# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

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| CITATION: | *Airlie Beach Real Estate Pty Ltd v Body Corporate for Delor Vue Apartments* [2018] QCAT 317 |
| PARTIES: | **AIRLIE BEACH REAL ESTATE PTY LTD** (applicant)<br>**v**<br>**BODY CORPORATE FOR DELOR VUE APARTMENTS CTS 39788** (respondent) |
| APPLICATION NO: | OCL022-18 |
| MATTER TYPE: | Other civil dispute matters |
| DELIVERED ON: | 28 August 2018 |
| HEARING DATE: | 17 April 2018 |
| HEARD AT: | Brisbane |
| DECISION OF: | Senior Member Brown |
| ORDERS: | **1. Upon the undertaking of Airlie Beach Real Estate Pty Ltd (ABRE) as to damages, the Body Corporate for Delor Vue Apartments CTS 39788 ("the Body Corporate") whether by its servants, agents, employees or otherwise is restrained from acting upon the purported termination of the Management Agreement dated 11 March 2009 ("the Agreement") between the Body Corporate and ABRE in reliance on:**<br>**(a) the resolution of the Body Corporate to terminate the Agreement passed at the Extraordinary General Meeting on 18 January 2018 ("EGM"); or**<br>**(b) The remedial action notice dated 20 October 2017, the subject of these proceedings;**<br>**until the earlier of:**<br>(i) **the final determination of the proceeding;**<br>(ii) **order of the Tribunal;**<br>(iii) **agreement in writing between the parties.** |

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – DUTY TO REPAIR AND MAINTAIN COMMON PROPERTY – where parties entered into caretaking agreement – where allegations that the applicant failed to comply with its contractual obligations – where the body corporate purported to terminate the caretaking agreement at an extraordinary general meeting – requirement that the body corporate act reasonably

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – RELEVANT CONSIDERATIONS – BALANCE OF CONVENIENCE GENERALLY – where the balance of convenience favours the granting of an interim order – where damages are not an adequate remedy

*Body Corporate and Community Management Act* 1997 (Qld) s 94(1), s 100(5), s 112, s 149B(1)(a), s 149B(2)(b)
*Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld), s 122, s 129(3), s 129(4)(b)(i), s 129(4)(b)(ii)
*Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 28(1), s 28(2), s 28(3)(a), s 59(1), s 59(6)(a), s 59(9), s 60, s 60(1)

*Active Leisure (Sports) Pty Ltd v Sportsman's Australia Ltd* [1991] 1 Qd R 301
*Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57
*Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618
*Bingham v 7-Eleven Stores Pty Ltd* [2002] QSC 209
*Blair & Perpetual Trustee Co Ltd v Curran (Adams' Will)* (1939) 62 CLR 464
*Carl Zeiss Stifung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853
*Castillon v P & O Ports Ltd* [2007] QCA 364
*Delmason Pty Ltd ATF Libby Mason Trust v Body Corporate for The Crest on Bonney* [2015] QCAT 209
*Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1
*Ramsay v Pilgram* (1968) 118 CLR 271
*Randall v Body Corporate for Runaway Cove Bayside* [2011] QCATA 10
*State of Queensland v Australian Telecommunications Commission* (1985) 59 ALR 243
*Thompson v Park* [1944] KB 408
*Varley v Varley* [2006] NSWSC 1025

APPEARANCES &
REPRESENTATION:

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| Applicant: | F Stewart, solicitor of Hynes Legal |
| Respondent: | J Faulkner of counsel, instructed by OMB Lawyers |

## REASONS FOR DECISION

[1] Airlie Beach Real Estate Pty Ltd (ABRE) is the service contractor and letting agent for Delor Vue Apartments, a scheme comprising 62 lots.[1] The *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (the module) applies to the scheme. A Management Agreement was entered into by the parties in 2009 pursuant to which ABRE was required to perform caretaking duties.[2] The parties fell into dispute. On 18 January 2018 the body corporate purported to terminate the Management Agreement. ABRE filed an Application for a complex dispute in the tribunal and also seeks an interim injunction restraining the body corporate from acting upon the purported termination. The application for an interim injunction falls for determination.

### The statutory framework

[2] The tribunal has jurisdiction to hear and decide a dispute about a claimed or anticipated contractual matter about the engagement of a person as a body corporate manager or caretaking service contractor for a community titles scheme.[3]

[3] A body corporate may terminate a person's engagement as a body corporate manager or service contractor, or authorisation as a letting agent: under the *Body Corporate and Community Management Act* 1997 (Qld) (BCCM Act); by agreement; under the engagement or authorisation. A body corporate may terminate a person's engagement as a body corporate manager or service contractor if the person fails to comply with a remedial action notice (RAN).[4] A RAN must, among other things, identify the duties the body corporate believes have not been carried out or the provision of the code of conduct or the module the body corporate believes has been contravened.[5]

[4] A body corporate must act reasonably in carrying out its functions.[6] The body corporate committee must act reasonably in making a decision.[7]

[5] The tribunal may, by order, grant an injunction, including an interim injunction, in a proceeding if it is just and convenient to do so.[8] An interim injunction means an injunction that has effect for the duration of the proceeding or a shorter period.[9] In

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1 New Community Management Statement dated 9 March 2009.
2 Management Agreement dated 11 March 2009.
3 *Body Corporate and Community Management Act* 1997 (Qld) (BCCM Act), s 149B(1)(a); s 149B(2)(b).
4 *Body Corporate and Community Management (Accommodation Module) Regulation* 2008, s 129(3).
5 Ibid, s 129(4)(b)(ii) and (iii).
6 BCCM Act, s 94(1).
7 Ibid, s 100(5).
8 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act), s 59(1).
9 QCAT Act, s 59(9).

making an order for an interim injunction, the tribunal may require an undertaking, including an undertaking as to costs and damages, it considers appropriate.[10]

**The background to the dispute**

[6] At a committee meeting of the body corporate on 4 May 2017, the committee resolved to consult with the body corporate's solicitors to determine if the scope of the Management Agreement encompassed the maintenance of reticulation, drainage and other infrastructure.

