

**Grima v Quantum United Management Pty Ltd (Owners Corporations) - [2016]
VCAT 1960**

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE: OC2286/2016

CATCHWORDS

Application by chairperson of owners corporation for an order authorising him to pursue the proceeding on its behalf – alleged revocation of appointment of respondent as manager – [Owners Corporations Act 2006](#) s. [119\(6\)](#), s. [163\(1A\)](#), s. [165\(1\)\(ba\)](#) .

APPLICANT: Frank Grima

RESPONDENT: Quantum United Management Pty Ltd (ACN: 118 344 880)

WHERE HELD: 55 King Street, Melbourne

BEFORE: Senior Member A. Vassie

HEARING TYPE: Directions Hearing

DATE OF HEARING: 27 October 2016

DATE OF ORDER: 25 November 2016

DATE OF REASONS: 25 November 2016

CITATION: Grima v Quantum United Management Pty Ltd (Owners Corporations)
[2016] VCAT 1960

ORDERS

1. Pursuant to s [165\(1\)\(ba\)](#) of the [Owners Corporations Act 2006](#) the applicant is authorised to prosecute this proceeding on behalf of Owners Corporation I Plan No PS540313Q.
2. The proceeding shall be fixed for hearing on a date and at a time to be fixed by the principal registrar before any Member with two consecutive days being allowed for the hearing.
3. Each party has liberty to apply for any further orders or directions.
4. The costs of the hearing on 27 October 2016 are reserved.

A. Vassie
Senior Member

APPEARANCES:

For the Applicant: Ms. R. Castro, Solicitor

For the Respondent: Mr. T. Graham, Solicitor

REASONS FOR DECISION

1. The applicant Frank Grima is a member of Owners Corporation I Plan No PS540313Q. He owns 4 lots in the subdivision, which is known as Wyndham Harbour. He is also the chairperson of the owners corporation.
2. The respondent Quantum United Management Pty Ltd (“Quantum”) was, before 13 July 2016, the manager of the owners corporation, appointed under a contract dated 28 September 2012. Quantum maintains that it is still the manager. Mr Grima maintains that owners corporation terminated Quantum’s appointment as manager on 13 July 2016 by a decision of the owners corporation’s committee.
3. On 27 October 2016 I heard Mr Grima’s application for an order under s [165\(1\)\(ba\)](#) of the [Owners Corporations Act 2006](#) (“the Act”) authorising him to pursue this proceeding on behalf of the owners corporation: a proceeding which asked for a declaration that Quantum’s appointment as manager has been terminated and for an order under s [127](#) of the [Act](#) requiring Quantum to deliver up the owners corporation’s records and funds. I reserved my decision.

4. The background to this case has a familiar pattern. A developer, in this case Wyndham Harbour Pty Ltd, prepares a plan of subdivision and has it registered, creating an owners corporation. At the outset the developer owns all the lots in the subdivision. It appoints a manager for the owners corporation for a fixed term, under a contract which provides for an automatic renewal of the management contract and restricts, or purports to restrict, the owners corporation's power to prevent the automatic renewal, to terminate the management contract or to revoke the manager's appointment. The developer sells the lots. The new lot owners inherit the management contract and the manager. They, or some of them, decide to appoint a different manager, and notify the existing manager accordingly. The existing manager disputes that its appointment has been terminated and disputes the ability of the owners corporation to terminate the appointment otherwise than in accordance with the terms of the management contract.
5. Mr Grima filed this proceeding on 15 September 2016. His aim is to achieve the delivery of the records and funds of the owners corporation from Quantum to his preferred manager. There has been no special resolution of the owners corporation to authorise it to bring this proceeding, as s. [18\(1\)](#) of the [Act](#) requires. Mr Grima does not allege any breach by Quantum of its duties under s. [122](#) of the [Act](#) to act in good faith and with care, so he has no cause of action in his own

right on which he can base a proceeding against Quantum. Only the owners corporation has a cause of action founded upon an alleged termination of the management contract. It cannot commence a proceeding based upon the cause of action because there has been no authorising special resolution. So he applies for an order authorising him to bring and pursue this proceeding on the owners corporation's behalf.

6. Sections [163\(1A\)](#) of the [Act](#) provides:

(1A) A lot owner may apply to VCAT on behalf of an owners corporation to resolve an owners corporation dispute.

