014 ('the order'), that the Applicant be wound up was something done, within the meaning of s 126(7) of the *Body Corporate and Community Management Act* 1997, after Suncorp-Metway Ltd started to act under s 126(2) of the *Body Corporate and Community Management Act* 1997.** **2. It is declared that the appointment of a liquidator by the order was something done, within the meaning of s 126(7) of the *Body Corporate and Community Management Act* 1997, after Suncorp-Metway Ltd started to act under s 126(2) of the *Body Corporate and Community Management Act* 1997.** **3. It is declared that the Respondent is not presently entitled to terminate the Caretaking Agreement between the**

Applicant and the Respondent dated 12 December 2007 ('the Caretaking Agreement') because of its failure to comply with the requirements of s 126(1) of the *Body Corporate and Community Management Act* 1997prior to 23 April 2015.

4. **The Respondent, by its servant, agents or otherwise is, for a period of 21 days from the date of these orders, restrained from:**
   a. **voting on any proposed motion to terminate the Caretaking Agreement at any general meeting; and**
   b. **taking any other steps to terminate or purporting to terminate the Caretaking Agreement;**

   on the basis that the Applicant is subject to a winding up order or has had a liquidator appointed to it.
5. **The parties shall file and serve, within 14 days of the date of these orders, written submissions in relation to the question of costs.**

CATCHWORDS:

Statutory interpretation – *Body Corporate and Community Management Act* 1997 (Qld) s 126 – financed contract – limitation on right to terminate – exception to limitation – reading words into statutes – test to be applied – whether financer '*started to act*' under s 126(2) – winding up order against caretaker – appointment of liquidator to caretaker – whether '*something done or not done*' after financier started to act within the meaning of s 126(7)

Acts Interpretation Act 1954 (Qld), s 14B
Body Corporate and Community Management Act 1997 (Qld) s 15, s 16, s 126, s 149B, s 229
Body Corporate and Community Management and Other Legislation Amendment Act 2003 (Qld), s 47
Corporations Act 2001 (Cth), s 420C, s 459A
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 10, s 59, s 60

Bermingham v Corrective Services Commission (NSW) (1988) 15 NSWLR 292
Cardinal Project Services Pty Ltd v Hanave Pty Ltd (2011) 81 NSWLR 716

Director of Public Prosecutions v Leys (2012) 296 ALR 96
Foster v Cameron [2011] QCA 48
Jones v Wrotham Park Settled Estates [1980] AC 74
Kelsall and Anor v State of Queensland and Anor [2012] QCA 369
Kingston v Keprose Pty Ltd [No 3] (1987) 11 NSWLR 404
McMahon v Permanent Custodians Ltd [2013] NSWCA 275
Minister for Immigration & Citizenship v SZJGV (2009) 238 CLR 642
R v Byerley (2010) 107 SASR 517
R v Di Maria (1996) 67 SASR 466
R v Young (1999) 46 NSWLR 681
Rail Corporation (NSW) v Brown (2012) 82 NSWLR 318
Saraswati v The Queen (1991) 172 CLR 1
Sevmere Pty Ltd v Cairns Regional Council [2010] 2 Qd R 276
Special Projects (Qld) Pty Ltd v Simmons [2012] QCA 205
Taylor v Owners – Strata Plan No 11564 (2014) 306 ALR 547
Tokyo Mart Pty Ltd v Campbell (1988) 15 NSWLR 275
VOAW v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 79 ALD 422

REPRESENTATIVES:

APPLICANT:	Vie Management Pty Ltd (Receivers and Managers Appointed) (In Liquidation) represented by Ms S Moody of counsel instructed by Herbert Smith Freehills
RESPONDENT:	Body Corporate for Gallery Vie CTS 37760 represented by Mr Charles Wilson of counsel instructed by Reichmann Lawyers

REASONS FOR DECISION

[1] The central issue raised by the Applicant's Application filed on 23 February 2015 ('the Application') is whether the Respondent ('the Body Corporate') is precluded from terminating a contract entitled '*Caretaking Agreement*' between the Body Corporate and the Applicant dated 12 December 2007 ('the Caretaking Agreement').

[2] By the Application, the Applicant sought against the Body Corporate the following relief:

> 1. An Interim Order, being an order restraining the [Body Corporate] from doing any of the following, pending determination of this proceeding:
>
> (a) Voting at its Annual General Meeting on 26 February 2015 to terminate the Caretaking Agreement; and/or
>
> (b) Taking any other steps to terminate or purport to terminate the Caretaking Agreement on the basis that the Applicant is insolvent, is subject to a winding up order, has had a liquidator appointed to it, and/or has had a Receiver and Manager appointed to it.
>
> 2. A declaration that the [Body Corporate] is not entitled to terminate the Caretaking Agreement on the basis that the Applicant is insolvent, is subject to a winding up order, has had a liquidator appointed to it, and/or has had a Receiver and Manager appointed to it;
>
> 3. Costs, based on the principles espoused in *Beachcomber Management Pty Ltd ATF Kafritas Family Trust v Body Corporate for the Surfers Beachcomber* [2014] QCAT 453 (11 September 2014); and
>
> 4. Such further or other relief (including on the Interim Order) deemed appropriate.

[3] The facts material to this Application are not in dispute.

Background

[4] The original parties to the Caretaking Agreement were the Body Corporate and Gallery Vie Management Pty Ltd ('Gallery Vie'). Pursuant to the Caretaking Agreement, Gallery Vie agreed to undertake caretaking duties within the whole of the land comprising the '*Gallery Vie*' Community Titles Scheme Number 37760 on the terms contained in the agreement.

[5] The Caretaking Agreement, as varied, was assigned by Gallery Vie to the Applicant (with the Body Corporate's consent) on 31 October 2011.