[7] The body corporate subsequently engaged consultants to prepare a report in relation to the condition of the common property of the scheme ('the September report').[11] The September report identified 36 items requiring attention ranging from damage to roofs and boundary fencing to the removal of a dead rodent. Following receipt of the September report the body corporate resolved to instruct its solicitors to prepare a RAN based upon the matters set out in the September report which was served upon ABRE on 20 October 2017.[12] The RAN specified that the identified breaches were required to be remedied within 30 days.

[8] At the conclusion of the 30 day period, the body corporate engaged the consultants to review and report on the condition of the common property ('the November report').[13] The report noted that a significant number of the items identified in the September report had been attended to. In respect of some items however, including roof damage, the report noted that there had been no improvement since the previous inspection.

[9] After receiving the November report, the body corporate committee resolved to convene an extraordinary general meeting to enable the members of the body corporate to consider whether the Management Agreement should be terminated.

[10] The EGM was held on 18 January 2018. Before the meeting was a motion authorising the body corporate to terminate the Management Agreement. The motion was passed 16 votes to 7. On 18 January 2018 the body corporate purported to terminate the Management Agreement.[14]

[11] An application was subsequently made to the Office of the Commissioner for Body Corporate and Community Management by a lot owner in the scheme, Delorain Pty Ltd, for an order declaring invalid the motion to resolve to terminate the Management Agreement. An interim order was also sought restraining the body corporate from acting further on the motion. Mr Paul Wellard is the sole director of Delorain Pty Ltd. Mr Wellard is also the sole director of ABRE. On 19 February 2018 the application for interim orders was dismissed by an adjudicator[15] ('the adjudication decision').

[12] ABRE filed an Application to resolve a complex dispute in the tribunal on 1 March 2018.

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10 QCAT Act, s 59(6)(a).
11 Report prepared by Seymour Consultants on 21 September 2017.
12 RAN dated 20 October 2017.
13 Report prepared by Seymour Consultants on 30 November 2017.
14 Letter from OMB solicitors to Hynes Legal dated 18 January 2018.
15 *Delor Vue Apartments* [2018] QBCCMCmr 91.

## Consideration

[13] Extensive material has been filed by the parties in relation to the substantive proceeding and the present application for an interim injunction. After the hearing of the application, the parties filed further written submissions.

[14] I will address each of the relevant considerations in respect of an application seeking interim injunctive relief. Before doing so however I will deal with two submissions by the body corporate:

(a) the adjudication decision gives rise to an issue estoppel in respect of the present application;

(b) the status quo is that the Management Agreement has been terminated and on this basis, the interim injunction cannot be granted.

### a. Issue estoppel

[15] The body corporate says that the Tribunal does not have jurisdiction to hear and decide the application for an interim injunction on the basis that an issue estoppel arises as a result of the adjudication decision. The applicant and the respondent in the adjudication proceeding were, respectively, Delorain Pty Ltd and the body corporate. ABRE was identified as an affected party.

[16] In *Blair v Curran*, Dixon J held:

> A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between res judicata and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.[16]

[17] The requirements for an issue estoppel to arise are: the same question has been decided; the judicial decision said to create the estoppel was final; the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.[17] An issue estoppel may arise in respect of the determination of an interlocutory application.[18]

[18] The body corporate says that ABRE was a party to the adjudication proceedings, having been named as an affected party and was the privy of the applicant in those proceedings. A privy may be of blood, of title and of interest. The basic requirement

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16 *Blair & Perpetual Trustee Co Ltd v Curran (Adams' Will)* (1939) 62 CLR 464.
17 *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 935.
18 *Castillon v P & O Ports Ltd* [2007] QCA 364.

of a privy in interest is that the privy must claim under or through the person of whom he is said to be a privy.[19]

[19] In considering whether an issue estoppel arises it is necessary to examine the adjudicator's findings. The adjudicator found that:

(a) His role was not to determine whether ABRE breached the terms of the Management Agreement, and any contractual dispute between ABRE and the body corporate was a matter for ABRE to pursue;[20]

(b) Given the volume and detail of the material before him, it was difficult in the context of the determination of an application for an interim order to ascertain whether there was a prima facie case to answer in respect of whether the body corporate acted reasonably in resolving to terminate the Agreement;[21]

(c) There may have been insufficient allowance for postage time which may have resulted in less than 21 days notice of the EGM having been given;[22]

(d) Delorain Pty Ltd had not established that it had been disenfranchised by any delay in the receipt of the notice nor that the right of any owner to vote was impeded by delay in the receipt of the notice;

(e) The balance of convenience did not favour the grant of the interim order on the basis that:

(i) The status quo vis-à-vis the parties was that the agreement had been terminated;

(ii) The interim order would not undo the steps taken by the body corporate to terminate the Agreement;

(iii) The interim order would not of itself prevent the body corporate from engaging alternative contractors;

(iv) The interim order would not prevent ABRE from pursuing separate legal proceedings against the body corporate;

(v) There may have been financial impacts for ABRE as a result of the termination of the Agreement however the issue had not been argued by Delorain Pty Ltd and did not appear to have been an issue for the applicant in its capacity as a lot owner;

(vi) The balance of convenience overwhelmingly favoured the body corporate;

(vii) There was potentially a serious issue to be decided as to whether the body corporate acted reasonably in passing the motion to terminate the Agreement however given the circumstances of the dispute between Delorain Pty Ltd and the body corporate, the adjudicator was not satisfied

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19 *Ramsay v Pilgram* (1968) 118 CLR 271.
20 *Delor Vue Apartments* [2018] QBCCMCmr 91 at [31].
21 Ibid, [32].
22 Ibid, [37].

> that Delorain Pty Ltd had established a sufficient basis for the making of the interim order.