Note

This subsection clarifies that the rule in [Foss v Harbottle](#) (1843) 67 ER 189 does not apply to owners corporation disputes.

7. Section [165\(1\)\(ba\)](#) provides that, in determining an owners corporation dispute, VCAT may make –
 - (ba) an order authorising a lot owner to institute, prosecute, defend or discontinue specified proceedings on behalf of the owners corporation.
8. Quantum concedes that this proceeding involves an owners corporation dispute. Mr Grima concedes that he cannot pursue this proceeding unless the Tribunal authorises him to do so on behalf of the owners corporation.
9. In Particulars of Claim attached to his initiating application Mr Grima sought these orders:

- (a) An order authorising him to institute this proceeding on behalf of the owners corporation in accordance with s 165(1)(ba) of the Act.
 - (b) A declaration that Quantum's appointment as manager is terminated or revoked.
 - (c) An order that Quantum immediately return to the owners corporation all of its records and funds in compliance with s 127 of the Act.
 - (d) Other orders which it is not necessary for me to describe.
10. The hearing that took place on 27 October 2016 was a preliminary hearing to determine whether the Tribunal should make the authorising order under s 165(1)(ba) of the Act. If the application for the authorising order were to be refused, the proceeding could go no further.
11. In support of his application Mr Grima swore an affidavit dated 18 October 2016. In the affidavit he deposed that:
- (a) he is a member of and the current chairperson of Owners Corporation I Plan No PS540313Q ("the owners corporation") and a member of the owners corporation's committee;
 - (b) on 13 July 2016 the committee resolved to terminate Quantum's appointment as manager of the owners corporation;
 - (c) on 28 July 2016 another committee member, and on 15 August 2016 he, notified Quantum by letter that its appointment had been terminated and requested Quantum to deliver the owners corporation's records and funds to another management company, Your Body Corporate;
 - (d) on 28 August 2016 the committee ratified the resolution it had made on 13 July 2016;
 - (e) by writing from Quantum's general manager and its solicitors Quantum refused to deliver the records and funds and asserted that Quantum's management contract had not been terminated;
 - (f) on 7 October 2016 at a special general meeting of members the owners corporation by interim resolution ratified the committee's decision to terminate Quantum's management and to request the delivery of the records and funds.
12. Exhibited to the affidavit were minutes of the special general meeting, which recorded that 87 members of the owners corporation attended either in person or by proxy. According to Mr Grima's affidavit there are 484 lots altogether in the subdivision.
13. Mr Grima also exhibited to his affidavit a copy of the management contract. It took the form of the Strata Community Australia (Vic) Contract Version 2.5 published in August 2011 with 15 pages of attached special conditions. The term of appointment was expressed to commence on 28 September 2012 and to expire on 28 September 2015. On the second page of the form and also on the first page of the special conditions there appeared this note:

PLEASE NOTE: If no notice is given by the Owners Corporation to the Manager at least 28 days prior to the expiry date the Appointment will continue until the expiration of three years after the expiry date which date will then become the expiry date.

Clause 8 of the contract was headed "Termination of Manager's Appointment". So far as is presently relevant, the paragraph provided:

8.1 Appointment may be terminated by notice of termination in the following ways:

8.1.1

8.1.2 after the initial term the Owners Corporation may by ordinary resolution of the Owners Corporation, at a general meeting only, resolve to terminate this Appointment effective upon the expiry date or any anniversary of the expiry date by giving 28 days' prior notice in writing to the Manager without having to specify the reason for termination. This instrument evidences the resolution of the Owners Corporation that the committee, its chairperson, secretary or delegate shall not have the power or function to terminate the Manager's Appointment unless so resolved at a general meeting of the Owners Corporation.

....

14. Quantum did not file, or seek to file, any affidavit material.

15. At the hearing on 27 October 2016 Mr Grima's solicitor Ms Castro made an oral submission, and Quantum's solicitor Mr Graham took me through a lengthy written submission. I gave Mr Grima leave to file and serve a short written submission in reply, which Ms Castro did file and serve. She also filed and served another short written submission which was dated 27 October 2016, the day of the hearing, but not filed until 10 November 2016 when it was filed together with the submission in reply. Quantum's solicitors have complained about the filing and serving of the submission dated 27 October 2016. It is true, as they say, that I had not given leave for that submission to be filed. It did little more, however, than to commit to writing the points that Ms Castro had made orally on 27 October 2016 ^[1], so no harm was done. I do not think that the matter requires any further comment.

