QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*K&A Property Services Pty Ltd as trustee for K&A Holding Trust v The Body Corporate for Island Park Gardens* [2016] QCAT 308
PARTIES:	K&A Property Services Pty Ltd as trustee for K&A Holding Trust (Applicant) v The Body Corporate for Island Park Gardens CTS 20219 (Respondent)
APPLICATION NUMBER:	OCL073-15
MATTER TYPE:	Other civil dispute matters
HEARING DATES:	11 and 12 August 2016
HEARD AT:	Brisbane
DECISION OF:	**Member Kanowski**
DELIVERED ON:	31 August 2016
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Motion 2 passed by the respondent's committee at its meeting on 7 August 2015 is invalid. The committee must not give effect to the motion.** **2. The applicant is not liable to pay to the respondent the sum of $5,126 being the respondent's legal fees and administrative expenses incurred in respect of an application for consent to assignment of the management rights to Smartnet Management Pty Ltd as trustee for the Feng Family Trust.** **3. The mowing of any lawn that is not common property, including the council-owned nature strips adjacent to the Island Park Gardens Scheme, is outside the scope of the duties required under the parties' caretaking agreement.** **4. The parties' applications for orders are otherwise dismissed.**

CATCHWORDS:	BODY CORPORATE – whether policy not to extend term of management rights contract is valid – scope of contractual duties – quantum meruit claim – whether caretaker entitled to restitution for work done outside scope of contract *Body Corporate and Community Management Act* 1997 (Qld) s 149B *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) ss 117, 120(3) *Angelopoulos v Sabatino* [1995] SASC 5536

REPRESENTATIVES:

APPLICANT:	Mr Nathan Shaw of Counsel instructed by Hynes Legal
RESPONDENT:	Mr Gary Bugden of Bugden Legal

REASONS FOR DECISION

Introduction

[1] This case arises from disputes between the applicant, "K&A", which is the caretaking service contractor at the Island Park Gardens unit complex, and the body corporate for that complex. Island Park Gardens is a complex of 75 units.

[2] K&A has been the caretaking service contractor since mid-2012. There was initially a good working relationship between K&A and the body corporate, but the relationship subsequently deteriorated. A number of disputes arose. These included whether K&A was obliged under the caretaking contract to perform certain tasks such as demolishing a fence, mowing council footpaths, and transporting green waste to the council waste station. K&A put the management rights up for sale and attracted a buyer. However, the body corporate committee did not consent to the proposed transfer. The committee adopted a policy against "top-ups" to the terms of the management rights contracts. K&A took issue with the policy. Disputes also arose over associated matters such as the payment of legal fees.

[3] K&A lodged the present application with QCAT seeking a resolution of the disputes. It proposes a number of orders (though Mr Shaw for K&A no longer seeks the proposed interim orders). The body corporate lodged a counter-application seeking different orders. The matter was heard over two days.

[4] Evidence for K&A was given by Ms Xin Shi and Mr Hai Peng Wang. They are a married couple who are the shareholders in K&A. During the period in question, Ms Shi was the sole director and the secretary of K&A. Mr Wang was an employee of K&A. Ms Shi handled the letting pool and the formal communications with the body corporate over caretaking matters, while Mr Wang handled the hands-on caretaking duties such as cleaning and gardening.

[5] English is not the first language of either Ms Shi or Mr Wang. A Mandarin/English interpreter was available at the hearing but was required to interpret only while Mr Wang was giving evidence.

[6] Evidence for the body corporate was given by a number of committee members: Mr Steven Hollister (chairperson), Dr Douglas Moore (secretary), Ms Cheryl Hogarth (treasurer), Mrs Myrna Warburton and Mr Ronald Uhlmann. Evidence was also given by Ms Patricia Witt who previously owned a unit at Island Park Gardens.

[7] The management rights are contained in a caretaking contract and a letting contract both dated 24 May 2006. The caretaking contract requires the caretaking service contractor to provide caretaking services in return for annual remuneration. The letting contract permits the caretaking service contractor to conduct a business as a letting agent for units in the complex. The contracts were between the body corporate and a Mr Peter Briggs. The management rights have since been sold a number of times. Through a chain of assignments, these contracts now bind the body corporate and K&A.

Orders relating to the non-top-up policy

[8] In August 2015 the body corporate committee declared a "policy of non top-up of Caretakers' Contract". This policy is variously referred to as the non-extension policy and the non-top-up policy. I will explain the context before giving details of the policy.

[9] The caretaking contract and the letting contract each provide for a lengthy term: 25 years, until 31 January 2031, if a 10 year option to extend is exercised by the caretaking service contractor. Section 117 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) regulates the length of such contracts. The provision is to the effect that the term, including any options to extend, must not be longer than 25 years. However, the provision also says that the body corporate may subsequently amend the contract to include an option to extend for a further period of up to five years. Such a further extension is often referred to as a top-up.

[10] K&A sought approval from the body corporate at its January 2014 annual general meeting for a five year top-up which would have extended the contracts to January 2036 if the options were exercised. The motion to approve the top-up was defeated. There were four votes in favour of the motion, and 29 votes against.

[11] In 2015 K&A put the management rights on the market. K&A entered into sale negotiations with the representatives of Smartnet Management Pty Ltd as trustee for the Feng Family Trust. These representatives were a couple from Sydney, Ms Xu and Mr Feng, who are presumably the shareholders in Smartnet. The sale could proceed only if the body corporate consented. This is because the caretaking contract and the letting contract contain provisions (in clause 8 of each contract) that the contracts cannot be assigned unless the caretaking service contractor obtains the body corporate's consent. These clauses also say that the body corporate must not unreasonably, arbitrarily or capriciously refuse consent.