[20] The adjudicator's reasons make clear that his primary focus was upon the dispute between the body corporate and Delorain Pty Ltd as a lot owner. Indeed, the reasons quite specifically draw a distinction between the issues the Adjudicator was required to determine in the application for interim order in respect of the dispute as between the body corporate and Delorain and any dispute between ABRE and the body corporate.[23] The adjudicator made no findings that could give rise to an issue estoppel in the present proceeding. The conclusion reached by the Adjudicator that the balance of convenience did not favour the grant of the interim relief involved the exercise of a discretion. That the adjudicator exercised the discretion as he did does not, in my view, give rise to an issue estoppel.

**b. The status quo and interim injunctions**

[21] The body corporate relies upon s 112 of the BCCM Act which, inter alia, authorises the body corporate to engage a person as a body corporate manager, service contractor, or letting agent and only if such engagement is authorised by an ordinary resolution.

[22] The body corporate says that an interim mandatory injunction as sought by ABRE would have the effect of requiring the body corporate to engage ABRE as a caretaking service contractor on the basis that the Management Agreement has been lawfully terminated. Before examining this issue it is necessary to address the submission by the body corporate that the termination of the Management Agreement prevents the making of an interim injunction as sought by ABRE.

[23] As a general rule, interlocutory orders and injunctions are confined to orders maintaining the status quo at the time of the making of an application for those orders.[24] However this is not invariably so.[25]

[24] It cannot be doubted, in the context of disputes generally between bodies corporate and service contactors, that there may be circumstances in which a body corporate resolves to terminate an agreement with a service contractor, proceeds to act upon the resolution and communicate termination of the agreement to the contractor and where it is ultimately found by the tribunal that the motion giving rise to the resolution is invalid.

[25] The body corporate argues that the status quo vis-à-vis the parties is that the Management Agreement, having been terminated, is at an end. Returning the parties to the position they were in immediately prior to the termination on an interim basis would not, says the body corporate, be to maintain the status quo. The following passage from Spry on *Equitable Remedies* is instructive:

> Although it is commonly found to be most convenient, where a case for an interlocutory injunction is made out, to preserve the status quo, that is, the position that exists at the time of the making of the material application, this is

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23 See *Delor Vue Apartments* [2018] QBCCMCmr 91 at [31], [47], [50].

24 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1.

25 *Thompson v Park* [1944] KB 408.

> by no means always so. Sometimes it is found that the most just regulation of the rights of the parties, in view of continuing hardship or inconvenience and the extent to which the court may need to ensure that its final order, when made, will operate reasonably, involves the maintenance of a different position, such as that which existed before particular acts alleged to be wrongful took place, or that which existed when some particular step in the proceedings was taken, and on some occasions it may even be necessary to grant an interlocutory mandatory injunction in order to have buildings or other structures removed, so that an earlier position is duly restored. So, for example, it may be appropriate, in particular circumstances, to order that part only of a wrongfully erected structure should be pulled down pending the final hearing. Here no general rule can be laid down, and the course that is taken in any particular case depends upon the balance of justice in all the material circumstances. But although it has been said that where other factors appear to be evenly balanced it is a counsel of prudence to preserve the status quo, it must be borne in mind that the burden is on the applicant for interlocutory relief to show that the intervention of the court is appropriate in all the circumstances.
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> Sometimes the circumstances in which an interlocutory application is made are such that if an interlocutory injunction is granted the benefits or advantages that the plaintiff thereby receives are all, or practically all, the benefits or advantages that are sought to be secured at the final hearing. It does not thereby follow, however, that in such cases an interlocutory injunction should be refused; the question remains one of the balance of justice in all the circumstances, although the seriousness of the consequences of the injunction that is sought is taken into account and may sometimes be decisive, especially where there are substantial doubts as to relevant questions of law and fact. (footnotes omitted).[26]

[26] The particular wrongful acts complained of by the ABRE include the issuing of the RAN, relying upon the RAN in placing the motion to termination before the EGM, other actions by the body corporate in placing the motion to terminate before the EGM and proceeding to terminate the agreement. I do not accept the submission by the body corporate that maintaining the status quo is confined to a consideration of the respective positions of the parties immediately before the commencement of the present proceeding. As noted from the passage extracted from *Equitable Remedies*, the just regulation of the rights of the parties in the present case may involve the maintenance of the position of the parties existing before particular acts by the body corporate alleged by ABRE to be wrongful took place.[27]

[27] In *Bingham v 7-Eleven Stores Pty Ltd* [28] Holmes J (as her Honour then was) was required to consider an application by two franchisees for an interim injunction in circumstances where a franchisor purported to terminate the franchise agreements. Her Honour found:

> In the present case the effect of the injunction is to preserve the status quo. There is no question of it finally determining the issue of termination of the franchise and, indeed, if there were any failure on the part of the applicants to perform their side of the agreement, the parties could by dissolution of the injunction be

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26 I.C.F Spry, *The Principles of Equitable Remedies* (Lawbook, 9th ed, 2014) at 472-473.

27 See for example *Bingham v 7-Eleven Stores Pty Ltd* [2002] QSC 209.

28 [2002] QSC 209.

> restored to the same position they previously occupied so far as the operation of the notices of termination is concerned.[29]

[28] The grant by her Honour of the interim injunction was appealed. The grounds of appeal included that her Honour erred in making orders altering the status quo which was the position of the parties subsequent to the service of the termination notices. It was argued that in making an order altering the status quo, a higher degree of assurance was required to be determined objectively before relief of the type sought should have been granted. It was not however argued that any alteration in the status quo as a result of the interim relief, of itself, precluded the grant of such relief.[30]

[29] An application for a complex dispute is brought in the tribunal's original jurisdiction. The tribunal may make such orders as are required to resolve the dispute.[31] The tribunal's power to grant declaratory relief and injunctive relief is found not in the BCCM Act but in the QCAT Act.[32] Section 60 of the QCAT Act empowers the tribunal to make a declaration about a matter in a proceeding instead of, or in addition to, an order it could make about the matter.[33] ABRE seeks final relief in the proceeding in the form of a declaration that the RAN is invalid and of no effect and that the body corporate be restrained from acting in reliance upon the RAN and from acting upon any resolution passed in reliance on the RAN.