[6] The provision of the Caretaking Agreement which is material to the present case is Clause 11. That clause provides:

> 11. This agreement may be terminated by the Body Corporate by written notice to the Caretaker upon any of the following events occurring:
>
> (a) the [Applicant] assigns its interest in this agreement in breach of clause 10;
>
> (b) the [Applicant] fails or neglects to carry out any of the duties and the failure or neglect continues for a further period of seven days after the Body Corporate has given written notice to the [Applicant] specifying the duty or duties which the [Applicant] has failed or neglected to carry out and requiring the [Applicant] to perform the duty or duties;

(c) the [Applicant] is guilty of gross misconduct or gross negligence in the performance of any one or more of the duties;

(d) a receiver or receiver and Caretaker of the undertaking or property of the [Applicant] or any part thereof is appointed;

(e) an order is made by a court that the [Applicant] be wound up;

(f) a liquidator or a provisional liquidator of the [Applicant] is appointed, whether or not under an order of a court;

(g) the [Applicant] enters into, or resolves to enter into, a scheme of arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them;

(h) the [Applicant] or its members resolve that it be wound up, or otherwise dissolved, or gives notice of intention to do so, except to reconstruct or amalgamate while solvent, on terms approved by the Body Corporate;

(i) the [Applicant] is or states that it is unable to pay its debts when they fall due;

(j) the [Applicant] commits an act of bankruptcy or is declared bankrupt in accordance with the provisions of the Bankruptcy Act;

(k) the [Applicant] commits any indictable offence; or

(l) the [Applicant] becomes a person of unsound mind or a person whose person or estate is liable to be dealt with in any way under any law relating to mental health;

(m) the registered owner from time to time of Lot 1 on SP 180452 terminates the service contract with the [Applicant] as a result of a breach by the [Applicant].

[7] Suncorp-Metway Ltd ('the Financier') holds registered security interests over all of the present and after acquired property of the Applicant with no exceptions.[1]

[8] On 24 September 2014, Mr Cronk caused to be served on the Body Corporate a notice entitled '*Notice to Body Corporate*' dated 24 September 2014 ('the September Notice').[2] The September Notice was executed by of both the Financier and the Applicant. That notice stated:

> This notice is issued in accordance with the requirements of sections 123(1) and 124 of the *Body Corporate and Community Management Act 1997* (Qld).
>
> Take notice that the Financier identified in the Schedule below/over is a financer of the Contract specified in the schedule. The Financier's address for service is:
>
> Suncorp Metway Ltd ABN 66 010 831 722
>
> c/- Herbert Smith Freehills

---

1 Affidavit of Mr Cronk, at [5].

2 Affidavit of Mr Cronk, at [7] and p 5 of Exhibit 'LIC-1'.

Attn: Peter Smith

Level 38, 345 Queen Street

BRISBANE QLD 4000

By fax: (07) 3258 6444, marked to the attention of Peter Smith

[9] The contracts referred to in the Schedule to the September Notice included the Caretaking Agreement.

[10] On 15 December 2014, Mr Cronk caused a further notice dated 15 December 2014 to be served on the Body Corporate.[3] This notice stated that it was issued in accordance with the requirements of s 126(3) of the *Body Corporate and Community Management Act* 1997 (Qld) ('the BCCMA'). This notice stated that the Financier intended to appoint Shaun McKinnon and Graham Killer of Grant Thornton ('the Receivers') as joint and several Receivers and Managers of property including the Contract specified in the schedule (which schedule referred to, inter alia, the Caretaking Agreement).

[11] On 16 December 2014, the Receivers were appointed to be receivers and managers of the '*Charged Property*' which was defined to mean all of the property, rights and undertaking charged or mortgaged by the '*Security*' including the whole of the Applicant's rights in relation to the management of the Gallery Vie CTS.[4]

[12] On 19 December 2014, the Supreme Court of Queensland ordered, inter alia, that the Applicant be wound up on the grounds of insolvency[5] and that Jonathan Paul McLeod ('the Liquidator') be appointed as liquidator for the purposes of the winding up.[6]

[13] By letter dated 28 January 2015 from the Body Corporate's solicitors to the Financier's solicitors,[7] it was asserted that the Body Corporate was of the view that the court orders of 19 December 2014 brought into play clauses 11(e) and 11(f) of the Caretaking Agreement and that in reliance upon s 126(7) of the BCCMA the Body Corporate asserted it had acquired a contractual right to terminate the Caretaking Agreement (and expressly reserved its rights under clause 11).

[14] The Financier's solicitors responded by letter dated 2 February 2015[8] asserting that s 126(7) did not apply because that provision only applies where a financier is acting under the contract in place of the contractor under s 126(2)(a).

[15] The Application was filed on 23 February 2015.

[16] On 26 February 2015 the Tribunal handed down a decision that, inter alia:

---

3 Affidavit of Mr Cronk, at [8] and p 7 of Exhibit 'LIC-1'.
4 Affidavit of Mr Killer, at [4] and p 1 of Exhibit 'GRK-1'.
5 Pursuant to *Corporations Act* 2001 (Cth), s 459A.
6 Affidavit of Mr Cronk, at [6] and p 4 and p 11 of Exhibit 'LIC-1'.
7 Affidavit of Mr Cronk, at [11] of pp 12-3 of Exhibit 'LIC-1'.
8 Affidavit of Mr Cronk, at [13] and p 14 of Exhibit 'LIC-1'.

> The Body Corporate whether by its servants, agents, employees or otherwise is restrained from voting on the proposed motion to terminate the Caretaking Agreement at the Annual General Meeting to be held on 26 February 2015 (or any adjournment of that general meeting).

[17] By directions made by the Tribunal, by consent, on 6 March 2015, the Tribunal directed, inter alia:

> 1. The Body Corporate whether by its servants, agents, employees or otherwise is until these proceedings are determined or upon the earlier order of the tribunal or agreement of the parties restrained from:
>
> a. Voting on the proposed motion to terminate the caretaking agreement dated 12 December 2007 (as subsequently varied and assigned) at the annual general meeting to be held on 26 February 2015 (or any adjournment of that general meeting); and
>
> b. Taking any other steps to terminate or purporting to terminate the caretaking agreement on the basis that the Applicant is insolvent, is subject to a winding up order, has had a liquidator appointed to it, and/or had a receiver and manager appointed to it.

[18] The hearing of this matter took place on 24 April 2015.

[19] The Tribunal convened a directions hearing on 30 April 2015 and raised with the parties an issue concerning the jurisdiction of the Tribunal to deal with the matter, specifically the issue of whether the Applicant was a letting agent within the meaning of that phrase in the BCCMA. The Tribunal gave directions for the provision of any further evidence and supplementary written submissions.

[20] The Applicant filed a further affidavit from Graham Killer sworn on 30 April 2015 and a supplementary outline of submissions. The Body Corporate chose not file any affidavit material or submissions in reply.