[12] Committee members interviewed Ms Xu and Mr Feng on 1 August 2015. A recording of the interview was played during the hearing. The question of whether a top-up might be available was a main focus of discussion. Committee members indicated that it was very unlikely, as things stood at least, that a top-up would be granted. Ms Xu and Mr Feng indicated that this would have an effect on the loan arrangements with their bank. They said that that if a top-up was unavailable they would not both be able to move to Brisbane. Mr Feng would have to remain in his existing employment in Sydney to help meet loan repayments. Ms Xu and their young children would move into the unit complex in Brisbane. It was the view of all of the people at the interview that it would not be sustainable for one person with family responsibilities to carry out the caretaking duties and manage the letting pool. Accordingly, the committee members indicated that consent would not be given to an assignment of the management rights to Smartnet.

[13] On 7 August 2015, which was within a week of the interview, a committee meeting was held. The motions passed included the following:

> *… 1. Motion: That the Body Corporate Committee declares its policy of non top-up of Caretakers' contract. …*
>
> *… 2. Motion: For the next AGM the Committee will move for this non-extension of contract policy to be voted in and become standing policy of the Body Corporate. The motion would be accompanied by an explanation of how any hypothetical top-up only benefits Caretakers and adversely affects the Body Corporate. …*
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> *This motion, once passed at the next AGM or EGM will go on the books and be revealed to any due diligence search carried out by third parties interested in acquiring a financial interest in the Management Rights of the complex. Such parties will be left in no doubt about the Body Corporate's non top-up policy.*

[14] Mr Shaw for K&A asks QCAT, in summary, to declare that motion 2 is invalid and that any such motion, from whatever source, would be invalid. He asks QCAT to order that the committee be restrained from putting the proposed motion to a general meeting. He also asks QCAT to order that the body corporate record be amended to reflect that the motion is invalid and that the body corporate has no authority to implement a non-top-up policy.

Does QCAT have jurisdiction to make orders about the non-top-up policy?

[15] QCAT has jurisdiction in relation to *"a dispute about a claimed or anticipated contractual matter about … the engagement of a person as a … caretaking service contractor for a community titles scheme"*.[1]

[16] Mr Bugden for the body corporate submits that QCAT does not have jurisdiction to make orders relating to the non-top-up policy. He submits that such a policy is not a contractual matter. He points out that the motion expressing the policy was not yet in existence when the committee decided to refuse consent to the proposed assignment of the contracts to Smartnet.

[17] While it is true that the committee policy was not adopted by way of a motion until 7 August 2015, it is apparent from the interview with the Smartnet representatives on 1 August 2015 that an informal policy was already in place. The committee chairperson, Mr Hollister, gave evidence at the hearing of an informal policy that was in place when he joined the committee in January 2014.

[18] The composition of the current committee is largely the same as the 2015 committee. It is apparent that the current committee's attitude to top-ups has not shifted from the policy adopted in August 2015.

[19] K&A still wishes to sell the management rights. The working relationship between K&A and the body corporate has broken down to the extent that K&A has subcontracted many of its functions to others. Therefore it can be expected that K&A will continue to wish to sell the management rights.

[20] The value of the management rights is affected by the prospects for success of any future top-up request. The perceived unlikelihood of such success was a critical factor behind the committee's refusal of consent for the proposed assignment to Smartnet. It is probable that the same issue would arise in any future proposed assignment. It may or may not have the same crippling effect: that would depend on the particular circumstances of the purchaser. However, it is a matter that will be of interest to a purchaser, and therefore to the committee. The existence of a non-top-up policy will inevitably play a part in the consideration of any future requests for consent for assignment.

[21] Clearly, the parties have diametrically opposed views about whether a non-top-up policy is appropriate.

[22] As the committee's evaluation of a proposed assignment is a contractual matter, and it is likely that the committee will be asked in due course to consent to one or more assignments, and the existence or otherwise of a non-top-up policy will feature in the evaluation, I consider that the parties have a dispute about an anticipated contractual matter about the

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1 *Body Corporate and Community Management Act* 1997 (Qld) s 149B(1).

engagement of K&A as a caretaking service contractor. Accordingly, QCAT has jurisdiction to make orders about the non-top-up policy.

Should orders be made?

[23] Responsibility for considering any request for a top-up rests with the body corporate in general meeting, rather than merely with the committee. Mr Shaw for K&A observes that a body corporate must act reasonably in performing its functions.[2] Mr Shaw submits that it would not be reasonable for the body corporate to adopt a non-top-up policy: each request for a top-up should be considered on its merits, unfettered by any blanket refusal policy.

[24] While it is common ground that a non-top-up policy adopted by the body corporate in general meeting could be revoked by another ordinary resolution at a future general meeting, Mr Shaw submits that it would not be reasonable for the body corporate to have a non-top-up policy on its books. He submits that such a policy would cause loss to K&A, and any subsequent caretaking service contractor, by reducing the value of the management rights and by hampering efforts to sell the rights. Further, such a policy would give the misleading impression to prospective purchasers that there was no prospect at any time – despite changes in the composition of the committee and the body corporate membership over the years – of obtaining a top-up.