^[1] The only new matter in the written submission was a comparison between s165(1)(ba) and s34D(3) and (5) of the Subdivision Act 1988; a comparison which I did not find persuasive.

16. The initial term of Quantum's appointment expired on 28 September 2015. Mr Grima does not concede that the management contract was renewed automatically for a further three years after

that date, but I see no reason at the moment to doubt that Quantum will be able to establish that the automatic renewal occurred, and shall proceed to determine Mr Grima's application for the authorising order on the assumption that the appointment was renewed automatically.

17. This is not a case where an owners corporation has attempted to achieve a special resolution to commence a proceeding but has failed. The owners corporation has not put to its members, by postal ballot or otherwise, a motion for such a special

resolution. Instead, a general meeting of members has voted to ratify a committee decision and, according to the minutes exhibited to Mr Grima's affidavit, has passed an ordinary resolution in favour of a legal proceeding to recover the owners corporation's records and funds.

18. An application for an authorising order under s165(1)(ba) is not simply an optional alternative to the fulfilment of the requirement for a special resolution in accordance with s18(1), and is not granted as a matter of course. The applicant for the authorising order must persuade the Tribunal that it ought to be made and that the applicant is not seeking to subvert the responsibility that the owners corporation has under the [Act](#) to achieve a special resolution before being able to begin a proceeding. In the exercise of its discretion to grant or refuse the application for the authorising order the Tribunal will consider, first, the reason why no special resolution was obtained or (as in the present case) attempted; secondly, the degree of support amongst the other members of the owners corporation for the application, even though the degree of support is less than the 75% support that would have achieved a special resolution; thirdly, what benefit there would be for the owners corporation as a whole if the order were made, and what disadvantage it might suffer if the order were not made; fourthly, whether the proceeding for which authority is sought has a prospect of success, or, at the very least, is not bound to fail. That list of factors that might be considered is not exhaustive.

19. A large part of Quantum's submission was devoted to the argument that this proceeding is bound to fail and so it would be pointless to authorise Mr Grima to pursue it. It is convenient to consider that argument first.

20. I paraphrase Quantum's argument, that the proceeding is bound to fail, as follows:

(a) There was not, and could not have been, any termination of Quantum's appointment by a decision of the owners corporation's committee.

(i) The committee had no power to resolve to terminate the appointment. By clause 8.I.2 of the management contract the owners corporation had acknowledged that the committee had no such power.

(ii) The minutes of the committee meeting on 13 July 2015 did not record any express resolution for termination of the appointment.

(iii) The committee on 28 August 2016 purported to confirm a decision to terminate which had never been made.

(iv) No proper notice of the committee meetings had been given to committee members. The applicant has not provided any evidence of what notice was given.

- (b) There was not, and could not have been, any valid termination of the appointment by resolution at the general meeting on 7 October 2016.
- (i) The meeting was not convened by any person authorised to convene it.
- (ii) The resolution was not one expressed to be effective on the expiration date of the contract or on any anniversary of the expiration date, as clause 8.1.2 required.
- (iii) The purported resolution was not to terminate the appointment but merely to ratify the committee’s decision to terminate it: a decision which was ineffective for the reasons given in (a) above.
- (iv) Unfinancial members voted at the meeting.
- (v) No proper notice of the general meeting was given to all members. The applicant has not provided any evidence of what notice was given.
- (c) Before the proceeding was begun the owners corporation had not followed the dispute resolution procedure under its rules, as s [153\(3\)](#) of the [Act](#) required.
- (d) The applicant is “estopped” from disputing the automatic renewal of the management contract.
21. Fundamental to Quantum’s argument that the proceeding is bound to fail, for all or some of the reasons set out in the previous paragraph, is the proposition that the owners corporation could not effectively terminate the appointment of Quantum as manager unless it did so in accordance with clause 8 of the contract: in the present case, in accordance with clause 8.1.2: i.e. by ordinary resolution at a general meeting, effective on the relevant expiry date, and with 28 days’ prior notice in writing to Quantum being given.
22. Section [119\(6\)](#) of the [Act](#) provides that an owners corporation may revoke the appointment of a manager. Section [202](#) of the [Act](#) provides that a provision of a contract is void to the extent that it purports to exclude, modify or restrict the operation of the [Act](#). In an earlier decision, [\[2\]](#) I have expressed the view that the power given under [119\(6\)](#) to revoke the appointment is absolute and cannot be modified or restricted by the terms of a management contract, even though