[21] For completeness, I note that by letter dated 24 December 2014 from the Liquidator to the Financier's solicitors, the Liquidator consented to the Receivers continuing to trade the business of the Applicant pursuant to s 420C of the *Corporations Act* 2001 (Cth).[9] In my view, this fact is irrelevant to the determination of the issues in the present case. This case turns on the proper construction of s 126 of the BCCMA and that fact has no bearing on such construction. I also note that the Liquidator's consent was not given until five days after the winding up order was made. Any right of termination had arisen prior to that time.

Jurisdiction

[22] The Tribunal's original jurisdiction includes the jurisdiction conferred on the Tribunal under an enabling Act to decide a matter in the first

---

9 Affidavit of Mr Cronk, at [8] and p 7 of Exhibit 'LIC-1'.

instance.[10] The BCCMA is the enabling Act for the purposes of this Application. The Tribunal has jurisdiction to resolve a '*complex dispute*' by an order of the Tribunal exercising the Tribunal's original jurisdiction under the QCAT Act.[11] The definition of '*complex dispute*' in the BCCMA includes a dispute mentioned in s 149B of the BCCMA.

[23] Section 149B applies to a dispute about a claimed or anticipated '*contractual matter*' about, inter alia, the engagement of a person as a body corporate manager or caretaking service contractor for a community titles scheme.[12] Having regard to the terms of the Caretaking Agreement, I consider that the Applicant is a service contractor within the meaning of the BCCMA.[13]

[24] The definition of '*caretaking service contractor*' is contained in Schedule 6 to the BCCMA. It provides:

> ***caretaking service contractor***, for a community titles scheme, means a service contractor for the scheme who is also –
>
> (a) a letting agent for the scheme; or
>
> (b) an associate of the letting agent.

[25] The definition of '*letting agent*' is found in s 16. That provision provides:

> (1) A person is a ***letting agent*** for a community titles scheme if the person is authorised by the body corporate to conduct a letting agent business for the scheme.
>
> (2) A person conducts a ***letting agent business*** for a community titles scheme if the person conducts, subject to the *Property Occupations Act 2014*, the business of acting as the agent of owners of lots included in the scheme who choose to use the person's services for securing, negotiating or enforcing (including collecting rents or tariffs for) leases or other occupancies of lots included in the scheme.

[26] I accept the Applicant's submissions that the Applicant is a '*letting agent*' for the purposes of the BCCMA. In this regard I refer to [4] of the further affidavit of Mr Killer and exhibit 'GRK-2' (in particular clause 2(a) and the definition of '*letting service*' in the Letting Agreement). I find that the Applicant is a '*caretaking service contractor*' for the purposes of the BCCMA.

[27] The phrase '*contractual matter*' is defined to mean:

> ***contractual matter***, about an engagement or authorisation of a body corporate manager, service contractor or letting agent, means—
>
> (a) a contravention of the terms of the engagement or authorisation; or
>
> (b) the termination of the engagement or authorisation; or

---

10 *Queensland Civil and Administrative Act* 2009 (Qld) (QCAT Act) s 10(1)(b).
11 BCCMA s 229(2)(a)(ii).
12 BCCMA s 149B(1)(a)
13 BCCMA definition of '*service contractor*' and s 15.

(c) the exercise of rights or powers under the terms of the engagement or authorisation; or

(d) the performance of duties under the terms of the engagement or authorisation.

[28] In my view, the present dispute is one about a claimed or anticipated termination of the engagement of the Applicant as caretaker (subsection (b)). It also involves the exercise of rights (by the Body Corporate) under the terms of such engagement (subsection (c)). I conclude that this is a complex dispute being a dispute about a claimed or anticipated "contractual matter" about, inter alia, the engagement of a person as a caretaking service contractor for a community titles scheme and that the Tribunal has jurisdiction to determine the dispute.

The Applicant's challenge to the Body Corporate's right to terminate

[29] The Applicant contends that the Body Corporate is not entitled to terminate the Caretaking Agreement. The Applicant relies upon three principal grounds:

a) s 126(2) of the BCCMA precludes the Body Corporate from terminating the Caretaking Agreement. The exception in s 126(7) does not apply to the facts of the present case because that subsection applies only where a financier has '*started to act*' under s 126(2)(a) and, here, the Financier has appointed receivers and managers under s 126(2)(b);

b) in the alternative, s 126(7) does not apply because, upon its proper construction, the subsection requires something to have been done or not done by the Applicant or the Financier which is in the nature of a breach of the Caretaking Agreement and the substance of which occurs after the Financier started to act (and the making of the order to wind up the Applicant and appointment of a liquidator does not satisfy those requirements);

c) further in the alternative, the Body Corporate is not entitled to terminate the Caretaking Agreement because it has not served a notice on the Financier as required under s 126(1) and s 126(9) of the BCCMA.

[30] In order to address these arguments, I will first consider the history of s 126 and the operation of s 126(2).

The history of s 126

[31] Section 126 in its current form provides:

(1) The body corporate under a financed contract may terminate the contract if—

(a) the body corporate has given the financier for the contract written notice, addressed to the financier at the financier's address for service, that the body corporate has the right to terminate the contract; and

(b) when the notice was given, circumstances existed under which the body corporate had the right to terminate the contract; and

(c) at least 21 days have passed since the notice was given.

(2) However, the body corporate can not terminate the contract if, under arrangements between the financier and the contractor for the contract, the financier—

(a) is acting under the contract in place of the contractor; or

(b) has appointed a person as a receiver or receiver and manager for the contract.

(3) A financier may take the action mentioned in subsection (2)(a) or (b) only if the financier has previously given written notice to the body corporate of the financier's intention to take the action.

(4) The financier may authorise a person to act for the financier for subsection (2)(a) if—

(a) the person is not the contractor or an associate of the contractor; and

(b) the body corporate has first approved the person.

(5) For deciding whether to approve a person under subsection (4), the body corporate—

(a) must act reasonably in the circumstances and as quickly as practicable; and (b) may have regard only to—

(i) the character of the person; and

(ii) the competence, qualifications and experience of the person.

(6) However, the body corporate must not—

(a) unreasonably withhold approval of the person; or

(b) require or receive a fee or other consideration for approving the person, other than reimbursement for legal or administrative expenses reasonably incurred by the body corporate for the application for its approval.