[25] Mr Bugden for the body corporate submits that the committee proposed the policy to signal to future purchasers the attitude of the body corporate toward top-up requests. He submits that the policy does not purport to be more than a policy, and it does not indicate that the body corporate would act unreasonably in considering any top-up requests. He notes that the policy would not prevent a motion being put by a caretaker seeking a top-up. Mr Bugden submits that it would be entirely reasonable for the body corporate to adopt the policy.

[26] I accept the evidence of the committee members to the effect that they promoted a written non-top-up policy in good faith in an effort to avoid the situation which had arisen with Smartnet. Both the body corporate and Smartnet had incurred legal fees in respect of that request, and the Smartnet representatives had travelled from Sydney to Brisbane for an interview. It was only at the interview stage, when the poor prospects for a top-up were discussed, that Smartnet reformulated its plans in a way that made the assignment unviable.

[27] However, on balance I prefer the submissions of Mr Shaw in relation to the policy. In acting reasonably, the body corporate must keep an open mind on any motions put to it. Adopting a non-top-up policy inevitably gives the impression, whether intended or not, that requests to the body corporate for top-ups will not succeed regardless of their merits. Such a policy also

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2 *Body Corporate and Community Management Act* 1997 (Qld) s 94(2).

carries a danger of misleading body corporate members into thinking that they do not have to consider top-up requests on their merits.

[28] Accordingly, it is appropriate to declare motion 2 invalid, and to issue an injunction restraining the body corporate committee from acting upon the motion.

[29] I do not consider it necessary to make a declaration that any motion for a non-top-up policy proposed by the committee or a lot owner would be invalid. It is quite unlikely that the committee or a lot owner would seek to move such a motion in light of my decision about motion 2. Nor do I consider it necessary to order that the body corporate records be amended. The body corporate records in due course will reflect the fact that a non-top-up policy has not been adopted by the body corporate in general meeting. That will be sufficient to dispel any supposition that the body corporate as a whole has adopted the policy favoured by the 2015 committee.

Proposed orders relating to the Smartnet assignment request and to any future assignment requests

[30] Mr Shaw for K&A seeks a declaration that the body corporate's withholding of consent to the proposed assignment of the management rights to Smartnet was unreasonable. He also seeks injunctions restraining committee members from communicating to any proposed transferee that the committee has a policy against top-ups and any opinion as to the likelihood of success in any request for a top-up.

[31] In respect of the Smartnet request, Mr Shaw acknowledges that the ultimate proposal put by Ms Xu and Mr Feng for only one of them to move to Brisbane was not tenable. However, he submits that this proposal emerged only because committee members had indicated that there was no prospect of a top-up being granted. Mr Shaw submits that it was not reasonable of the committee members to give this impression: any top-up request would have to be considered on its merits by the body corporate as a whole. Further, the views and/or composition of the body corporate at the time when another request is considered may be quite different from the views and composition that prevailed in 2014 or 2015.

[32] It is clear from the recording of the 1 August 2015 meeting that the committee members did convince Ms Xu and Mr Feng that they had little or no prospect of obtaining a top-up in the short-term at least, and that this led the couple to alter their proposal such that only Ms Xu would move to Brisbane. I find accordingly.

[33] Committee members noted in the meeting that the 2014 top-up request had been defeated by a large majority and that the current committee remained opposed to top-ups. However, committee members also pointed out the possibility that a future committee could take a different view.

[34] A body corporate may have regard to the financial standing and competence of any proposed transferee.[3] It was therefore appropriate for the committee to explore with Smartnet its expectations about top-ups, and how this affected its financial arrangements and its plans for providing services. The committee did not convey to Smartnet that there was an absolute prohibition on top-ups. On the contrary, it noted that its views might not be shared by others in the future. It did convey that there was no real prospect of a top-up as things stood. However, I am satisfied that this was the reality. The 2014 top-up request had been resoundingly defeated. The current committee was firmly opposed to a top-up.

[35] In the witness box the committee members explained their opposition to top-ups partly in terms of dissatisfaction with some terms in the current caretaking contract. However, the main driver for opposing any unnecessary extension of the contracts is a belief that the body corporate would be able to save a lot of money under different arrangements, such as engaging caretakers on short-term contracts for reduced remuneration. This view was promoted most strongly by Dr Moore, who also believes that unit values will increase as a result of lower body corporate levies. In cross-examination and submissions, Mr Shaw for K&A highlighted the fact that Dr Moore's expectations have not been subject to any rigorous professional analysis. I accept that in the absence of such analysis it cannot be assumed that the body corporate will make a saving from different arrangements, or that values will increase.

[36] Committee members who were questioned about top-ups indicated that they believe that an unlimited number of top-ups can, potentially, be granted over time. Mr Shaw submits that this view is mistaken, having regard to the terms of section 117 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld). Mr Shaw submits that this misapprehension further detracts from any rational basis for the non-top-up policy. I am not convinced that section 117 does impose a cap on top-ups, but it is not necessary to decide the question. I am satisfied that the committee had a rational basis for not favouring top-ups even if a cap applies. There was no obvious reason for committee members to favour top-ups as at 2015. No tangible advantage for the body corporate was suggested by Smartnet. The body corporate had resoundingly rejected a top-up as recently as 2014, and the circumstances had not otherwise changed materially. Understandably, the committee could see no virtue in the body corporate tying itself to a contract for a further five years in the 2030s for no apparent benefit. Accordingly, I do not consider that there was anything irrational in the committee's approach of not favouring top-ups in 2015.

