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New court rulings impact on recovery costs for bodies corporate

Fact Sheet

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IMPORTANT NEWS

New court rulings impact on recovery costs for bodies corporate

Two Queensland Magistrates Court decisions delivered in December 2021 stand to disrupt levy recovery that bodies corporate, body corporate managers and body corporate lawyers have come to know.

The decisions in Body Corporate for Pinehaven 1 CTS 31755 v MacKenzie [2021] QMC 8 and Body Corporate for Natchez CTS21238 v Leet [2021] QMC 9 have resulted in a significant departure from established body corporate debt recovery processes.

Overview

When a body corporate pursues payment of unpaid instalments and contributions, and it wishes to recoup its "recovery costs" under the applicable body corporate module, if those costs exceed the court scale costs under the Uniform Civil Procedure Rules 1999 (UCPR), then an application for default judgment cannot be determined by a Registrar.

This should not (but will) come as a revelation for bodies corporate, body corporate managers and body corporate lawyers because while the UCPR has never allowed it, it has been common practise for default judgment applications to be made before a Registrar, and for Registrars to award recovery costs that exceed the court scale.

The issue is that the UCPR scale of costs does not reflect the reality of commercial charges made by body corporate managers, recovery agents and law firms for recovery of unpaid instalments and contributions.

For example, where the unpaid instalments and contributions owing by a lot owner is less than $2,500, the body corporate's cost recovery under the scale is limited to $380.70 for instructions to sue, and $100.50 for obtaining judgment by default. If an application for substituted service is required, costs are limited to $184.30. While the court scale gradually improves for higher debts, the charges made by law firms typically exceed these amounts. The scale does not provide for reminder letters, or letters of demand to be recovered.

If a body corporate is prepared to accept scale costs (despite the likelihood of being charged a higher amount by its recovery agents and lawyers), then it can still file an application for default judgment before a Registrar. By doing so however, it will have to accept costs on the court scale, absorbing the difference between those costs and its actual costs, and it will not be able to recover the difference from the defaulting lot owner.

While the Registrar is limited to awarding costs on the court scale, applications before a Registrar have a benefit in that the Registrar does not need to assess the merits of the application. Provided the Registrar is satisfied the proceeding has been served and a defence has not been filed, judgment can be entered provided costs are limited to the court scale.

Where a body corporate wishes to recover "recovery costs" that exceed the court scale, a default judgment application must be brought before a Magistrate, and the Magistrate must undertake an assessment of the reasonableness of those costs.

The decisions in Pinehaven and Natchez

The decisions in Pinehaven and Natchez came about because of a change in Registry practice, where the Registry (doing so correctly – in hindsight) refused to entertain an application that included an amount of "recovery costs" pleaded in a statement of claim. Those applications were referred to a Magistrate.

The matters before the Magistrate for determination in Pinehaven and Natchez were:

- Are "recovery costs" under the various body corporate modules a liquidated or unliquidated debt?
- Are "recovery costs" associated with one proceeding only recoverable in that proceeding?

That is, if enforcement of a judgment for unpaid instalments and contributions becomes necessary, must the body corporate recover those costs as recovery costs in that proceeding, or can those costs be sought as recovery costs in a later proceeding.

- Can unpaid instalments and contributions that become payable after commencement of proceedings be recovered on an application for judgment without amending the statement of claim?

Registrar powers to award costs are limited to the court scale

Default judgment applications are decided by Registrars on the face of the material filed. Those applications have commonly included unpaid instalments and contributions, interest, and recovery costs pleaded in the statement of claim, and in some instances, unpaid instalments and contributions that became due and payable after filing the statement of claim but before judgment, together with the recovery costs incurred by the body corporate in obtaining judgment.

Rule 694 of the UCPR provides that where a default judgment is to be given by a Registrar, the Registrar must fix the costs in accordance with the court scale. This rule has been overlooked historically by both lawyers and Registrars, with costs often being awarded for amounts higher than the court scale.

The rule means that if a body corporate is claiming costs other than in accordance with the court scale, it must abandon the claim for costs beyond the court scale, or apply to a Magistrate for judgment, see McGill DCJ in Laminex Group Pty Ltd v Fresh Electrical and Data Pty Ltd [2017] QDC 181.

Recovery Costs are an Unliquidated Debt

"Recovery costs" under the body corporate modules include all costs incurred by a body corporate in pursuing unpaid instalments and contributions, including legal costs, agents costs, disbursements and also (by way of example) fees charged by a body corporate manager to a lot owner's levy statement for reminder notices for unpaid instalments and contributions.