[30] In circumstances where final orders might include final declaratory and injunctive relief, the status quo may well be the parties' respective positions as they were before the purported termination.

[31] The reliance by the body corporate upon s 112 of the module is misplaced. Section 112 is concerned with the engagement of a person as a service contractor or letting agent. In the circumstances of the present application, ABRE contends that it remains the caretaker. Granting interim injunctive relief would not have the effect of forcing the body corporate to engage ABRE as the caretaker. Such relief would maintain the status quo as it existed immediately before the purported termination at which time ABRE was the caretaker under the Management Agreement. Section 112 has no application in the present circumstances.

### c. Grant of interim injunction - considerations

#### *i. Has the applicant established an arguable case?*

[32] An applicant seeking an interim injunction must show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial.[34] How strong those prospects of success must be depends upon the nature of the rights the applicant is asserting and the practical consequences of the orders sought.[35]

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29 Ibid, [12].
30 *Bingham v 7-Eleven Stores Pty Ltd* [2003] QCA 402.
31 BCCM Act, s 149B(2)(b).
32 *Delmason Pty Ltd ATF Libby Mason Trust v Body Corporate for The Crest on Bonney* [2015] QCAT 209.
33 QCAT Act, s 60(1) and see, for example, *Randall v Body Corporate for Runaway Cove Bayside* [2011] QCATA 10 as to the scope of the power to grant declaratory relief.
34 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.
35 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

*What does ABRE say?*

[33] ABRE says that:

(a) The RAN included remedial works:

(i) Not required to be performed by ABRE under the Management Agreement;

(ii) related to matters subject to an insurance claim arising out of the effects of Cyclone Debbie;

(iii) related to matters in relation to which the body corporate had resolved to undertake;

(iv) outside of the powers of ABRE to undertake;

(b) the body corporate failed to act reasonably because:

(i) the RAN was defective;

(ii) defects in parts of the RAN were not capable of remedy and the RAN was therefore invalid;

(iii) in respect of those parts of the RAN that might be considered valid, ABRE remedied the matters identified;

(iv) the body corporate has acted maliciously and not reasonably in all the circumstances including by not engaging with ABRE to address the issues in dispute between the parties;

(c) the RAN does not comply with s 129(4) of the module:

(i) the RAN refers to the failure by ABRE to perform duties outside the scope of the duties set out in the Management Agreement;

(ii) the RAN refers to matters already actioned, or being actioned, by the body corporate;

(iii) the RAN refers to matters that are the subject of an insurance claim by the body corporate arising out of the effects of Cyclone Debbie;

(iv) it was unreasonable for the RAN to include those matters (i), (ii) and (iii) above;

(v) the RAN is confusing as a result of being unnecessarily long, including matters not the subject of the Management Agreement, being ambiguous and vague, being trivial in parts and includes matters concerning the actions of occupiers;

(d) the RAN contains significant levels of duplication;

(e) in relation to the November report, most of the issues in the September report had been remedied by ABRE and those matters identified as outstanding had either been remedied, were not tasks required to be carried out by ABRE or were

in the process of being remedied but for reasons outside ABRE's control could not be remedied within the time prescribed under the RAN;

(f) the RAN is invalid;

(g) the body corporate failed to give proper notice of the EGM held on 18 January 2018.

[34] ABRE says that, reading the September report, the November report and the RAN together, the following matters appear to be the outstanding matters ABRE was required to attend to and were relied upon by the body corporate in placing before the EGM the motion to terminate the Management Agreement:

(a) Presence of weeds in the lawn and possibly elsewhere. ABRE says this is not a proper basis for termination of the Agreement;

(b) Mulching and replanting. ABRE says these were duties not within the scope of the Management Agreement;

(c) The presence of palm fronds and leaf litter. ABRE says this cannot be a proper basis for termination of the Agreement;

(d) Overgrown plants on structures. ABRE says that the structures are not identified in the reports or the RAN, that some remedial work was undertaken and that otherwise this cannot be a proper basis for termination of the Agreement;

(e) Oil stains, including in exclusive use areas. ABRE says that the November report recognises that oil stains identified in the September report had been cleaned but that new oil stains were present. ABRE says that this cannot be a proper basis for termination of the Agreement;

(f) Bin area which ABRE says is an ongoing issue and requires ongoing attention and cannot be a proper basis for termination of the Agreement;

(g) Items in car park spaces. ABRE says that this is not a duty it is required to perform under the Management Agreement and involves an impermissible attempt by the body corporate to delegate its responsibility for enforcing compliance with the scheme by-laws and cannot be a proper basis for termination of the Agreement;

(h) Stairwell, tiles and walls. ABRE says that it has acted reasonably to clean scuff marks, that repainting of some of the common areas is required, that leaves build up on a regular basis such that all leaf build up and scuff marks cannot be remedied within 24 hours and that water damage is a matter that has been acknowledged by the body corporate as requiring the engagement of a contractor to undertake repairs and painting (which the body corporate has done or intends to do);

(i) Light fittings are referred to generally as requiring remedial action without identifying the actual light fittings. ABRE says that any remedial work that may have been required was performed and the matters complained of cannot be a proper basis for termination of the Agreement;

(j) Caps on handrails. ABRE says that replacement parts have been ordered but not yet delivered;

(k) Eaves, roofs, fencing and driveway. ABRE says that these matters relate to the effects of Cyclone Debbie and are not maintenance issues in respect of which ABRE is required under the Management Agreement to attend to;

(l) Line marking. ABRE says that the body corporate has undertaken to attend to this matter.