(7) Subsection (2) does not operate to stop the body corporate from terminating the contract for something done or not done after the financier started to act under the subsection.

(8) Nothing in this section stops the ending of a financed contract by the mutual agreement of the body corporate, the contractor and the financier.

(9) In this section—

address for service, for a financier, means the financier's address for service—

(a) for notices given by the body corporate under this division; and

(b) stated in a notice given to the body corporate under section 123 or 124.

[32] As originally enacted, the limitation on a body corporate terminating a financed contract was confined to circumstances in which the financier

was acting under the contract in the place of the contractor for the contract.

[33] The Explanatory Notes for the *Body Corporate and Community Management Bill* 1997 provided that:

> clause 110 sets out the level of protection given to a financier of a contract of a person who is engaged as a service contractor or authorised as a letting agent when the body corporate terminates the contract.

[34] Section 126 was originally numbered as s 110. It was substituted in 2003.[14] Section 126(5) was subsequently amended but that amendment is not relevant for present purposes.

[35] When the subsection was substituted in 2003, among other amendments, s 126(2) was amended to include the reference to circumstances in which a financier has appointed a person as a receiver or receiver and manager for the contract.

[36] The Explanatory Notes for the *Body Corporate and Community Management and Other Legislation Amendment Bill* 2002 provide that:

> Section 110 has been substantially rewritten to clarify the rights and responsibilities of the financier of a finance contract and the body corporate. For instance the section now recognises the appointment of a receiver and manager for the financed contract. The section also places greater emphasis on the giving of appropriate notices between the financier and the body corporate.
>
> A new section 110A is included that, from the commencement of the section, will prohibit the financier requiring the body corporate to enter into a contract with the financier about the financier's rights under the financed contract. Such contracts have previously been used by the financiers to support and even extend the operation of section 110 and to prevent the body corporate from reaching an arrangement with a financed letting agent that the financier perceives may not be in the best interest of the financier. It is intended that the financier will rely on the expanded provisions of section 110.
>
> The new section does not act retrospectively. Rather it applies to contracts purportedly entered into after the section's commencement.

The operation of s 126(2)

[37] Section 126(2) provides that the body corporate cannot terminate a financed contract if (under arrangements between the financier and the contractor for the contract) the financier '*is acting under the contract*' in place of the contractor or '*has appointed*' a person as a receiver or receiver and manager for the contract. In these reasons, any reference to a '*receiver*' should be taken as also referring to a '*receiver and manager*'.

---

[14] See the *Body Corporate and Community Management and Other Legislation Amendment Act* 2003 (Qld) (Act 6 of 2003, s 47).

[38] Section 126(1) provides that the body corporate may terminate a financed contract if three conditions are satisfied. The second condition is that when the requisite notice was given '*circumstances existed under which body corporate had the right to terminate the contract*'. In my view (assuming that a compliant notice is given pursuant to s 126(1)) s 126(2) operates (subject to s 126(7)) to preclude a right to terminate a financed contract whether pursuant to an express contractual provision or by reason of the common law doctrines applying to the termination of contracts (e.g. repudiation or breach of an essential term). I consider that the broad terms of s 126(1)(b), in particular the reference to '*circumstances existed*' under which the body corporate had a right to terminate, support a conclusion that those circumstances encompass the grounds of termination identified above.

[39] Two further matters should be mentioned in relation to s 126(2).

[40] First, the Body Corporate submits that s 126(2) operates as a statutory '*standstill*' and that once the financier is no longer acting under the contract or the receiver has ceased to act in that capacity, any pre-existing right of termination is '*reactivated*'. This raises the issue of whether the operation of s 126(2) merely suspends any right of termination or whether it extinguishes such right. It is unnecessary to decide that question in the present case because the Receivers continue to act pursuant to their appointment and I do not propose to decide the point. For this reason, I will refer to the operation of s 126(2) as effecting a '*limitation*' on the right of termination (reflecting the language of the BCCMA).

[41] Secondly, s 126(2)(b) refers to the appointment of a person as a receiver '*for the contract*'. There is no dispute between the parties that this subsection was engaged upon the appointment of the Receivers in the present case. In my view, it is inapt to refer to a receiver being appointed '*for the contract*'. However, it seems clear that the legislature intended that the subsection is to encompass circumstances in which a receiver is appointed to *the property of* the contractor *including the contractual rights* enjoyed under a financed contract (otherwise the purpose of the provision would be defeated because a receiver could not, literally, be appointed '*to a contract*').

[42] I will now address each of the grounds relied upon by the Applicant.

The first ground

[43] The Applicant's first contention is that s 126(2) gives a financier (of a financed contract) two alternative options, either to '*act*' under s 126(2)(a) or to appoint receivers under s 126(2)(b); that these two alternative options are treated differently throughout the balance of s 126; and that s 126(7) expressly applies only where financier is '*acting*' under s 126(2)(a).

[44] In my view, the phrase '*started to act*' sits more comfortably (in a grammatical sense) with the language of s 126(2)(a) than with the language of s 126(2)(b). However, the phrase '*started to act*' is expressly

qualified by the words '*under the subsection*'. The subsection referred to is s 126(2) being the subsection referred to in the opening words of s 126(7). The ordinary grammatical meaning of '*under the subsection*' is a reference to both s 126(2)(a) and s 126(2)(b) in s 126(2).

[45] In my view, s 126(7), upon its proper construction, is not limited to the circumstances contemplated by s 126(2)(a); it applies to both scenarios in s 126(2). I consider that there are three factors that point to this construction being the proper construction of the subsection.

[46] First, as the Body Corporate submitted, the Parliamentary drafter has referred to the discrete subsections of s 126(2) in other provisions of s 126. Section 126(3) refers to s 126(2)(a) or s 126(2)(b) and s 126(4) refers to s 126(2)(a). There is no apparent reason why the drafter would not have made express reference to s 126(2)(a) in s 126(7) if it was intended that the exception provided by that subsection applied only to s 126(2)(a). Further, the words adopted in s 126(2)(a) refer to circumstances where the financier is acting '*under the contract*'. In its current form, s 126(7) refers to the financier starting to act '*under the subsection*'. I consider it unlikely that the Parliamentary drafter would have eschewed the use of the phrase '*under the contract*' and adopted the phrase '*under the subsection*' if it had been intended that s 126(7) was to apply only to s 126(2)(a).