The decisions in Pinehaven and Natchez have determined (and we believe correctly so), that while "recovery costs" are expressed to be a debt under the body corporate modules, they are nonetheless an unliquidated debt. The position of the Magistrate in Pinehaven and Natchez adopts the rationale of Robin DCJ in Rollone Pty Ltd v Byrne [2010] QDC 517 (albeit in the context of damages in a motor vehicle collision) and of Brabazon DCJ in Day v Bell [2001] QDC 329.

In short, if an application for default judgment includes any amount of "recovery costs", the application must be determined by a Magistrate.

Recovery Costs in a later proceeding

In deciding Pinehaven and Natchez, the Magistrate determined that:

- "recovery costs" were distinct from costs of a proceeding recognised under the UCPR;
- "recovery costs" associated with one proceeding can be recovered in a later proceeding;
- a body corporate is not required to have "recovery costs" awarded in the proceeding to which the costs relate; and
- no issue estoppel arises.

Whether the Magistrate's decision is followed remains to be seen, however it is conceivable that if the decision is not followed, a body corporate could potentially be shut out from recouping "recovery costs" associated with enforcement, for example, which are incurred after judgment but still incurred within an existing proceeding.

Unpaid instalments and contributions post filing

The Magistrate in Pinehaven and Natchez determined not to award judgment for unpaid instalments and contributions that fell due after filing the Claim and Statement of Claim. The Magistrate's reasoning being that a lot owner is entitled to know the case made against them, and it would be procedurally unfair if that were not the case. That was despite circumstances where:

- the statement of claim pleaded that future instalments and contributions would become due and payable if not paid;
- notices of contribution for further unpaid instalments and contributions were put on as evidence before the Magistrate; and
- the non-payment of those further unpaid instalments and contributions were deposed to and put on as evidence before the Magistrate.

These decisions appear to determine, in effect, that unless the further unpaid instalments and contributions are specifically pleaded, lot owners could not properly know the case brought against them. Pleading a general liability, even if supported by evidence, is no cure.

In arriving at the decisions, the Magistrate concluded that rule 658 of the UCPR did not over-ride the general position despite providing that the court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim, counterclaim or similar document, the rule.

Recovery costs incurred post filing

In Pinehaven and Natchez the body corporate sought judgment for all of its "recovery costs" including up to the date of the hearing. Evidence of those costs was put before the Magistrate for consideration. Despite the Magistrate saying that some recovery costs were unknown at the time of filing the proceeding albeit contemplated within the Claim, the Magistrate later said those same costs were not contemplated within the Claim, declining to consider them. The contradictory comments confuse the matter, particularly as it would be clearly preferrable to determine as much of the "recovery costs" incurred in one proceeding, in that same proceeding. The Magistrate left the door open for recovery in future proceedings in any event.

The reasonableness of "recovery costs"

It is well established that a body corporate bears the onus of proving that the recovery costs they claim have been reasonably incurred and are reasonable in amount: see Body Corporate for Sunseeker Apartments CTS 618 v Jasen [2012] QDC 51. How those costs will be assessed as being reasonable is however, unclear. No guidance is provided by the body corporate legislation, and no criteria for assessment of recovery costs arose from the decisions in Pinehaven and Natchez.

What we do know is that assessments conducted by the courts will be conducted on a case-by-case basis, with the metric of reasonableness being guided by the views of the court on each occasion. That will inevitably lead to potential inconsistencies. However unhelpful that is, the evidentiary burden to be met by bodies corporate has been judicially considered.

Attempts at meeting the evidentiary burden have varied, and with mixed results.

Butler SC DCJ in the case of Thompson v Body Corporate for Arila Lodge was tasked with assessing recovery costs for a summary judgment application and found that "the reasonableness of recovery costs requires scrutiny of the individual items claimed and that a global assessment will not suffice." Thompson involved a decision at first instance where judgment was given for the full amount of recovery costs, including both legal and recovery agent costs. An affidavit was sworn deposing to the reasonableness of the costs, exhibiting copies of the relevant invoices. On appeal to the District Court, Butler SC DCJ found:

- features of the evidence relating to costs prevented His Honour from being satisfied that the body corporate could prove to the necessary standard all aspects of its claim for costs, including that:
    - the invoices for legal costs varied in the degree of particularisation of the items claimed, with some invoices only giving a general description of the work performed;
    - some invoices for legal costs failed to provide units of time or the level of employee performing the work; and
    - the invoices for the mercantile agents failed to particularise the specific work performed, with each item charged merely described as "Debt Recovery Costs".
- the Magistrate had failed to properly scrutinise the evidence and apply the correct onus of proof.

The issue of the reasonableness of the recovery costs in Thompson was remitted back to the Magistrates Court for re-determination.
The more recent case of Jorgensen v Body Corporate for Cairns Central Plaza Apartments confirmed the position in Thompson, and the body corporate met a similar outcome on appeal.