*What does the body corporate say?*

[35] The body corporate says the application for an interim injunction should be refused because:

(a) An issue estoppel arises as a result of the earlier adjudication decision;

(b) ABRE does not have standing to bring the present application;

(c) Damages are an adequate remedy;

(d) ABRE has not established a prima facie case;

(e) The threshold requirement for the making of an order under ss 58 and 59 cannot be met as the status quo sought by ABRE no longer exists and the order sought is not of sufficient urgency;

(f) ABRE has provided no undertaking as to damages;

(g) The balance of convenience does not favour the grant of the interim order.

[36] The body corporate says that ABRE is not a lot owner in the scheme and is therefore not a voting member of the body corporate and does not have the rights of a voting member to challenge a decision of the body corporate.

[37] As to whether ABRE has established a prima facie case, the body corporate says that the RAN was clear on its face and no steps were taken by ABRE to seek to have the RAN set aside on the grounds that it was unreasonable for the body corporate to issue the RAN or that the RAN did not comply with the Module. In its submissions, the body corporate says that ABRE failed to place any evidence before the Tribunal, in the form of a statement, to support its application.

[38] The body corporate says that the focus of the application insofar as it seeks to set aside Motion 2 at the EGM should be upon whether the body corporate acted unreasonably in passing the motion and whether notice of the EGM was given to ABRE in accordance with the requisite time frames and whether any non-compliance was prejudicial to ABRE.

[39] The body corporate appears to concede in its submissions that an enquiry into the scope of the caretaking duties, whether ABRE carried out the duties as required, the accuracy of the matters set out in the September report and whether the body corporate acted unreasonably in terminating the agreement will require evidence to be led from individual witnesses.

[40] As to the issue of whether the RAN complied with the Module, the body corporate says that evidence from witnesses will be required and the final determination of the matters in dispute cannot be undertaken on the strength of untested submissions.

[41] The body corporate says that the status quo is that the Management Agreement has been terminated and that the body corporate has resolved to engage new contractors to carry out the caretaker's duties.

*Supplementary submissions by the parties*

[42] Following the hearing of the application for interim order the parties were given the opportunity to file further submissions.

[43] ABRE says that its undertaking as to damages has value and refers to an asset it owns in the form of a Management Agreement in another scheme in relation to which ABRE receives $160,000 per annum. ABRE seeks to rely upon an affidavit by Mr Wellard in which he deposes, among other matters, to the value of the management rights in the Delor Vue scheme as being at least $460,000.

[44] ABRE says that the tribunal is not restricted in making an order for an interim injunction to those cases where the body corporate has not yet purported to terminate an agreement with a service contractor. ABRE says that the tribunal has consistently decided that an interim injunction may be granted in circumstances where a body corporate has purported to terminate an agreement with a service contractor.

[45] ABRE submits that the body corporate is a creature of statute and cannot contract out of the provisions of the BCCM Act including, specifically, sections 94 and 95. The result, says ABRE, is that any decision by a body corporate made beyond power is ultra vires and thus any such decision is, and always was, invalid.

[46] The body corporate objects to the further affidavit by Mr Wellard on the basis that it has been filed late and does not, for a number of reasons set out in its further submissions, assist ABRE in the application.

[47] The body corporate, itself also seeking to rely upon further affidavit evidence, says that the value of ABRE's management rights is not $460,000 as asserted by Mr Wellard, but rather no greater than $140,000. The body corporate says that if the interim injunction is granted it will suffer a detriment in that it will be required to pay twice for the same caretaking service on the basis that it has engaged contractors to undertake maintenance in the scheme. The body corporate estimates that the financial consequences in this regard will be in the order of $80,000 per annum.

[48] The body corporate says that if the interim order is made it will be prevented from appointing a new caretaker in the interim and that, in any event, the relationship between the parties has broken down and enforcing the fractured relationship will adversely impact upon the effective management of the scheme for the benefit of lot owners.

[49] As to the undertaking given by ABRE, the body corporate says that the failure by the applicant to provide evidence of its worth gives pause for concern about the worth of the undertaking. The body corporate observes that Mr Wellard has not offered any personal undertaking.

[50] Regarding the issue of termination and the status quo, the body corporate says that once the resolution was passed and the agreement terminated in a prima facie lawful manner, s 112 of the Module requires there to be a resolution at a general meeting to engage a contractor in the nature of a caretaker. The effect of s 112, says the body corporate, is to rob the tribunal of any jurisdiction to grant the interim relief sought. The body corporate says that the situation where a termination is prima facie lawful is to be distinguished from that where the termination is prima facie unlawful. Where there is sufficient doubt as to whether the termination is prima facie lawful or unlawful, the body corporate says that the ordinary balance of convenience considerations apply.

[51] The body corporate says that the only bases upon which ABRE can succeed in the substantive proceeding is if the tribunal finds that the RAN did not comply with the requirements of the Module and/or the obligations under the RAN were complied with within the remediation period and/or the conduct of the body corporate at the general meeting was unreasonable.

[52] The meaning of a prima facie case was explained by the High Court in *Australian Broadcasting Corp v O'Neill*[36] in the following way:

> The first (inquiry) is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief.
>
> …
>
> By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the Court was referring to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument. With reference to the first inquiry, the Court continued, in a statement of central importance for this appeal:
>
> How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks.

[53] The strength of ABRE's case will depend to a large extent on an evaluation of the evidence and findings on the evidence. In its submissions, the body corporate has pointed to the lack of evidence filed by ABRE in support of the present application. An affidavit by Mr Wellard, the director of ABRE, has been filed[37] to which the body corporate objects on the basis that the parties had been directed to file further submissions but no direction had been made for the parties to file further statements of evidence. Despite this, the body corporate also filed further affidavit evidence.[38] The procedure for a proceeding is at the discretion of the tribunal subject to the QCAT

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36 (2006) 227 CLR 57.