[47] Secondly, s 126(3) provides that a financier may '*take the action*' mentioned in s 126(2)(a) or s 126(2)(b) (if the financier has previously given the requisite written notice). The phrase '*take the action*' necessarily contemplates that the appointment of a receiver constitutes the taking of action by a financier. '*Action*' is defined in the Macquarie Dictionary (5th edition) to mean, inter alia: '*1. The process or state of acting or of being active ... 2. Something done: an act; deed …*'. '*Act*' is defined to mean, inter alia: '*1. Anything done or performed; a doing: deed. 2. The process of doing; caught in the act …*'.

[48] In my view, there is no warrant for construing the word '*act*' in s 126(7) as bearing a meaning materially different to the term '*action*' in s 126(3). In my view, the language adopted by the legislature supports a conclusion that the reference to a financier starting to '*act*' within the meaning of s 126(7) contemplates the '*act*' or '*action*' comprising one or other of the circumstances set out in s 126(2)(a) and s 126(2)(b) respectively.

[49] Thirdly, the effect of the Applicant's construction is that a body corporate would be precluded from terminating a financed contract after a receiver is appointed for the purposes of s 126(2)(b). This would be so even if the conduct of the contractor (by the receiver) constituted a repudiation of, or a breach of an essential term of, the contract occurring after the receiver was appointed. I consider that there is nothing in the language of s 126, the purpose of Division 4 (or of the BCCMA generally), or in the Explanatory Notes which suggests that Parliament intended to permit a right of termination if a financier acts under the contract but not if a receiver (appointed by the financier) is acting pursuant to that appointment.

[50] In my view, the exception or carve out provided by s 126(7) applies to s 126(2) generally, that is, it applies to each of the circumstances in s 126(2)(a) and s 126(2)(b).

The second ground

[51] Based on the view that I have reached in relation to the first argument, I consider that a financier starts to act under s 126(2) either when the financier commences acting under the financed contract in place of the contractor[15] or when the financier appoints a person as a receiver '*for the contract*'.[16]

[52] In the present case, there is no dispute that the winding up order (which also appointed the Liquidator to the Applicant) was made *after* the appointment of the Receivers.

[53] In my view:

a) the making of the order by the Supreme Court of Queensland that the Applicant be wound up was an event contemplated by clause 11(e) of the Caretaking Agreement; and

b) the appointment of the Liquidator under that order was an event contemplated by clause 11(f) of the Caretaking Agreement.

[54] The Body Corporate contends that each of these events constituted '*something done or not done*' within the meaning of s 126(7) and, having occurred after the appointment of the Receivers, fell within the exception to s 126(2) provided by s 126(7).

[55] The Applicant's case is set out in [22] and [23] of its outline of submissions:

> 22. … the Applicant submits that section 126(7) does not apply in this matter because, when properly construed in light of its purpose discussed above, it requires something to have been *'done or not done'*:
>
> (a) by the Applicant or the Financier;
>
> (b) which is in the nature of a breach of the Caretaking Agreement; and
>
> (c) the substance of which occurred after the Financier commenced enforcement action.
>
> 23. In this respect:
>
> (a) liquidation is not a thing *'done or not done'*. It is a condition brought about by an Order of the Court;
>
> (b) the making of the winding up order and appointment of the Liquidator arose by the acts of third parties. They did not arise

---

15 BCCMA s 126(2)(a).

16 Ibid, s 126(2)(b).

from the direct actions of the Applicant or the Financier and could not have been readily avoided by either;

(c) In any event, neither the making of a winding up order or liquidation of the Applicant constitute *'breaches'* of the Caretaking Agreement. They are simply termination events, and do not constitute any breaches of any obligations under the Caretaking Agreement;

(d) the winding up application against the Applicant was filed on 28 November 2014 and all substantive affidavits were filed in the proceeding by 9 December 2014. This predates any enforcement action taken by the Financier, with the Receivers being appointed some 7 days later on 16 December 2014; and

(e) the liquidation of the Applicant has no impact on the conduct of the Applicant's business. The Receivers have priority and have the Liquidator's express statutory authorisation to continue to operate the Applicant's business as duly authorised agents of the Applicant.

[56] In her oral submissions, Ms Moody, who appeared for the Applicant, focused on three aspects (without abandoning reliance on the grounds contained in the written submissions):

a) that s 126(7), on its proper construction, contemplated something done or not done by the financier or by the contractor (in respect of whom receivers and managers had been appointed);

b) that the phrase '*something done or not done*' was referable to the parties' contractual obligations; and

c) that the winding up order (and the appointment of the liquidator) was not something done (or not done) within the meaning of s 126(7).

[57] It was also submitted on behalf of the Applicant that the rights granted under an agreement such as the Caretaking Agreement can be very valuable and that the financier of such a contract has an obvious interest in preserving the value of that agreement. So much may be accepted.

[58] The appointment of a receiver is the event upon which s 126(2)(b) is predicated. I consider that the primary question is whether the protection provided by s 126(2) was intended to extend to prevent termination by the Body Corporate for terminating events which arose by reason of something done or not done by an entity other than the financier or the contractor.

[59] I consider that neither the Explanatory Notes in relation to s 126 as originally enacted (then numbered s 110) nor the Explanatory Notes in relation to that provision as inserted in 2003 provides assistance in determining which construction should be preferred.[17] Such Notes leave open the question of whether the exception provided for by s 126(7) should be limited in the manner contended for by the Applicant.

---

17 *Acts Interpretation Act* 1954 (Qld), s 14B.

[60] The essence of the Body Corporate's written submissions was that the phrase '*done or not done*' was '*perfectly general*' and the only limitation on the '*amplitude*' of the expression was the temporal limitation introduced by the words '***after the financier started to act*** *…*'; the expression was satisfied by acts or omissions on the part of a third party, the Body Corporate or the contractor.[18] In his oral submissions, Mr Wilson, who appeared for the Body Corporate, submitted that the making of the order was a '*juridical act*' and was necessarily '*something done*' within the meaning of the subsection. The Body Corporate submitted that the Applicant's construction requires reading words of limitation into s 126(7) and that the Applicant could not satisfy the three limb test applicable to the reading in of words in a statute (citing *Bermingham v Corrective Services Commission of New South Wales*[19] and *R v Young*).[20]

[61] That test was espoused by Lord Diplock in *Jones v Wrotham Park Settled Estates* (sub nom *Wentworth Securities Ltd v Jones*) and provides that:[21]

> (1) the Court must know the mischief with which the Act was dealing;
>
> (2) the Court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved; and
>
> (3) the Court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.