[37] In considering the proposed assignment to Smartnet, the committee members had to perform a practical task of assessing whether a viable arrangement would result. In the circumstances it was proper for them to take into account and discuss with Smartnet the current poor prospects for

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3 *Body Coroporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) s 120(3).

a top-up. The committee members acknowledged that others in the future might take a different view, but clearly a top-up in the relatively short-term was an important goal for Smartnet. I find that the committee made a realistic appraisal of whether Smartnet was likely to obtain a top-up as matters stood, appropriately discussed this with the representatives of Smartnet, and made a reasonable decision to refuse consent based on those discussions.

[38] Accordingly, I decline to make the proposed declaration.

[39] In relation to the proposed injunctions, it follows from the above discussion that I do not consider it appropriate to restrain committee members in the future from communicating their opinions as to the likelihood of success in any application for a top-up. Provided such communications are balanced and are made in good faith, they may well be entirely proper.

[40] The other proposed injunction relates to communicating that the committee has a policy against top-ups. There is a good argument for such an injunction. It is inappropriate for the committee to have a blanket policy on the matter. Like other lot owners, committee members should approach any top-up request with an open mind. However, I am reluctant to issue an injunction where a declaration about the validity of motion 1 passed on 7 August 2015 has not been sought. Further, it is doubtful that the formal policy of the 2015 committee continues in the absence of a motion by the 2016 committee to adopt the policy. Therefore, while I do not consider that it would be desirable for committee members to speak of such a policy to prospective transferees, I decline to issue an injunction.

Is K&A liable to pay the body corporate's legal fees for considering the Smartnet assignment request?

[41] Mr Bugden for the body corporate seeks an order that K&A pay the body corporate $5,126 for the body corporate's legal fees and administrative expenses incurred in relation to the application for consent for an assignment to Smartnet. Mr Shaw for K&A seeks a declaration that K&A is not liable to pay those costs.

[42] Mr Bugden points out that the 2008 and 2012 deeds of assignment of the management rights made the assignors liable to pay the costs of the body corporate for those assignments. Mr Bugden submits that this illustrates the expectations in the industry.

[43] Section 120 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) deals with the transfer of management rights. Mr Bugden submits that K&A is liable for the body corporate's costs under section 120(6):

> *The body corporate must not … require or receive a fee or other consideration for approving the transfer (other than reimbursement for expenses reasonably incurred by the body corporate in relation to the application for its approval).*

[44] Mr Bugden submits that it is the clear intention in the regulation that a body corporate should not be out of pocket for conducting what needs to be an extensive process in considering an assignment application. Mr Bugden submits that the words in brackets indicate that the right to reimbursement must extend to applications for approval whether successful or not. Mr Bugden submits that an interpretation of the provision that limits the right of reimbursement to cases in which approval is granted would encourage body corporates to avoid proper diligence because of the risk of having to bear costs when consent is refused.

[45] I do not accept Mr Bugden's submissions on this point. Clear words would be required to shift responsibility for costs incurred by one party to another party. Section 120(6) envisages that certain costs incurred by a body corporate in approving a transfer can be placed upon another party, but it does not provide for the imposition of cost on another party simply in relation to considering an application. Had the section been intended to impose such liability, that could have easily been expressed. The words in brackets qualify but do not expand the preceding words.

[46] Similarly, the caretaking contract and the letting contract in the present case provide (in clause 8 in each contract) that the body corporate is entitled to require the caretaking service contractor to pay to the body corporate all legal costs incurred in giving its consent to an assignment. The contracts do not give the body corporate an entitlement to recover the costs incurred in considering a request where consent is not given.

[47] As the body corporate's solicitor sent an invoice to K&A for the fees in question, it is appropriate to make a declaration that K&A is not liable to pay.

Should the body corporate be required to reimburse K&A for legal costs incurred in relation to a 2015 remedial action notice?

[48] In 2015 the committee asked K&A to remove a boundary fence near one of the units. K&A declined on the basis that such work was not within the terms of the caretaking contract. On 13 August 2015 the body corporate issued a remedial action notice in respect of this refusal.

[49] Remedial action notices are significant because if a caretaking service contractor fails to comply with such a notice, the body corporate can terminate the contract.[4]

[50] The body corporate did not end up acting on the remedial action notice because an owner proceeded to remove the fence.

[51] K&A obtained legal advice, at a cost of $1,980, about how it should deal with the remedial action notice. The solicitor's invoice was issued on 31

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4 Ibid s 129.

August 2015. This was more than two months before K&A commenced the QCAT application.

[52] Mr Shaw for K&A seeks an order that the body corporate reimburse K&A for these legal fees. He submits that there was no proper basis for demanding that K&A remove the fence. Mr Shaw suggests that the issue of an invalid remedial action notice might amount to a breach of contract but acknowledges that there is no term in the caretaking contract expressly covering the situation. Mr Shaw, however, invites me to include the amount in any order for costs in respect of the QCAT proceeding.

[53] However, I am not satisfied that such costs relate to the proceeding. They were incurred before the proceeding was commenced. While the cost of preparing an application to QCAT could properly regarded as a cost in the proceeding, the costs in question were not of that nature. The fence dispute was resolved without the need to seek orders from QCAT. There is no basis to make an order for the body corporate to reimburse K&A for those costs even assuming that the remedial action notice was misconceived.

Scope of the caretaking contract: mowing

[54] Mr Shaw for K&A seeks a declaration that the mowing of any lawn that is not common property, including the "council nature strip adjacent to the Scheme" is outside the scope of the duties of the caretaker as required under the caretaking contract.