revoking the appointment otherwise than in accordance with the terms of the contract may amount to a breach of the contract and may expose the owners corporation to a claim for damages for breach of contract. I adhere to that view, [\[3\]](#). It follows that I consider that this proceeding is not bound to fail just because the revocation has not occurred in a way allowed for in clause 8.1.2 of the management contract. Of course, Quantum is free to argue that the view I have expressed is wrong and ought not to be followed.

[\[2\]](#) *Owners Corporation RP 11571 v Walshe & Whitelock Pty Ltd* [2015] VCAT 1819.

[\[3\]](#) An Associate Justice of the Supreme Court has held that a clause in a management contract which purported to prevent the owners corporation from revoking the contract would be

23. Some of the steps in Quantum’s argument fall away because there is no evidence in support of them. There is no evidence at present that any member was unfinancial at any relevant time. There is no evidence that no proper notice of a committee meeting or of a general meeting was given. True it is that Mr Grima’s affidavit did not mention or exhibit any notice, but there was no evidence of the absence of notices; there was just no evidence one way or the other. Attached to Quantum’s written submission was an email from a committee member asserting that he had not received a notice, but that is not evidence that no notice was given, and indeed is not evidence at all.
24. The point about the failure to go through a dispute resolution process before the commencement of the proceeding cannot succeed. Addressing it, I assume (for there is no evidence on the matter) that the dispute resolution procedure in the model rules set out in Schedule 2 of the [Owners Corporations Regulations 2007](#) is applicable. In the first place, the prohibition in s153(3) upon an application to VCAT applies only when an owners corporation is an applicant or a would be applicant; in this proceeding Mr Grima is the applicant and will remain the applicant even if the order authorising him to pursue the application on behalf of the owners corporation is made. Secondly, the obligation upon an owners corporation to follow the dispute resolution before applying to VCAT occurs only when there has been a written “complaint” to the owners corporation made in accordance with s152(1)^[4]; there is no evidence at the moment of any such complaint. Thirdly, a failure of an owners corporation to comply with s153(3) is not fatal; s 164 of the [Act](#) confers a discretion to dismiss or strike out an application in those circumstances, but does not compel VCAT to do so.^[5] Finally, there is simply no evidence as to whether the owners corporation did, or did not, follow a dispute resolution process before Mr Grima began this proceeding.
-

^[4] [Shearman v Owners Corporation No 1 417405](#) [2016] VSC 551.

^[5] See footnote 4.

25. As to the proposition that Mr Grima is “estopped” from denying that the management contract had been renewed automatically, I have already said that I am assuming in Quantum’s favour that the contract was renewed automatically. That assumption does not necessitate a conclusion that the proceeding is bound
- to fail. It means only that clause 8.1.2 of the management contract was still a term of the agreement between the parties at the time that the owners corporation revoked Quantum’s appointment (according to Mr Grima) or purported to revoke it (according to Quantum).
26. So I conclude that Quantum has not established that the proceeding is bound to fail.
27. Mr Grima’s explanation for why no attempt was made to achieve a special resolution authorising the bringing of this proceeding was that it was most unlikely that a ballot for a motion for a special

resolution would have resulted in 75% of members voting. The evidence that he put forward in support of the explanation was that only 87 members voted at the general meeting on 7 October 2016 either in person or by proxy. Ms Castro told me from the bar table that the low attendance at annual general meetings in 2013, 2014 and 2015 demonstrated that there was no chance that a special resolution could ever be achieved; however, there was no evidence about attendance at annual general meetings so I cannot and do not have regard to that matter.