37 Affidavit of Paul Wellard filed 10 May 2018.

38 Affidavit of Thomas John Robinson filed 11 May 2018.

Act, an enabling Act and the QCAT rules.[39] The tribunal must act fairly and according to the substantial merits of the case and must observe the rules of natural justice.[40] Both parties seek to rely upon affidavit material, not filed in accordance with tribunal directions. If the body corporate considered it was disadvantaged by the filing of the affidavit of Mr Wellard it could have filed material in response. The affidavit of Mr Robinson relied upon by the body corporate is quite limited in scope addressing only the issue of the value of ABRE's management rights. Alternatively, the body corporate could have applied to either file further affidavit material or applied to have the further affidavit of Mr Wellard struck out. In any event, in its further submissions the body corporate addresses the issues it says arise out of the further affidavit of Mr Wellard. In the circumstances there is no prejudice to the body corporate occasioned by the filing of the affidavit of Mr Wellard. I am prepared to have regard to the further affidavit material filed by both of the parties.

[54] The RAN is lengthy, containing 39 breaches said to require remedy. The RAN was prepared upon the basis of the September report. Some of the breaches appear minor such as removing weeds from lawns, cleaning switches in car parking areas and removing a dead rodent. Some of the breaches appear more serious such as failing to maintain the roofs of the common property.[41] I do not propose, nor is it necessary for me in an application such as this, to traverse in detail the breaches identified in the RAN however I will make some comments about the alleged breaches and the reports prepared by the body corporate's consultants.

(a) Damages to roofs. The September report notes 'major damage to roofs including the eaves' and that 'remedial action is required'.[42] The RAN notes that the particulars of the duty ABRE failed to carry out are as set out in the September report. The report requires 'remedial action' without specifying more. The RAN then identifies the remedial action to be taken by ABRE as 'organise the repair of the water damaged areas of common property by providing two (2) competitive quotations to the Committee for the Committee's approval.'[43] The November report notes 'no improvement since previous inspection.'[44] ABRE says that the repairs required to the roof were the subject of an insurance claim by the body corporate following Cyclone Debbie. There is no mention of the insurance claim in either of the Seymour reports, the RAN or the material placed before the EGM. Whether it was reasonable for the RAN to include the roof remediation and whether this issue should have been brought to the attention of lot owners in the material circulated by the body corporate prior to the EGM raises issues as to whether the body corporate acted reasonably. The determination of the issue in an application such as this, involving as it does disputed facts, is not possible.

(b) The driveway. The September report notes a 'potential safety hazard on the driveway' and goes on to note '(t)he Body Corporate should consider whether further investigation by a qualified engineer is required.'[45] The RAN identifies that the 'particulars of the duty that the Body Corporate believes that the

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39 QCAT Act, s 28(1).
40 Ibid, s 28(2), s 28(3)(a).
41 RAN dated 20 October 2017 at page 16.
42 Report prepared by Seymour Consultants on 21 September 2017 at page 22.
43 RAN dated 20 October 2017 at page 23.
44 Report prepared by Seymour Consultants on 30 November 2017 at page 21.
45 Report prepared by Seymour Consultants on 21 September 2017 at page 23.

Caretaker has failed to carry out are provided … in the … report.' The complaint by the body corporate appears to relate to the alleged failure by ABRE to inform the body corporate about the condition of common property. The RAN identifies the required remedial action in the following terms: 'Repair or organise the repair of the … driveway by providing two (2) competitive quotations …'. As ABRE submits, the required remediation action (obtaining quotes) appears to be at odds with the recommendation in the September report (further investigation by an engineer). ABRE says that what it was required to do in order to comply with the RAN is unclear.

(c) Mulching. The September report notes that 'all gardens appeared to be severely lacking in mulch. It appeared mulching had not been undertaken throughout the property.' The RAN alleges a failure by ABRE to supervise the performance of gardening, cleaning, pool maintenance, building maintenance or any other work upon the Common Property. The required remedial action in the RAN is 'mulch the gardens of the common property.' ABRE says that the body corporate had undertaken to attend to this matter, that a large amount of mulch had been obtained by the body corporate prior to the RAN issuing and that the body corporate was considering paying a member of the committee $5,000 to spread the mulch. The November report notes that the 'majority of gardens had been mulched'.

[55] In the explanatory memorandum accompanying the EGM material, there is reference to 'a significant number (around 20) of the matters raised in the Remedial Action Notice have not been attended to the by the Caretaker.' ABRE says that attached to the Notice of EGM was a copy of a letter from the body corporate's solicitors to lot owners. The letter refers to the September and November reports and notes 'The (November) report … reported on 49 items. A significant amount of these items remained outstanding from the RAN (ie at least 20 items with 13 new items requiring remedial action by your Caretaker).' The letter goes on to say that 'the Committee is proposing a motion to terminate the Agreement due to the continual failure by the Caretaker to perform its duties under the Agreement for which it is paid a salary…'. There are a number of observations to be made about this letter. Firstly, it is tolerably apparent that the '13 new items' were not the subject of a further RAN. Secondly, it refers to the motion proposing to terminate the agreement as being on the basis of the 'continual failure' by ABRE to perform its duties rather than on the basis of its failure to comply with the RAN. Thirdly, the question arises as to the reasonableness of the actions of the body corporate in distributing the letter to lot owners.

[56] The letter from the body corporate's solicitors to lot owners refers to 'at least 20 items' identified in the RAN as remaining outstanding. It is not apparent from the material filed that lot owners had made available to them the September and November reports. The actual details of the 20 outstanding items are not set out in the solicitor's letter nor, it would seem on the evidence currently before the Tribunal, in the material circulated with the Notice of the EGM. Upon comparing the September report and the November report it is possible to identify at least some of these items. Some are seemingly trivial such as the presence of weeds in the lawns. Others relate to the need to remove dead palm fronds and leafy litter although it is not apparent whether these are the same palm fronds and litter identified in the September report or whether fresh palm fronds and leaf litter has appeared. The floors of the bin areas being in bad condition and smelling is another outstanding item in relation to which ABRE says it

cleaned the area regularly and that it is not unexpected that bins will leak and that marks and smells will be a constantly arising issue. Similarly whether scuff marks and sticky marks identified in the November report are the same as those identified in the September report cannot be determined on an application such as this particularly in circumstances where ABRE says that it regularly cleaned the stairwell, that some marks could not be removed and that it is unreasonable to expect all marks, litter and leaves to be removed 24 hours per day.

