

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1478/2019

CATCHWORDS

Unlawful removal of funds by manager from owners corporations account to pay termination payment; termination of management contract lawful; removal of funds unconscionable conduct; director knowingly involved in contravention of *Australian Consumer Law*, claim for additional services not contemporaneously invoiced disallowed.

APPLICANT	ACN: 149 972 529 Pty Ltd (formerly Your Body Corporate Pty Ltd)
RESPONDENT	Owners Corporation 1 PS540313Q
WHERE HELD	Melbourne
BEFORE	Member L. Rowland
HEARING TYPE	Hearing
DATE OF HEARING	28, 29 and 30 October 2019
DATE OF ORDER	12 November 2019
CITATION	Your Body Corporate Pty Ltd v Owners Corporation 1 PS540313Q (Owners Corporations) [2019] VCAT 1772

ORDERS

1. The name of the applicant is amended to ACN 149 972 529 Pty Ltd (formerly Your Body Corporate Pty Ltd).
2. The claim is dismissed.
3. Costs are reserved. The respondent must file and serve any submission on costs by 29 November 2019. The applicant must file any submission in reply by 16 December 2019. The proceeding is referred to Member L. Rowland in chambers, after 17 December 2019 to determine any costs applications.
4. Liberty to apply in respect of the funds held by the Tribunal pursuant to the security for costs order dated 23 October 2019.

MEMBER L. ROWLAND

APPEARANCES:

For the Applicant

Mr D. Yarrow of counsel

For the Respondent

Mr G and Mrs S. Veneziano in person

REASONS

Introduction

- 1 Wyndham Harbour A2 Pty Ltd, the developer of Wyndham harbour, seeks an order on behalf of Owners Corporation 1 PS54033Q¹ in proceeding OC1955/2018 for recovery of \$192,465. The developer says the funds were wrongfully removed from the owners corporation's bank account by the owners corporation manager.
- 2 The owners corporation manager in OC1478/2019 claims it is entitled to retain the \$192,465 for damages for wrongful termination of its management contract and services provided.
- 3 These reasons relate to both proceedings.

Background

- 4 Wyndham Harbour, is a staged residential development comprising: apartments; townhouses; a small number of retail lots; and houses abutting a marina. There are now 819 mostly residential lots. The first lots were sold in 2012.
- 5 The development had a history of disputes between the developer, lot owners and the owners corporation managers. Some of these disputes were litigated in the Tribunal. The disputes included the delay in completion and hand over of the bay trail, the completion of the long awaited gymnasium, rotting seaweed collecting in the marina, the division of utility bills for shared water and electricity meters, the payment of landscaping incentives from owners corporation funds, the accounting of bonds, revoking and appointment of owners corporation managers and perceived high owners corporation fees.
- 6 Fortunately, most of these matters are now resolved or close to being resolved. The developer, current manager and lot owners seem to be operating harmoniously.
- 7 In 2016, the owners corporation resolved to remove the incumbent owners corporation manager, Quantum United. Lot owners perceived that Quantum United was sympathetic to the developer, and lot owners' interests were not being protected by that manager.
- 8 On 1 August 2016, Your Body Corporate Pty Ltd (YBC) was appointed owners corporation manager for one year. Its appointment was renewed on 28 July 2017 for a further two years from 1 August 2017. Stephanie Veneziano is the sole director of YBC and Mr Giovanni (also known as Jon) Veneziano was the registered owners corporation manager appointed

¹ By Order dated 19 March 2019 the applicant was authorised under s 165(1)(ba) of the *Owners Corporations Act 2006* to prosecute this proceeding on behalf of the owners corporation.

by YBC to manage the owners corporation. The evidence of Mr and Mrs Veneziano is that they both controlled YBC.

9 Due to a dispute with Quantum United over a termination payment, YBC did not take control of the bank accounts of the owners corporation until 14 March 2017.²

10 YBC received owners corporation funds of \$825,563.56 from Quantum United on 14 March 2017, comprising:³

\$440,180.63	Administration fund
\$268,395.43	Maintenance fund
\$116,987.50	Bond money

11 YBC's appointment proved divisive, with both lot owners and the developer in dispute with YBC. The outcomes of the peripheral disputes are not relevant to these proceedings, other than to say there were strong differences of opinion and strong personality clashes.

12 As a consequence of these disputes, the developer became concerned over the YBC's ability to manage the owners corporation.

13 On 1 March 2018, the owners corporation received Fortiz Accountants' audit report on the financial reports prepared by YBC for the year ended 30 September 2017.⁴ The audit report did not verify that the accounts represented a true and fair view of the financial position of the owners corporation. The report stated:

Subsequent to the transfer of records and funds during FY2017, the current OC Manager has not been able to provide evidence that the financial records that they have been maintaining for the OC are in good order, in particular that the opening balances are correct, that all bond monies received or refunded have been accounted for, that GST on insurance premiums have been correctly recorded and that GST refunds have been appropriately recorded as refunds instead of being erroneously recorded as revenue. It is noted that the OC Manager made changes to the financial records of the OC after conclusion of our audit in November 2017, and have not been willing to furnish these records for our final review to ensure that our audit points have been acted upon.

