Month to Month Management Rights...?

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A recent Adjudicator's decision has shed some light on the casual engagement of Caretakers, and a spotlight on a significant legal loophole.

In *Lakelands Signature Living* [2019] QBCCMCmr 608 Adjudicator Stone was called upon to determine whether the casual engagement, of a former Committee Member as a Caretaker, was void.

On 28 February 2019 the Committee had resolved to approve "*the casual engagement of Mr John Murray to carry out Caretaker duties on behalf of the Body Corporate of approx. six (6) hours per week at $33.75 per hour on a month to month basis*".

At the Annual General Meeting a few months later, an amount of $9,720.12 was budgeted for the Caretakers fees.

One of the Lot owners brought an Adjudication Application alleging that Mr Murray's engagement was void, because as a Service Contractor he could only be engaged after the passage of an Ordinary Resolution (at a General Meeting).

There are very strict rules around the engagement of a Service Contractor, Letting Agent or when one person takes on both roles, a Caretaking Service Contractor. The engagement and / or authorisation must be in writing, the start date and end date must be stated, the basis for calculating the service contractor's renumeration must be stated and there is a maximum term; 10 years in a Standard Module complex and 25 years in an Accommodation Module complex.

For the purposes of the maximum term rules, the term includes any rights or options of extension or renewal.

Accordingly, a 5-year initial term with three, 5 year options will contravene the term limitations in a Standard Module complex. Indeed, there are provisions in the Standard Module that provide in such a case the maximum term of the agreement is taken to be 10 years; i.e. the option periods over the term limit are rendered void.

In Mr Murray's case the Committee had not specified a start date or an end date. The engagement was on a "month to month" basis. On one view the engagement was therefore open ended, that is it would be a perpetual engagement, presumably until terminated by either the Body Corporate or Mr Murray.

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Adjudicator Stone did not adopt that view. Instead the adjudicator concluded that Mr Murray was not a Service Contractor as he was not engaged for a term of *at least* 1 year; that being an essential feature of the definition of Service Contractor in the *Body Corporate Community Management Act 1997*.

It can be implied from Adjudicator Stone's reasoning that the engagement, being a periodical engagement, was actually a series of engagements lasting a month each, presumably determinable by Mr Murray or the Body Corporate on at least a month's notice to the other.

The money set aside in the budget at the AGM was irrelevant to the question of whether Mr Murray was a Service Contractor or not. As the adjudicator pointed out, simply because provision is made in the budget for an amount to be paid to a Caretaker, does not mean the amount will be paid to the Caretaker; the engagement might be terminated at any time, another person may be engaged to do the same, or different work and in short, the money is not spent until it is spent.

While the decision may be seen as strictly in accordance with the requirements of the Act and indeed, providing a practical and common sense resolution to the dispute then before the Adjudicator, it highlights both a significant loophole in the legislation and raises some interesting questions.

The loophole is that when the 12 month period is being calculated, to determine whether someone is a Service Contractor or not, rights or options of extension or renewal are not counted (they are only counted for the purposes of the maximum term limit if the *initial term* is at least 12 months).

Using this rationale it is theoretically possible, for example, for a Developer to grant a Caretaking Agreement to a Caretaker "off the plan" for an initial term of 6 months with rights or options of extension or renewal, exercisable by the Caretaker (and not the Body Corporate) for a further fifty-nine, 6 month periods; i.e. leading to a term of 30 years in total.

That Caretaking Agreement would not be a Service Contract (it is not for an *initial term* of at least 12 months) and the fifty-nine further options of 6 months each are not taken into account when calculating that initial term.

Not being a Service Contract also then means that the statutory provisions, for consumer protection, in relation to breach and termination, or the insertion of further options, would also not apply.

Putting aside those more hypothetical questions, for the Lot owners within Lakelands Signature Living, a question will arise in 12 months' time whether, if Mr Murray is still performing the Caretaking duties, his agreement will become a Service Contract, by dint of having been performed for 12 months.

If so, will retrospective approval for Mr Murray's engagement be required to be passed in the form of an Ordinary Resolution?

Alternatively, if the Agreement remains a month-to-month engagement, irrespective of how long it lasts, could Mr Murray still be performing the duties, without his engagement ever being approved by the lot owners, in a general meeting, say in 5 years' time?

Stratum Legal can help you with the interim engagement of caretakers, or disputes about their engagement or duties.

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