[57] The determination of whether the body corporate acted reasonably in issuing the RAN and then acted upon the RAN to place before the EGM the motion to terminate will require the tribunal to make findings of fact, an exercise which cannot be undertaken on an interim application. This much appears to be conceded by the body corporate in its submissions.[46]

[58] The matters to which I have referred and as set out in the parties submissions give rise to serious questions as the content of the RAN and the reasonableness of the actions of the body corporate in issuing the RAN and then placing the RAN, and other material including the solicitors' letter, before the EGM.

[59] In all of the circumstances I am satisfied that ABRE has established a prima facie case.

*ii. Balance of convenience*

[60] I must be satisfied that the balance of convenience favours the grant of the interim injunction.

[61] ABRE says that the financial consequences to it, if the interim injunction is not granted, will be significant including that it will lose the ability to earn an income from the management business, it may incur liabilities to its employee for termination or repudiation of an employment agreement, it will lose the ability to sell the Management Agreement rights in the future and it will otherwise only be left with the Letting Agreement.

[62] The body corporate says that if the interim injunction is granted it will be forced to pay for the same service twice. The body corporate says that it has engaged contractors to undertake maintenance at the scheme. In its submissions, the body corporate refers to a figure of $80,000 per annum. This figure appears to be the total annual expense the body corporate says it will incur in paying for two service providers. The body corporate also says that it will be held out from engaging a new caretaking contractor which constitutes a detriment to lot owners, although this submission is not further expanded upon.

[63] On 2 February 2018 the body corporate resolved to engage a pool cleaning contractor and a garden maintenance contractor. The pool cleaning contractor was engaged on a weekly basis until further notice. It would appear from the relevant flying minute[47] that the garden maintenance contractor was engaged on the basis of a monthly payment plan. It is unclear from the body corporate's submissions what this means

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46 Respondent's submissions filed 6 April 2018 at [165] – [168].

47 Flying minute dated 2 February 2018.

however from the evidence it appears that neither of the contractors has been engaged other than on a short term basis.

[64] ABRE says that it remains willing and able to perform the caretaking duties. The body corporate on the other hand says its concern that ABRE is neither willing nor able to carry out the maintenance of the site and buildings is not a recent one. The body corporate says it has little confidence in ABRE attending to the caretaking duties.

[65] The body corporate is concerned that the injunction sought is mandatory in nature and will force the parties to continue in a commercial relationship that has broken down. It is not immediately apparent that the interim injunction sought by the applicant is in the nature of a mandatory injunction. The orders sought by ABRE are directed at the purported termination of the agreement and seek to prohibit the body corporate from acting upon the purported termination. The status quo ABRE is seeking to maintain is that existing before the purported termination. ABRE is not seeking orders of a mandatory nature enforcing the agreement although the granting of the interim orders would be to return the parties to the position they were in prior to termination. Even if the nature of the relief sought by ABRE is in the nature of a mandatory injunction there remains, as Muir J observed in *Bingham*, uncertainty as to whether an applicant for a mandatory interlocutory injunction is obliged to meet the high degree of assurance of success test.[48] Muir J referred to Spry on Equity and the observation that a judge hearing an application for an interlocutory mandatory injunction must apply exactly the same tests as he would in the case of an application for an interlocutory prohibitory injunction, not some different or more exacting test. And as Cooper J observed in *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Ltd*[49] the reasoning behind the traditional test in *State of Queensland v Australian Telecommunications Commission* is that where a mandatory injunction will or may have the effect of finally determining the matter, the defendant ought not be denied his right to a trial. Here, the interim injunction sought by ABRE will not finally determine the matter.

[66] As to whether the parties are able to continue to work together, I am not persuaded that, on the evidence, the relationship between the parties is such that ABRE could not continue to perform the caretaking duties. The proposed interim injunction is for a relatively short duration, that is, until the final determination of the dispute between the parties. Just how long that takes is to some not inconsiderable extent, in the hands of the parties.

[67] On the evidence before the Tribunal I am not satisfied that the basis upon which the body corporate has engaged alternate contractors to perform the gardening and pool maintenance duties commits the body corporate to paying for two contractors during the period of the proposed injunction. If ABRE is performing the caretaking duties, the services currently being rendered by the other contractors will not be required and as those contactors have been engaged on a weekly and possibly monthly basis termination of those services should cause little detriment to the body corporate.

[68] On the other hand, if the injunction is not granted, ABRE will lose the benefit of the income from the agreement in addition to the benefit of the ownership of a valuable asset. Just how valuable is a matter of dispute between the parties. ABRE says that

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48 *State of Queensland v Australian Telecommunications Commission* (1985) 59 ALR 243.

49 [1991] 1 Qd R 301.

the value of the caretaking rights is in the order of at least $460,000. The body corporate says that the value is not in excess of $140,000. Subject to the exercise of the option period, the agreement will end on 10 March 2034, or in excess of 16 years hence. I am unable to form any concluded view on the matter in the absence of valuation evidence however I am prepared to accept that a not inconsiderable value attaches to the caretaking rights. If the injunction is not granted, the benefit of those rights will be lost to ABRE, now and in the future.

[69] The body corporate raises, as a consideration relevant to the exercise of the discretion to grant the injunction, the delay by ABRE in bringing the application. It is true that the motion to terminate was passed on 18 January 2018, that notice of the termination was given on the same day to ABRE's solicitors and that the present application was not filed until 22 March 2018. The delay in bringing these proceedings was occasioned by a decision to pursue the application to the Commissioner's office. Whilst the merits of that particular course of action are debatable I do not consider the delay in bringing this proceeding is a sufficient factor in itself to deny the relief sought.