[55] Previous caretakers were in the practice of mowing not only the common property but also lawns inside lots and the council-owned footpaths running along the complex's two street frontages. Mr Wang continued this practice but then in mid-2014 he stopped mowing lawns that did not form part of the common property. This was after K&A received legal advice about the extent of K&A's contractual duties.

[56] The mowing duty under the caretaking contract in clause 5.1(e) is expressed to relate to the common property only. The Scheme's by-laws, however, in clause 41 provide that the body corporate including its employees and/or contractors shall be responsible for mowing, amongst other lawns, the lawns in lots (if requested by the proprietor) and the council footpaths.

[57] The by-laws bind K&A as it owns the caretaker's unit, which is one of the units in the complex.

[58] Mr Bugden for the body corporate submits that by-law 41 forms a surrounding circumstance to which QCAT can have regard in interpreting the caretaking contract. However, he acknowledges that the date of the by-laws is not evident. Mr Shaw for K&A submits that in the absence of evidence that the by-laws were in existence when the caretaking contract was formed in 2006, reliance should not be placed on the by-laws in interpreting the contract. I accept this submission: it cannot be supposed

that the by-laws, which may or may not have even been in existence, were in contemplation when the contract was formed.

[59] The caretaking contract imposes a mowing duty which does not extend beyond the common property to lots or the council footpaths. Although this position appears to have eventually been accepted in practice by the body corporate, the limitation upon the mowing duty was not conceded by Mr Bugden. It is therefore appropriate to make the declaration sought by Mr Shaw.

Must the body corporate reimburse K&A for mowing done outside the scope of the contract?

[60] Mr Shaw for K&A seeks a declaration that K&A is entitled to be reimbursed for works it performs that are not required by the caretaking contract, and an order that the body corporate reimburse K&A for unpaid works it has performed that are outside the scope of the caretaking contract.

[61] So far as the mowing is concerned, such a declaration is not required as K&A has ceased mowing areas that are not part of the common property.

[62] K&A did mow the footpaths and lawns inside lots between June 2012 and early June 2014, continuing the practice of previous caretakers. According to Ms Shi's witness statement, she tried to explain to the committee on many occasions that the extra mowing was outside the scope of the contract and that K&A was therefore entitled to be compensated. Ms Shi quotes an email from Mr Hollister, the chairperson, the date of which is not indicated. In the email Mr Hollister refers to a recent conversation and thanks Ms Shi for agreeing to continue the extra mowing for four weeks. Mr Hollister says he has researched the matter and acknowledges that there is no clause in the caretaking agreement relating to such mowing. However he expresses the view that it is *"fairly clear"* from a catch-all clause in the contract and from the by-laws that the extra mowing is part of the caretaking duties. Having regard to the overall chronology, I infer that this email must have been sent in 2014.

[63] In her witness statement Ms Shi says that K&A:

> *… did not undertake these out of scope works voluntarily with a view of never being compensated. … It was actually the case that I was concerned that the Body Corporate would issue the Applicant with a further remedial action notice or would publicly bully or criticise Kevin[5] or myself if we did not undertake the out of scope works. We did eventually stop mowing the non-common property lawns though and the Committee were very vocal in criticising us for it.*

[64] Two remedial action notices have been issued: the first in January 2014 (relating to rubbish removal) and the second in August 2015 (relating to the fence discussed earlier). Given that the first remedial action notice was

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5 Mr Wang's anglicised name is Kevin. Ms Shi's is Annie.

issued in January 2014, concern about further remedial action notices cannot have arisen before then.

[65] In her oral evidence Ms Shi said the body corporate had reimbursed K&A for the costs of maintaining equipment but this ceased after the 2014 annual general meeting, as the relationship deteriorated, and so K&A stopped doing the extra mowing. K&A sought legal advice and, as advised, gave notice that it would shortly stop the extra mowing. It was difficult to follow Ms Shi's evidence about when she first became aware that the extra mowing was not required under the contract. At one point she agreed with a proposition put by Mr Bugden that K&A had done the extra mowing for two and a half years knowing it was outside the scope of the contract and without asking for payment. However, at another point Ms Shi said that K&A did ask for payment.

[66] In his witness statement Mr Wang says that he initially did the extra mowing because he thought he had to: *"the Previous Committee and the Committee had told me to"*. Mr Wang goes on to describe continuing the extra mowing after Ms Shi had been unsuccessful in reaching an agreement with the committee for compensation for that work. Mr Wang says that Ms Shi directed him to continue lest the committee issue another remedial action notice.

[67] There is no suggestion that K&A invoiced the body corporate for the extra mowing.

[68] The body corporate's evidence is to the effect that K&A was happy to carry on the practice of the previous caretakers in doing the extra mowing until there was a falling out at around the time of the January 2014 annual general meeting.

[69] The evidence from both sides about the timing of many relatively mundane events, or about motivations at particular times, was somewhat vague. This is understandable because the witnesses were being asked to discuss events in a working relationship that has spanned several years. It is therefore difficult to make precise findings in this area. However, I consider the evidence overall supports the conclusion that until around January 2014 K&A undertook the extra mowing without protest, either because it was unaware that it was not legally obliged to do the work or because it chose to do the work in order to promote a good relationship with the body corporate. I find that the body corporate believed that the extra mowing was part of the caretaker's obligations.

[70] I find that it was only some time in 2014 that K&A communicated to the body corporate its view that the extra mowing was not part of its legal duties. Discussions ensued and the body corporate informed K&A that it maintained its view to the contrary. K&A sought legal advice and then stopped the work in early June 2014.