[62] This test has been applied by the High Court of Australia,[22] the Queensland Court of Appeal[23] and at appellate level in other States.[24]

[63] In *Taylor v Owners – Strata Plan No 11564*,[25] a majority of the High Court considered the operation of Lord Diplock's test in the context of the

---

18 At [14] and [15].

19 (1988) 15 NSWLR 292 at 302.

20 (1999) 46 NSWLR 681 at [3] ff per Spigelman CJ.

21 [1980] AC 74 at 105-106.

22 See e.g. *Saraswati v The Queen* (1991) 172 CLR 1 at 22 per McHugh J; Toohey J agreeing; *Minister for Immigration & Citizenship v SZJGV* (2009) 238 CLR 642 at [9] per French CJ and Bell J.

23 See e.g. *Kelsall and Anor v State of Queensland and Anor* [2012] QCA 369 at [49]-[52] per White JA with whom Gotterson JA and North J agreed (Special leave refused: [2013] HCATrans 124); *Foster v Cameron* [2011] QCA 48 at [29] per Chesterman JA with whom McMurdo P and Ann Lyons J agreed; *Special Projects (Qld) Pty Ltd v Simmons* [2012] QCA 205 at [24] per Fraser JA.

24 See e.g. *Kingston v Keprose Pty Ltd [No 3]* (1987) 11 NSWLR 404 at 423 per McHugh JA, as he then was; *Director of Public Prosecutions v Leys* (2012) 296 ALR 96 at [45] per Redlich and Tate JJA and T Forrest AJA; *Victorian WorkCover Authority v Vitoratos* (2005) 12 VR 437 at [22]-[23] per Buchanan JA; *Rail Corporation (NSW) v Brown* (2012) 82 NSWLR 318 at [45]-[47] per Bathurst CJ; Beazley and Basten JJA agreeing; *McMahon v Permanent Custodians Ltd* [2013] NSWCA 275 at [55]-[56] per Ward JA; Meagher and Barrett JJA agreeing.

25 (2014) 306 ALR 547.

modern purposive approach to statutory interpretation. It is worthwhile setting out the relevant observations of the majority in full:[26]

> [35] In *Young* Spigelman CJ suggested that the authorities do not warrant the court supplying words in a statute that have been "omitted" by inadvertence per se. Construing the words actually used by the legislature in "their total context", Spigelman CJ suggested that the process of construction admits of reading down of general words or giving the words used an ambulatory operation. His Honour cited *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* as an instance of the former and *Bermingham v Corrective Services Commission (NSW)* as an instance of the latter. In *PLV* his Honour expanded on his analysis in *Young*, observing (at [88]):
>
> > [88] The authorities which have expressed the process of construction in terms of "introducing" words to an Act or "adding" words have all, so far as I have been able to determine, been concerned to confine the sphere of operation of a statute more narrowly than the full scope of the dictionary definition of the words would suggest. I am unaware of any authority in which a court has "introduced" words to or "deleted" words from an Act, with the effect of *expanding* the sphere of operation that could be given to the words actually used. … There are many cases in which words have been *read down*. I know of no case in which words have been *read up*. [Emphasis in original.]
>
> [36] In *Leys* the Victorian Court of Appeal was critical of Spigelman CJ's characterisation of purposive construction as a process of construing "the words actually used" (emphasis in original). Their Honours said that the process requires the court to determine whether the modified construction is reasonably open in light of the statutory scheme and against a background of the satisfaction of Lord Diplock's three conditions. Their Honours questioned the utility of the distinction between "reading up" and "reading down" and rejected the proposition that a purposive construction may not result in an expanded operation of a provision.
>
> [37] Consistently with this court's rejection of the adoption of rigid rules in statutory construction, it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. As the review of the authorities in *Leys* demonstrates, it is possible to point to decisions in which courts have adopted a purposive construction having that effect. And as their Honours observed by reference to the legislation considered in *Carr v Western Australia*, the question of whether a construction "reads up" a provision, giving it an extended operation, or "reads down" a provision, confining its operation, may be moot.
>
> [38] The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps

---

[26] At [35]–[40] per French CJ, Crennan and Bell JJ.

disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".

> [39] Lord Diplock's three conditions (as reformulated in *Inco Europe*) accord with the statements of principle in *Cooper Brookes,* and McColl JA was right to consider that satisfaction of each could be treated as a prerequisite to reading s 12(2) as if it contained additional words before her Honour required satisfaction of a fourth condition of consistency with the wording of the provision. However, it is unnecessary to decide whether Lord Diplock's three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that 'the modified construction is reasonably open having regard to the statutory scheme' because any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in *Newcastle City Council v GIO General Ltd*, the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour's further observation, '[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances'.
>
> [40] Lord Diplock's speech in *Wentworth Securities* laid emphasis on the task as construction and not judicial legislation. In *Inco Europe* Lord Nicholls of Birkenhead observed that even when Lord Diplock's conditions are met, the court may be inhibited from interpreting a provision in accordance with what it is satisfied was the underlying intention of parliament: the alteration to the language of the provision in such a case may be 'too far-reaching'. In Australian law the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the Constitution. (citations omitted)

[64] The phrase '*something done or not done*' is very broad. On the ordinary grammatical meaning of the language of s 126(7), s 126(2) does not operate to '*stop*' a body corporate from terminating the contract for something done or not done at any time after the financier has started to act (as I have found, under either s 126(2)(a) or s 126(2)(b)). The Applicant seeks to read down the phrase by a process of construction which limits the exception to something done or not done by the contractor or the financier and is in the nature of a breach of the financed contract (and the substance of which occurred after the financier started to act). In my view, the Applicant's construction necessarily involves a modified construction, one requiring the reading of s 126(7) as if it contained additional words. The Applicant's modified construction requires substantial recasting of the provision to meet the construction placed upon it by the Applicant. Even if the construction proposed by the Applicant were limited in the manner set out in [22(a)] of the Applicant's written submissions (which it is not), I consider that the Applicant's case would involve a modified construction necessitating the reading in of words. In that event, the provision would be required to be read as '*… something*

done or not done by the financier or the contractor …' or, perhaps, as '*… something done or not done by the financier or the contractor (by the receiver or receiver and manager for the contract) …*'.