*iii. Are damages an adequate remedy?*

[70] Whether damages will be an adequate remedy in the event that an applicant is ultimately successful in a proceeding is always a significant factor in weighing the balance of convenience.

[71] ABRE says that damages are not an adequate remedy. It says that whilst it has made determination to seek to sell the caretaking rights, it may do so at some point in the future. ABRE says that it is not necessary for the purposes of the application for interim order for it to say whether it intends to seek to assign the rights in the future. ABRE says that the quantification of damages would be difficult given the uncertainties in valuing the asset; the uncertainty as to ABRE's intentions in relation to the sale of the rights in the future; that it does not seek damages but rather the contractual obligations continue; there is uncertainty as to whether the body corporate would be able to satisfy a damages award.

[72] The tribunal has previously considered whether damages would be an adequate remedy in circumstances where a service contractor seeks an interim injunction.[50]

[73] As I have observed, the agreement has in excess of 16 years to run inclusive of the option term. The evidence of ABRE is that while it may wish to sell the management rights in the future it does not intend doing so at this point in time. Evidence will be required to be led by the parties at the hearing in relation to, among other things, the value of the caretaking rights now and in the future. Given the period the agreement has yet to run, it seems to me that the evidence currently before the Tribunal does not address in any meaningful way the complexity of issues that will fall for determination on the question of damages. In *Bingham* Muir J held:

> The question of whether damages would provide the respondents with an adequate remedy was hardly so clear that it gave rise to no triable issue. In the circumstances under consideration, it is a matter best suited for determination by a judge possessed of all relevant facts after the trial of the action. There is

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[50] See for example *Ranch Frey Pty Ltd v Body Corporate for Quarterdeck* [2016] QCAT 252, *Polar Bear Panda Pty Ltd as trustee for Zhen Family Trust v Body Corporate for Duo on Gordon* [2017] QCAT 382.

> also the consideration that after trial the court may, in its discretion, conclude that an injunction should lie notwithstanding that its effect might be to order specific performance where equity would not do so. And the fact that damages would provide the plaintiff with an adequate remedy is not necessarily conclusive of a plaintiff's rights.[51]

[74] In the circumstances I am satisfied on the evidence before me that damages would not be an adequate remedy.

*iv. Undertaking as to damages*

[75] The body corporate says that ABRE is a company with $1 share capital, has a single director and shareholder and has recently been the subject of a winding up application. The body corporate says that ABRE has not placed before the Tribunal any evidence of its financial circumstances or an explanation of the winding up proceedings. This, says the body corporate, gives pause for concern about the value of any undertaking.

[76] Whether there is a risk that an undertaking as to damages may be inadequate is a relevant factor in considering the balance of convenience.[52]

[77] As outlined earlier in these reasons, Mr Wellard deposes to ABRE being the duly appointed caretaker for another scheme, and to the income ABRE derives under the caretaking agreement.

[78] Whilst the body corporate raises the issue of the application to wind up ABRE, it appears that the application was dismissed and that these events occurred in 2017. Other than the fact of the application to wind up, the body corporate raises no other issues relevant to the present application. In the absence of any further evidence from the parties I am not persuaded that the fact an application for winding was filed and later dismissed is relevant to a consideration of the worth of an undertaking as to damages by ABRE.

[79] I am also not persuaded that the damages the body corporate may be exposed to are of the magnitude claimed by the body corporate. As I have observed, the business arrangements the body corporate has entered into to replace the services provided by ABRE appear to be limited to the pool maintenance contractor and the garden maintenance contractor. Neither of these arrangements appears to be long term and there is no apparent reason why, if ABRE continues to provide the caretaking services, the amounts claimed by the body corporate will be incurred. I would also observe that there is no evidence before the Tribunal as to any amount the body corporate has incurred to date on alternative contractors.

[80] In the circumstances I am persuaded that the undertaking by ABRE is worthwhile. If, before the final determination of the proceeding, the body corporate forms the view that ABRE is not adequately performing the caretaking services, or it forms a view based upon further evidence as to the adequacy of the undertaking as to damages, the body corporate may apply for a discharge or variation of the injunction.

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51 *Bingham v 7-Eleven Stores Pty Ltd* [2003] QCA 402.

52 *Varley v Varley* [2006] NSWSC 1025.

**Conclusion**

[81] I am satisfied that ABRE has established a prima facie case. I am satisfied that the balance of convenience favours the grant of the interim injunction. I am satisfied that damages would not otherwise be an adequate remedy should ABRE ultimately be successful in the proceeding.

[82] The orders sought by ABRE include an order that the body corporate continue to make the payments to ABRE in accordance with the terms of the Management Agreement including any arrears from the date of the purported termination. The effect of the interim injunction is to place the parties in the position they were in immediately prior to the purported termination of the Management Agreement. To this extent, the rights and obligations of the parties under the agreement are matters for the parties. Accordingly I do not propose to make the orders sought by ABRE relating to the payment of remuneration by the body corporate. If the parties are unable to satisfactorily maintain an ongoing commercial relationship either party is at liberty to apply to the Tribunal for further orders.

[83] I order as follows:

(a) Upon the undertaking of Airlie Beach Real Estate Pty Ltd (ABRE) as to damages, the Body Corporate for Delor Vue Apartments CTS 39788 ("the Body Corporate") whether by its servants, agents, employees or otherwise is restrained from acting upon the purported termination of the Management Agreement dated 11 March 2009 ("the Agreement") between the Body Corporate and ABRE in reliance on:

(i) the resolution of the Body Corporate to terminate the Agreement passed at the Extraordinary General Meeting on 18 January 2018 ("the EGM"); or

(ii) the remedial action notice dated 20 October 2017, the subject of these proceedings;

until the earlier of:

A. the final determination of the proceeding;

B. order of the Tribunal;

C. agreement in writing between the parties.