[71] Mr Shaw submits that K&A is entitled to be paid a reasonable sum for the extra mowing it did, on a quantum meruit basis. A quantum meruit claim is one for restitution on the basis of unjust enrichment. In *Angelopolous v*

Sabatino,[6] the Full Court of the South Australian Supreme Court discussed unjust enrichment. The case involved a claim for restitution by tradespersons who had made improvements to a hotel in the expectation of being granted a lease to run the hotel. That expectation was not fulfilled. Doyle CJ considered it unwise to list specific facts which would invariably provide a basis for relief, but he discussed the factors that were important in that case. These included whether the tradespersons had intended to provide their services gratuitously, whether they had provided them of their own initiative, and whether the hotel owner must have known that the tradespersons expected remuneration.

[72] In the present case, the body corporate has been enriched in that it benefitted from the extra mowing that K&A performed. However, I do not consider that the enrichment was unjust. Prior to the falling out in 2014, there was either a mutual belief that the work was simply part of the caretaking duties or, if K&A did not share that belief, a willingness on its part to perform the work on an unremunerated basis (apart from reimbursement for equipment maintenance) to keep up a good relationship with the body corporate. If that were not the situation, it is likely that K&A would have issued invoices for the work or sought legal advice earlier. I do not accept that fear of action by the body corporate was a motivating factor at that stage. If K&A was unaware that the works fell outside the scope of the contract, it could have examined the contract and if necessary sought legal advice at any stage. At the time the work was performed there was no expectation on the part of either party that it would be remunerated. I do not consider that there was anything unjust about K&A doing the work, or the body corporate accepting it, on an unremunerated basis during that phase of the relationship.

[73] At some point during the first half of 2014 the situation changed, and K&A began to voice its dissatisfaction with being expected to do the extra mowing without remuneration. The committee through its chairperson expressed the view that the work was part of the caretaker's duties. This view, while incorrect in my view, was reasonably open having regard to the clauses quoted by the chairperson. I accept that K&A was concerned during this phase about further remedial action notices and criticism by the committee if it ceased doing the extra mowing. K&A then took legal advice and decided to stop doing that work. There is a stronger argument for restitution in respect of this later phase but on balance I am not persuaded, in light of the background, that the body corporate was unjustly enriched. The matter had only recently become the subject of dispute. The long-standing expectation of the body corporate, reinforced by the conduct of K&A in the first few years, was that no additional fee would be charged. The committee considered the matter and formed the view, not unreasonably, that the extra mowing formed part of the duties. K&A did not commence issuing invoices. When K&A obtained legal advice that it was not obliged to do the work, it acted on that advice and stopped doing it after a short notice period. In these circumstances, I do not consider that the continuing benefits to the body corporate can be regarded as having been unfairly obtained.

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6 [1995] SASC 5536.

[74] Accordingly, I am not persuaded that an order should be made for payment to K&A for the extra mowing work.

Scope of the caretaking contract: removal of rubbish from barbecue area etc.

[75] Mr Shaw for K&A seeks a declaration that *"removal of rubbish from common property where rubbish is left as a result of a private residents' function or gathering and in contravention of By-Law 6"* is outside the scope of the caretaking contract.

[76] The background to this is a dispute which arose in late 2013 and early 2014 about whether K&A was required to empty a rubbish bin in the barbecue area. The body corporate issued a remedial action notice in January 2014 when K&A did not empty the bin after a new year's eve party.

[77] The body corporate's position is that K&A must empty the bin as the caretaker is obliged under clause 5.1(b) of the caretaking contract to:

> *… remove all rubbish from the Common Property including the recreation and barbecue areas so as to keep such areas at a high standard of cleanliness at all times.*

[78] Mr Bugden submits that this obligation extends to rubbish in a bin just as much as to rubbish scattered on the ground.

[79] K&A's position in its communications with the body corporate was that residents should not be leaving rubbish in the barbecue area, whether in a bin or otherwise, because by-law 6 says that a proprietor or occupier of a lot *"shall not deposit or throw upon the common property, any rubbish …"*. Mr Shaw in his oral submissions at the hearing on behalf of K&A does not primarily rely on the by-law, consistent with his submission in relation to the mowing issue that the by-laws are not relevant in interpreting the contract. Rather, Mr Shaw submits that the removal of rubbish under clause 5.1(b) of the contract is limited to the maintenance of a high standard of cleanliness. This would require collecting any litter and putting it in a bin, but an area will be clean notwithstanding that there is rubbish in a bin within the area. Mr Shaw submits that the contractual provision would have expressly referred to emptying bins if that had been required.

[80] In my view, the contractual term, reasonably construed, does not require the immediate removal of rubbish from such a bin. As Mr Shaw submits, an area can be clean despite the presence of rubbish in a bin. However, for cleanliness to be maintained, a bin must be emptied from time to time, either as it is filled or sooner if the contents are smelly or likely to attract vermin. The responsibility for emptying such bins must fall to the caretaker under clause 5.1(b) of the contract. It cannot have been the intention of the parties who entered into the contract that the caretaker would be responsible for removing scattered rubbish while someone else would have to attend to binned rubbish. That would be impractical.

[81] Accordingly, I decline to make the declaration sought by K&A. I also decline to make the consequential orders sought in the form of a declaration about entitlement to reimbursement and an order for payment for work performed in removing such rubbish.