[65] I consider that it is necessary to address whether the Applicant's construction satisfies the test espoused by Lord Diplock. In doing so, I note the unresolved issue of whether there is a fourth element requiring consistency with the wording of the provision.

What was the mischief with which the Act was dealing?

[66] The Applicant submitted that s 126 is intended to achieve a '*common sense and practical balance*' between the interests of '*body corporates*' (whose primary interest is in having their caretaking duties properly performed as agreed with the caretaker) and financiers of caretaking agreements (whose interest is in preserving the value of the security by avoiding termination of the caretaking agreement where the caretaker has defaulted, but the financier has taken appropriate action to ensure that the caretaking duties continue to be carried out).

[67] With respect to the amendment of what is now s 126 in 2003, the Body Corporate submitted that this involved a '*rebalancing*' of the rights and obligations as between the body corporate and the financier. As I understood the thrust of the submissions, it is suggested that this involved the tilting of the balance back towards the body corporate.

[68] Section 126 forms part of Division 4 of Part 2 of Chapter 3 of the BCCMA. The heading to the Division states '*Protection for financier of contract*'. The heading to s 126 states '*Limitation on termination of financed contract*'. The original Explanatory Notes stated that the provision sets out the '*level of protection*' given to a financier of a contract of a person who is engaged as a service contractor or authorised as a letting agent when the body corporate terminates the contract.

[69] In my view, the legislature intended to provide protection to financiers of financed contracts by permitting them to act (by an agent) in place of the contractor or to appoint receivers (to the contractor's property to the extent that it included the rights under a financed contract) without the prospect of the contract being terminated by reason of those acts. I am also of the view that additional protection was provided by precluding the body corporate from exercising any existing right of termination arising under an express contractual provision or by reason of common law doctrines applying to the termination of contracts (e.g. repudiation or breach of an essential term). This protection was maintained (at the least) while either of the circumstances in s 126(2) continued. This limitation assisted in preserving the value of the security comprising the bundle of rights bestowed upon the contractor under the relevant financed contract.

[70] In my view, the provision substituted in 2003 effected four main changes to the existing provision. First, the notice contemplated by (what is now) s 126(1)(a) was required to be addressed to the financier at the financier's

address for service. Secondly, that if a financier elected to act under the contract it could not authorise the contractor or an associate of the contractor to do so. Thirdly, the limitation on a body corporate's right to terminate a financed contract extended to circumstances in which the financier appointed a person as a receiver (for the contract). Fourthly, for the reasons expressed above, I consider that the exception to the operation of s 126(2) was also extended to the circumstances in which the financier appointed a person as a receiver. That is, both the limitation on termination applied, and the existing exception was extended, to circumstances in which a receiver was appointed '*to the contract*'. In my view, the substitution of the provision in 2003 did not affect the scope of the protection provided by s 126(2) other than by applying it to circumstances in which a receiver was appointed.

[71] However, in my respectful view, neither the language of s 126 (as originally enacted or in its subsequent form) or the BCCMA in general nor the Explanatory Notes sheds light on the precise scope of the '*level of protection*' intended to be provided to a financier after the financier started to act under s 126(2). There appears to be no dispute that the provision in its current form is intended to achieve a balance between the rights of bodies corporate and the protection of financiers of financed contracts. What is unclear is how that balance was to be struck in circumstances where a contractual right of termination arose after a financier started to act under s 126(2).

[72] Despite this lack of clarity, it is my view that the Body Corporate's construction does not lead to an absurd, unreasonable or capricious result. A financier still enjoys a level of protection. First, a body corporate is denied the right to terminate a financed contract in the event that receivers are appointed '*to the contract*' (in the present case, clause 11(d) of the Caretaking Agreement provided that the appointment of a receiver was an event of termination). Section 126(7) operates only '*after*' a financier starts to act under s 126(2). Secondly, as noted above, there is a limitation on the body corporate terminating a financed contract on any applicable *existing* ground of termination (for, *at least*, the duration of the occurrences of either of the events identified in s 126(2)).

[73] I will turn to the second limb of Lord Diplock's test which provides that the Court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved.

Parliamentary inadvertence?

[74] With respect to '*inadvertence*' in this context, it was said by the New South Wales Court of Appeal in *Tokyo Mart Pty Ltd v Campbell*:[27]

---

[27] (1988) 15 NSWLR 275 at 283 per Mahoney JA (McHugh and Clarke JJA agreeing). Cf *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* (2011) 81 NSWLR 716 at [36]-[37] per Basten JA.

> Legislative inadvertence may consist, inter alia, of either of two things. The draftsman may have failed to consider what should be provided in respect of a particular matter and so fail to provide for it. In such a case, though it may be possible to conjecture what, had he adverted to it, he would have provided, the court may not, in my opinion, supply the deficiency. In the other case, the legislative inadvertence consists, not in a failure to address the problem and determine what should be done, but in the failure to provide in the instrument express words appropriate to give effect to it. In the second case, it may be possible for the court, in the process of construction, to remedy the omission.

[75] These observations were cited with approval by the Queensland Court of Appeal in *Sevmere Pty Ltd v Cairns Regional Council*.[28] They have also been cited with approval by the Full Federal Court[29] and the South Australian Court of Criminal Appeal.[30]

[76] While greater protection would be afforded to financiers if the Applicant's construction were accepted, I cannot conclude that this was the intention of Parliament. I do not consider that a scenario in which a contractual right of termination may arise for something done or not done by an entity other than the financier or the contractor is an eventuality which must be dealt with if the purpose of s 126 is to be achieved. As noted above, financiers receive a level of protection in the event that the Body Corporate's construction is accepted. In my view, even if it were assumed that Parliament (if alerted to this issue) would have limited s 126(7) in the manner set out in [22(a)] of the Applicant's outline of submissions, this would be the result of the legislature's failure to consider the matter and to provide for it (and would fall within the first category identified in *Tokyo Mart*). In those circumstances, the Tribunal could not supply the deficiency.

[77] I am mindful that the Tribunal's task is one of construction and not legislation. I conclude that the Applicant's modified construction, even to the extent set out in [22(a)] of its outline of submission, would cross the boundary between construction and legislation.