28. Although Ms Castro did not make the particular point on Mr Grima's behalf, it seems to me that a justification for the owners corporation's not having attempted a postal ballot of members is the logistical difficulty that one owners corporation has when the manager is retaining all records of the owners corporation, including addresses and contact details for members, and is resisting the request to deliver the records to another manager. In other words, a proceeding in which an order is sought against a manager for the delivering up of of the owners corporation's records and funds is a paradigm case for deciding that there is an acceptable explanation for a special resolution not having been attempted.
29. Each party relied upon the fact that there were 87 voters at the special general meeting held on 7 October 2016. Quantum submitted that the small number of members who attended showed that the degree of support for the commencement of this proceeding was minimal. Mr Grima submitted that the passing of resolution at the meeting in favour of the bringing of this proceeding showed that Mr Grima was not wanting to air any personal grievance but has been acting in the interests of the membership as a whole, as at least the majority of the 87 members considered. I do not think that much can be deduced either way, from the attendance at the meeting in person or by proxy, about the degree of support that Mr Grima has amongst members for the proceeding that he has brought. I think that the better argument, for the proposition that this proceeding is not a personal frolic by Mr Grima, is that he is the chairperson of the owners corporation committee and has the support of the committee for what he is doing.
30. There is no evidence of any particular benefit that the owners corporation could receive if Mr Grima were to succeed in this proceeding. In the minutes of the committee meeting on 13 July 2016^[6] it was said that Quantum's charges were "expensive" and that there were "serious concerns of Quantum's past and current performance". I do not know what those concerns are. I repeat that there has been no specific allegation of a breach by Quantum of its statutory duties.

^[6] The minutes are exhibit RC1 to the affidavit of Mr Grima.

31. Quantum has submitted that the owners corporation will be disadvantaged by an order authorising Mr Grima to pursue the proceeding because it will become liable to Quantum in damages for breach of contract. In support of the submission it pointed to clause 7.2 of the management contract, whereby the owners corporation "releases and indemnifies [Quantum] and holds [it] harmless" from all claims that arise out of the performance or non-performance of services or the exercise of its functions and powers. In my opinion this clause is irrelevant to any actual or potential liability of the owners corporation in damages to Quantum. Read as a whole, the clause can be seen as an indemnity against claims of third parties against Quantum. At all

events it does not impose any liability upon the owners corporation in damages to Quantum or govern the scope of its liability. It is, nevertheless, correct to say that even if Quantum's appointment has been effectively revoked, and the Tribunal rules accordingly, there still may be a liability of the owners corporation in damages for breach of contract.

32. Quantum also submitted that because Mr Grima has not undertaken not to ask the owners corporation to meet any costs of the proceeding unless at a general meeting of members a resolution is passed to meet those costs, the Tribunal should refuse to make an authorising order. Quantum referred to a decision of mine, [\[7\]](#), in which I had stated that I would make an authorising order only if the applicant were to give such an undertaking. In that case the material on which the respondent owners corporation intended to rely in defence of the claim against it for recovery of allegedly unauthorised charges was so voluminous that the hearing of the proceeding would have taken many days and would have been very expensive indeed. That is why I proposed an authorising order that was conditional upon the giving of the undertaking. The present case is not comparable in terms of length and expense. There is no need to require Mr Grima to give such an undertaking, so the absence of one does not preclude the making of the authorising order.

[\[7\] *Wong v Network Pacific Real Estate Pty Ltd* \[2012\] VCAT 791.](#)

33. On balance I consider that Mr Grima should be authorised to pursue this proceeding on behalf of the owners corporation. The following matters tilt the balance in his favour.
- (a) Mr Grima is bringing the proceeding in his capacity as chairperson of the owners corporation, and with the apparent support of its committee. It is not a personal frolic.
 - (b) The very fact that Quantum has possession of the owners corporation's records, and is resisting the request for delivering up of those records, explains why no special resolution has been obtained or attempted.
 - (c) Unless the authorising order is made there is no way in which the claim that Quantum's appointment has been terminated can be tested in the Tribunal.
 - (d) The proceeding is not bound to fail so has some prospect of success.
34. Because each party's case has been well ventilated at the hearing on 27 October 2016, and because it would appear to be in each party's interests to have the dispute determined as soon as practicable, I shall direct that the proceeding be listed for a two day hearing. In case either party wishes to apply for any further orders or directions before there is a final hearing, I shall reserve liberty apply.

A. Vassie
Senior Member

