

'Management Rights lost'

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October 2019



A Townsville Management Rights operator has lost their management rights because of failure to comply with the BCCM Act. On 10 July 2019 Adjudicator Barry declared that body corporate committee resolutions from 2015 consenting to the transfer of management rights were void...

Accordingly, the current management rights operator did not own the management rights, despite having performed the caretaking duties, and having been paid for doing so, for almost 4 years.

The Adjudicator's decision was the latest in a line of decisions dealing with the management rights for Allure Apartments CTS 46322 in Townsville. On 26 September 2018 another Adjudicator had declared the letting agreement for the scheme void, from the date it had been granted 4 years earlier on 3 September 2014. That was for a breach of s116 *Body Corporate and Community Management Act 1997 (Act)*.

At committee meetings held on 25 May 2015 and 10 September 2015 the body corporate committee had authorised the transfer of the caretaking agreement and letting agreement from Allure Hotel and Apartments Pty Ltd (AHA) to Allure Townsville Accommodation Pty Ltd (ATA).

In the 2018 Adjudicator's decision, it was found that the letting agreement had not been transferred from AHA to ATA because at the time of transfer the letting agreement was void. The letting agreement was void because the letting business was being operated from a manager's unit and a reception area which were not owned or leased by the letting agent. Crucially, neither was there a deed in place under s116 of the Act between the owner of the reception and manager's unit and the Body Corporate.

At least one owner in the scheme asked the question, after the September 2018 Adjudication, "*if the letting agreement wasn't transferred because it was void, did that mean the caretaking agreement was also not transferred?*"

Most letting agreements and caretaking agreements contain provisions that if one is transferred without the other, then here is a breach of both. An alleged breach of a management rights agreement is not however within the jurisdiction of an Adjudicator appointed by the Commissioner for Body Corporate and Community Management under Chapter 6 of the Act.

Cleverly the applicant had not strayed into territory where the dispute would have to be dealt with by QCAT, instead of through the Commissioner's office. The applicant framed the dispute in another way. Particularly, rather than arguing whether there had been a breach, the applicant simply asked the

Adjudicator, '*if the letting agreement has not been transferred, has the caretaking agreement been transferred?*'

While the Adjudicator found that was the case, the Adjudicator's reasons had nothing to do with s116 of the Act, or the (void) letting agreement.

Instead, the Adjudicator took into account a number of earlier adjudicator's decisions (from 2017) where the eligibility of the voting committee members who constituted the committee in 2015 was discussed.

The decision is important for management rights operators for a couple of reasons:

- it is critical to ensure that the committee must be properly constituted when it is voting upon the transfer motion.
- adjudicators will, when making their own decisions about a current dispute, refer to and abide by earlier adjudicator's decisions that are relevant.

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The adjudicator in those earlier decisions had found that there were relationships between members of the committee (in 2015) and either AHA or ATA. As a result, all committee members bar one had a conflict of interest and were not entitled to vote on the motion to consent to the transfer of the management rights. In the 2018 adjudication decision on the letting agreement, the 2017 decisions were taken into account and the adjudicator concluded that because of conflicts of interest, there was only one committee member who was entitled to vote on the transfer of the management rights back in 2015.

Because every other committee member was ruled out with a conflict of interest, the committee wasn't properly constituted to be able to pass a resolution to consent to the transfer of the management rights.

As a result, Adjudicator Barry declared both that the committee resolutions purporting to consent to the transfer of management rights were void and, most importantly, as a result of the resolutions being void the transfer from AHA to ATA of the caretaking agreement had no effect. In other words, because the caretaking agreement can only be transferred with the body corporate's consent, and that consent was not properly given, the transfer never took place.

This most recent Adjudicator's decision is important for management rights operators for a couple of reasons.

The first is, it is critical to ensure that if you are relying on a committee resolution to authorise a transfer of management rights, then the committee must be properly constituted when it is voting upon the transfer motion. There are many reasons that a committee may not be properly constituted. For example, the committee may fall foul of the quorum rules.

The other take away message is that adjudicators will, when making their own decisions about a current dispute, refer to and abide by earlier adjudicator's decisions that are relevant. While it's not every community titles scheme that has multiple adjudicator's decisions relating to it, parties to a management rights transfer must check to see if there are earlier decisions, and what impact they may have.

If you have any doubts about your management rights, or how this decision may affect you, contact Stratum Legal.

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