Scope of the caretaking contract: transporting waste to the council waste station

[82] Mr Shaw for K&A seeks a declaration that the transporting of rubbish and other waste, including green waste, to the council waste station, as well as the payment of associated fees and costs such as trailer hire and waste station fees, are outside the scope of the caretaking contract.

[83] The local council collects rubbish from bulk bins located near the gates twice per week. In the past K&A transported green waste to the council waste station without incident until the council started imposing fees. The body corporate sought a fee exemption but this was refused. A dispute then arose between K&A and the body corporate over whether K&A is obliged to take any waste that cannot fit into the bulk bins to the council waste station.

[84] Mr Bugden for the body corporate relies on clause 5.1(b) of the caretaking contract (cited earlier in paragraph 77). He submits that removal of rubbish from the common property includes removing any rubbish in excess of that collected by the council. The only place to which it can properly be removed is the council waste station, he submits.

[85] Mr Shaw for K&A submits that the problem could be solved by the body corporate supplying larger or additional bulk bins. He submits that clause 5.1(b) should not be interpreted as extending to the quite onerous task of transporting rubbish offsite, particularly where the caretaker may not be entitled to recover the associated costs.

[86] I do not know whether the problem could be fully solved by the body corporate supplying larger or additional bulk bins. There may be space or other limitations. In any event, while there is rubbish in excess of that collected by council, I consider that the responsibility clearly falls to the caretaker under clause 5.1(b) to remove rubbish to the only practical destination namely the council waste station.

[87] So far as the associated costs such as trailer hire and waste station fees are concerned, it is relevant to note that the caretaking contract contains provisions in clause 6 about how the parties are to bear costs associated with the caretaking duties. Other than for specified items, the caretaker is to bear the costs. The only potentially relevant category of costs to be borne by the body corporate is for *"repair and maintenance of the Common Property"*. While it could be argued that in a broad sense the removal of rubbish helps to maintain the common property in a presentable state, I consider that the category is much more apt to describe work done directly on the common property, such as fixing broken downpipes and repainting road markings, rather than work done offsite. I therefore find that K&A is not entitled to recover the associated costs from the body corporate.

[88] Accordingly, I decline to make the declaration sought by Mr Shaw.

Should the body corporate be ordered to pay K&A labour costs for pool landscaping?

[89] It is undisputed that Mr Wang performed landscaping work around the pool. According to K&A's application, the work was done in or about October 2012, May 2013 and March 2014. It consisted of installing timber edging, replacing soil, planting plants, laying a new pathway of stepping stones and pebbles, and spreading pebbles. The body corporate paid for the materials but not the labour. K&A estimates that approximately 75 hours of labour were contributed by Mr Wang.

[90] Mr Shaw for K&A submits that landscaping goes beyond maintenance of the gardens (required under clause 5.1(c) of the caretaking contract), and constitutes improvement. I accept this, and find that the work was outside the scope of the caretaking contract.

[91] Mr Shaw seeks an order for the body corporate to reimburse K&A for Mr Wang's labour.

[92] Mr Wang's witness statement refers to Ms Warburton (a committee member who was the body corporate's nominated liaison person with K&A for a period) and Ms Witt, who was a resident with an interest in gardening. Mr Wang says that on many occasions he was directed by Ms Warburton, whom he believed was acting on behalf of the committee, to undertake the landscaping work. Mr Wang adds that Ms Warburton and Ms Witt gave verbal directions about where they wanted plants placed. In his oral evidence Mr Wang said that Ms Warburton asked him to do the landscaping work in a threatening tone. In relation to his attitude generally to doing work outside the scope of the contract, the tenor of his evidence was that K&A did such work only because it felt it must in order to avoid further trouble from the body corporate.

[93] Ms Shi in her witness statement says that *"despite* [K&A] *identifying the landscaping works to be out of scope"*, the committee verbally directed Mr Wang and herself that K&A must do the work. From the context, this must have been on or after 21 March 2014, which is the date on which Ms Shi sent a quoted email to Mr Hollister. This would have been close to the end of the landscaping work.

[94] The evidence from Ms Warburton and Ms Witt is to the effect that Ms Witt initiated the pool landscaping project and that Mr Wang and Ms Warburton joined in, and that there was some assistance from other owners as well. They say that Mr Wang was happy to pitch in as he enjoys gardening, but he was not instructed that he had to perform the work. On the other hand, Ms Warburton mentioned in her oral evidence that Ms Witt might ask Mr Wang to dig a hole, for example. According to Ms Warburton's witness statement, *"to the extent that he did work which was outside his contractual duties he did it voluntarily as a unit owner, just like the other unit owners and residents who volunteered".*

[95] In light of the generally harmonious initial working relationship between the body corporate and K&A, I consider the general tenor of the evidence given by Ms Warburton and Ms Witt to be credible. I do not accept Mr Wang's evidence that he did the landscaping work under sufferance. I find that he willingly participated in the landscaping project, although probably with

declining enthusiasm in 2014 as the overall working relationship deteriorated.

[96] It is clear that committee members and other residents asked Mr Wang to undertake particular tasks, but I consider that this was done in the course of a cooperative project rather than in the nature of directions being issued to a subordinate. Mr Shaw for K&A submits that the language barrier may have led to misunderstandings about the parties' expectations. I accept that there may well have been miscommunications at times but I do not consider these contributed to significant enduring differences of understanding. There is no suggestion that K&A issued invoices for the labouring work, even when the overall working relationship was good in the early years and there was no reason to fear reprisals. This is consistent with there being no expectation of payment for the labour. I find that K&A willingly contributed labour to the project in order to help enhance the complex – in which K&A, as a lot owner, has an interest – and to promote a harmonious relationship with co-owners and the body corporate in the mutual interest of all parties. K&A's enthusiasm probably waned in 2014, but evidence from Ms Shi and Mr Wang of any directions that Mr Wang had to perform the landscaping work was only rather general. On balance, I do not accept that the body corporate made demands or exerted improper subtle pressure on K&A to ensure Mr Wang's continued assistance.