[78] That the Applicant's construction crosses that boundary is plain in relation to the contentions in [22(b)] and [22(c)] of its outline of submissions.

[79] If, as I have found, s 126(2) operates to limit termination by the Body Corporate for breaches of essential terms, repudiation or pursuant to express contractual rights of termination, there is no indication in the language of the provision (or the Explanatory Notes) that the exception provided by s 126(7) is limited to breaches of contract only. The Applicant seeks to draw a distinction between the scope of events of termination limited by s 126(2) and the scope of the events of termination the subject of the s 126(7) exception. In my view, there is no warrant for adopting

---

28 [2010] 2 Qd R 276 at [56], [65] per Holmes JA (with whom Dutney J agreed).

29 *VOAW v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 79 ALD 422 at [13] per Ryan, Lindgren and Sundberg JJ.

30 *R v Di Maria* (1996) 67 SASR 466 at 474 per Doyle CJ; Prior and Nyland JJ agreeing. See also *R v Byerley* (2010) 107 SASR 517 at [108] fn 18 per Kourakis J.

such a modified construction; it cannot be concluded that this was the result of Parliamentary inadvertence.

[80] I also reject the contention that the '*substance*' of the breach (or event) must occur after the Financier started to act. In my view, the reference to '*something done or not done*' is a reference to some occurrence, or a failure to do something, giving rise to a right to terminate the financed contract. The legislature has drawn a clear dividing line between events occurring before and after the time at which the financier starts to act. In my view, the concept of the '*substance*' of something being done after that time would introduce a significant degree of uncertainty in the application of the provision and it is unlikely that the legislature could have intended such a concept to apply to the operation of the provision.

[81] For the above reasons, the Applicant's construction is rejected. I find that s 126(7), upon its proper construction, applies to the contractual events of termination under clauses 11(e) and (f) of the Caretaking Agreement (which occurred after the appointment of the Receivers) notwithstanding that the events arose by the act of an entity other than the Applicant or the Financier.

[82] For completeness, I will consider the third limb of Lord Diplock's test.

Certainty of the words Parliament would have used to overcome any omission?

[83] As discussed above, the construction contended for by the Applicant as set out in [22] of its outline of submissions requires considerable modification of the language of s 126(7). In my view, even if relevant Parliamentary inadvertence existed, there is no formula of words which could be adopted which would reflect, with certainty, a construction that would overcome any such omission. In this regard, I note that the Applicant did not attempt to frame the modified terms of s 126(7) to encapsulate its preferred construction set out in [22] of its outline of submissions (other than in the general manner set out in that paragraph).

Was the making of the winding up order and appointment of the Liquidator "something done or not done"?

[84] The Applicant submitted that the liquidation was a '*condition*' brought about by an order of the court. No authority was cited for this proposition The Applicant did not, in my respectful view, make clear what is meant by the term '*condition*'. The phrase '*something done*' is expressed in very broad terms. I find that the appointment of a liquidator pursuant to an order of the Court is something done within the meaning of that phrase.

[85] In any event, I also find that the making of the winding up order was '*something done*' with the meaning of s 126(7). It is difficult to see how a formal Court order could not fall within the broad phrase '*something done*'. I reject the Applicant's argument that the grounds upon which the Body

Corporate proposed to terminate the Caretaking Agreement did not fall within the phrase of '*something done or not done*'.

[86] Subject to the third argument raised by the Applicant, I consider that the Body Corporate would be entitled to terminate the Caretaking Agreement pursuant to clauses 11(e) and 11(f) of the agreement.

The third ground

[87] Section 126(1) provides that the Body Corporate under a financed contract) may terminate the contract '*if*' the matters specified are satisfied. In my view, compliance with the requirements of that subsection is necessary in order to terminate a financed contract.

[88] The purported notice was sent by email and was not addressed to the Financier. The Body Corporate conceded, in the course of oral submissions, that (prior to 23 April 2015) there was no notice compliant with s 126(1).

[89] On the basis of that concession, I am of the view that the Body Corporate is, presently, not entitled to terminate the Caretaking Agreement given the absence of the requisite notice under s 126(1) at any time prior to 23 April 2015. The relevance of that date is that the Body Corporate purported to serve a compliant notice on 23 April 2015. A copy of the purported notice is Exhibit 'MHB-1' to the affidavit of Mitchell Brown sworn on 24 April 2015. Despite objection by the Applicant, I admitted that affidavit only to the extent of [1]-[3] inclusive. The Body Corporate was concerned to avoid any argument that the grant of declaratory relief would be based on a hypothetical scenario. While it is not evident to me that evidence of the purported notice was necessary to demonstrate a proper basis for the grant of declaratory relief, I admitted the affidavit on that limited basis. The Applicant has not conceded that the purported notice is a compliant notice and the validity of same is not a matter that is the subject of determination in the present matter.

Conclusion

[90] For the reasons set out above, I consider that to resolve the dispute between the parties it is appropriate to declare, pursuant to s 60 of the QCAT Act, that:

a) the making of the order by the Supreme Court of Queensland, on 19 December 2014, that the Applicant be wound up was something done, within the meaning of s 126(7) of the BCCMA, after the Financier started to act under s 126(2) of the BCCMA;

b) the appointment of the Liquidator by that order was something done, within the meaning of s 126(7) of the BCCMA, after the Financier started to act under s 126(2) of the BCCMA;

c) the Body Corporate is not presently entitled to terminate the Caretaking Agreement because of its failure to comply with the requirements of s 126(1) of the BCCMA prior to 23 April 2015.

[91] The Applicant also seeks the continuation of the interim orders made on 6 March 2015 for a further period of 21 days. In my view, in light of the declaration in [90(c)] above, it is just and convenient to make an order restraining the Body Corporate from voting on or taking any steps to terminate or purport to terminate the Caretaking Agreement (pursuant to s 59 of the QCAT Act). I consider that the period of 21 days sought by the Applicant is a reasonable period given that the validly of the purported notice of 23 April 2015 is yet to be determined. However, I consider that this order should be made as a final order albeit for that limited period because this is a hearing to determine the final relief to be granted in the Application.

[92] As to the question of costs, I direct that the parties are to file any written submissions in relation to costs within 14 days of the date of this Decision.