In the matter of Body Corporate for Cherwood Lodge CTS 20711 v Christophi [2021] QSC 270, orders were made for the appointment of a referee pursuant to rule 501 of the UCPR to determine the amount of recovery costs, although the referee in that case was found (amongst other issues) to have considered matters they should not have. As a result the referee arrived at an amount of costs that exceeded the pleaded amount of recovery costs by $140,000. The decision was challenged, and was remitted again for determination with a greater amount of guidance, effectively making the process more akin to a costs assessment.

The approach taken by this firm has been to provide high level detail of the tasks undertaken, including great detail of the time spent in performing fixed fee items. If charge is made on a time-spent basis, for each cost item, details are provided for the date, description of the work performed, time spent, person undertaking the work, the relevant charge out rate for that person and total cost for that item, and finally, evidence of the work having been performed.

Of the matters approached on this basis, there have still been differing outcomes, ranging from a 100% recoupment of recovery costs through to determinations that the recovery costs should be reduced, as was the case in Pinehaven and Natchez.

In Pinehaven and Natchez, the Magistrate determined that the recovery costs of the recovery agent and the lawyers should be reduced. In the case of the recovery agent, while finding that the work undertaken was reasonable, the Magistrate formed a view that a lower rate should be applied. It is unclear however what factual basis was relied upon by the Magistrate in finding that a lower rate was more reasonable. The finding was also inconsistent with the view of other Magistrates, who found the same charge out rate to be reasonable.

The Magistrate found the legal rates charged were in the range of those of other law firms. The Magistrate also observed the steps taken for commencing a proceeding, preparing an application for substituted service, and request for default judgment, and found the involvement of a partner was infrequent and commensurate with the level of complexity of the matter.

Even though no adverse finding was made regarding the steps taken or the charge out rates, a global reduction was applied to the legal fees, even though those fees were largely in line with or less than those charged by other firms.

Having regard to the Magistrates comments, it is difficult to reconcile the factual basis relied upon by the Magistrate to find that a reduction should be applied. While the Magistrate referred to the court scale (leading to an inference that the difference between the court scale and the rate charged warranted a reduction), there appears to have been no scrutiny of the kind contemplated in Thompson, and in fact a global assessment was applied, notwithstanding the contrary comments in Thompson.

What have we learnt?

Despite it being historical practise, default judgments cannot be brought before a Registrar if:

- the statement of claim includes any amount of "recovery costs"; and/or
- seeks payment of costs above the court scale.

An application for an amount that includes "recovery costs" must provide sufficient detail for each item charged. A non-detailed approach is not good enough, and the same detailed approach can result in different outcomes.

Practical consequences for bodies corporate

- Unless body corporate managers, recovery agents and lawyers are collectively prepared to limit their costs to the court scale, all default judgment application will need to be brought before a Magistrate.
- The default judgment applications to be brought before a Magistrate will result in higher costs for default judgment applications because of the increased level of legal work required to be undertaken in order to meet the evidentiary onus to prove the reasonableness of the costs.
- Default judgment applications may be able to be heard on papers (without an appearance), although some Magistrates may still require appearances.
- Because of the increase in default judgment applications being made to Magistrates, there is likely to be an increase in workloads, and therefore an increased delay in the turnaround time for such applications, resulting in likely delay of enforcement and ultimate delay of recoupment of unpaid instalments and contributions.
- The reasonableness of "recovery costs" is under constant scrutiny, and subject to differing judicial opinions, it is possible that not all costs will be recoverable in pursuing unpaid instalments and contributions.

Are there any practical solutions?

In short, there are no absolute solutions short of legislative reform. However, we believe the following provides helpful guidance.

If the court is prepared to hear applications for default judgment on the papers, then the time spent by legal practitioners will be less. Less time, less cost. That does not however, resolve the fact that a body corporate needs to now prove that all costs incurred in recovering unpaid instalments and contributions are reasonable, including costs charged by body corporate managers, recovery agents and lawyers. It should not be lost that the onus is high. Streamlining of systems and processes will become paramount.

The most obvious solution (as we see it), is legislative change. A legislative change that creates the equivalent of a court scale, but one that reflects the commercial realities of charges made by body corporate managers, recovery agents and lawyers would be of great assistance. That scale should encompass pre-court steps, such as sending reminder notices and letters of demand. Fixing a scale should remove the element of "reasonableness" and should make "recovery costs" a liquidated debt as opposed to an unliquidated debt, at least for fixed fee items.

A scale should mean that the overwhelming majority of recovery proceedings will be caught, opening the door again for default judgment applications to be brought before the Registrar. Until then, lot owners who pay their instalments and contributions will ultimately bear additional costs caused by lot owners who do not make payment of their instalments and contributions in those instances where "recovery costs" are disallowed by the courts.

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