[97] Overall, I do not consider that the benefit to the body corporate was obtained unjustly. There is no basis for restitution. Accordingly, I decline to make an order that K&A be compensated for the labour contributed by Mr Wang to the landscaping project.

Should costs orders be made?

[98] Each party seeks a costs order against the other for reasonable legal costs incurred in respect of the QCAT proceeding.

[99] The starting point under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) is that each party to a proceeding is to bear its own costs.[7] However, QCAT may award costs if it considers that the interests of justice so require.[8] Matters that can be considered include the relative strengths of the competing claims, and whether a party is acting in a way that unnecessarily disadvantages the other party.[9]

[100] Mr Bugden submits that K&A has brought the QCAT proceeding for an improper purpose namely to pressure the body corporate into granting a top-up of the management rights. He points to a positive answer given by Ms Shi in cross-examination to the proposition that the case was all about getting the top-up. Mr Bugden also submits that the application has been made unnecessarily complex and lengthy by K&A seeking remedies that should have been pursued through adjudication.

[101] I do not accept that the application has been brought by K&A for an improper purpose. I consider that K&A had a substantial and legitimate interest in seeking to prevent the committee pressing for the non-top-up policy to

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7 Section 100.

8 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 102(1).

9 Ibid s 102(2).

become body corporate policy. Such a policy would tend to impede K&A's efforts to sell the management rights. I do not take Ms Shi's answer in cross-examination to indicate more than that the policy is K&A's major concern. The other matters in the case relate to grievances that have arisen as the working relationship has deteriorated. It was reasonable for K&A to seek to have all of the grievances addressed and resolved in a single proceeding.

[102] Mr Shaw for K&A submits that the body corporate has caused unnecessary disadvantage to K&A including by not reasonably considering K&A's position, allowing members to engage in unconscionable behaviour, issuing baseless remedial action notices, and not meaningfully responding to assist in resolving the dispute.

[103] Much of that alleged conduct pre-dates the QCAT application, but I will consider it as part of the background. The exhibits contain examples of what could be regarded as unconscionable, or at least unwise, behaviour. One example is newsletters issued by the committee secretary which to some extent ridicule the caretakers. Another is an email sent between committee members which poked fun at Ms Shi's limitations with the English language. On the other hand there are counter-allegations of verbal abuse by Ms Shi towards a committee member. Overall, it is clear that there was a breakdown in the working relationship. The situation turned rather toxic. Despite some unfortunate comments by certain committee members, I regard the committee's overall handling of the matter as that of a group of ordinary people trying their best to deal with a very difficult situation. The first remedial action notice was well-founded. The second was arguably misconceived but quite genuine. It is apparent from the recording of the meeting with Smartnet that the committee as a whole was well-intentioned. The committee's approach in respect of many matters in dispute in the QCAT proceeding have been vindicated. Its promotion of the non-top-up policy was misconceived but not malicious. I do not accept that to any significant degree the body corporate has unnecessarily disadvantaged K&A.

[104] I regard the overall outcome in the proceeding as more or less evenly balanced. K&A has succeeded in respect of the non-top-up policy, which is a matter of commercial significance. On the other hand K&A has not succeeded in respect of most of its other grievances. Unfortunately the working relationship had broken down to the extent that it became necessary for the various grievances to be addressed and resolved by an external body. Many of the disputes were matters on which reasonable minds could differ. In these circumstances, I do not consider that the interests of justice require an order displacing the starting position that each party is to bear its own costs.

Should an order be made preventing the body corporate from levying K&A in respect of costs incurred in the QCAT proceeding?

[105] Mr Shaw for K&A seeks an order that the body corporate not levy K&A as the owner of the caretaker's unit in respect of the body corporate's costs

incurred in the present QCAT application. Mr Shaw cites section 314 of the *Body Corporate and Community Management Act* 1997 (Qld). That provision allows a court to order that a body corporate's costs in a proceeding are to be paid by owners in certain proportions. Whether that power vests in QCAT is debateable. Further, the provision requires that affected owners be joined as parties to a proceeding if such an order is sought.

[106] Even if it is open to QCAT to make the order sought by Mr Shaw, I do not consider that such an order is warranted in the circumstances of this case. Such an order might be warranted, for example, where a body corporate has engaged in unreasonable litigation contrary to the wishes of certain lot owners. The situation in the present case is quite different. The body corporate has successfully resisted many of the claims brought by K&A. K&A has been successful on some matters, most significantly in relation to the top-up policy. However, that was a dispute which could easily have arisen sooner or later, regardless of the identity of the caretaker. While criticisms can properly be made of some comments of individual committee members, overall I consider that the body corporate has conducted itself reasonably and responsibly in its dealings with K&A in the course of the dispute. I do not consider it would be unfair for K&A to have to contribute, along with other owners, to the body corporate's costs.

[107] Accordingly, I decline to make the order sought by Mr Shaw.

Conclusion

[108] Ultimately, only a small number of orders are required to resolve the disputes between K&A and the body corporate. The other orders sought by the parties are not warranted, and the applications for those orders are dismissed.