14 The operating accounts to 30 September 2017, prepared by YBC, contained material discrepancies. Notably, a transfer of approximately \$190,000 from the maintenance fund was used to fund administrative costs, and the bond payments of \$140,000 were recorded as revenue instead of trust funds.

² The owners corporation paid Quantum United \$65,000 for management fees and \$41,000 for loss of profit to resolve the dispute.

³ Fortiz Accountants audit report 20 July 2017 at Court Book pages 123 to 140

⁴ Court Book page 532

- 15 The developer called a special general meeting on 20 April 2018. A quorum was not achieved. The meeting resolved, on an interim basis, to revoke the appointment of YBC and to appoint Excel Strata Managers Pty Ltd for a period of 12 months.
- 16 An annual general meeting (AGM) was scheduled for 5 May 2018 in accordance with terms of settlement of another Tribunal proceeding. On 3 May 2018, the Tribunal granted an interlocutory injunction. This injunction prevented the owners corporation from carrying out any resolutions passed at the AGM until further hearing by the Tribunal on 23 and 24 July 2018.
- 17 Voting at the AGM on 5 May 2018 was by ballot. The votes were counted by the chairperson after the meeting.
- 18 On 10 May 2018, the chairperson announced the AGM voted to set aside the resolution of 20 April 2018 which revoked the appointment of YBC and appointed Excel Strata Management Pty Ltd. Instead, the lot owners voted "not to continue to appoint YBC" and to appoint another manager to be agreed at a further AGM. In counting the votes, the chairperson ruled that the proxies held by Mr O'Halloran, the authorised representative of the developer, were invalid. The proxies were deemed invalid because they had been signed by only one director of the developer. The developer's votes were not counted. Had the developer's votes been counted, the meeting would have ratified the resolutions of 20 April 2018.
- 19 On 11 May 2018, YBC accepted its appointment would be revoked, irrespective of the outcome of the Tribunal proceedings. The voting demonstrated YBC lacked the support of the developer and the lot owners.
- 20 YBC, on 11 May 2018, prepared an invoice for \$192,465. This amount represented the balance of management fees and disbursements under the unexpired term of its management contract. YBC immediately paid itself that sum from the owners corporation maintenance fund. It did not inform the owners corporation of the invoice or the payment. It did not have the approval or consent of the owners corporation to make this payment to itself. YBC justified the payment on the grounds some committee members were aware that a termination payment to YBC would be payable if the management contract was wrongfully terminated.
- 21 At the time YBC made the payment to itself, the owners corporation had not given a notice to terminate the management contract to YBC. The owners corporation was unable to give a termination notice because it was restrained by Tribunal order from doing so.
- 22 In turn, on 18 May 2018, Stephanie Veneziano transferred \$195,000 from YBC's account to her personal account. Stephanie and Giovanni Veneziano admit that the funds were paid to them for their benefit.⁵

⁵ Tribunal Order dated 19 June 2019 records "The first respondent, the second respondent and Mr Giovanni Veneziano each admits and agrees that the sum of \$192,465.00 which was transferred, on or about 11 May 2018, from a bank account of Owners Corporation 1 PS540313Q, and in turn transferred to

- 23 On 1 June 2018, YBC informed the owners corporation committee that the owners corporation files will be ready for collection on 4 June 2018. By return email on 3 June 2018 the chairperson replied

“Good evening Stephanie

Marco and I are a little confused by your email below. Is the email below a letter of resignation? Please respond as a matter of urgency.

Myself as Chairperson, the Secretary nor the OC1 Committee members have not provided any instructions for OC1 PS540313Q files to be made ready, nor anything to suggest to close the OC bank accounts and where cheques need to be sent.

Kind regards

Annette Bugeja

OC1 Chairperson”

- 24 A further email was sent by Committee member Marco Ferreccio to YBC on 4 June 2018

“Dear Jon

Please be informed that as per VCAT instructions of 3rd May 2018, all OC resolutions are to be put on hold, this means that YBC still be the OC1 Manager until the final hearing on 23rd/24th July 2018, where it will be determined what is happening next.”

- 25 By email dated 6 June the lawyers for the owners corporation sent an email to YBC

“The OC notes that YBC will continue performing its function as manager of OC1 Wyndham Harbour until the outcome of the current VCAT proceeding OC940/2018 is released or unless the OC instructs it otherwise.”

- 26 On 4 June 2018, YBC made the records available for collection by the owners corporation. They were collected on 12 June 2018 by the secretary. The records included up to date annual financial statements and a statement of transactions for the owners corporation.⁶ Despite the financial records showing transactions after 11 May 2018, neither document disclosed the payment of \$192,465 to YBC. Mrs Veneziano described this as an “oversight.”

a bank account in the name of the second respondent on or about 18 May, 2018, has been paid to the benefit of the second respondent and Mr Giovanni Veneziano, jointly and severally, and not to any other person or entity.” Mr and Mrs Veneziano confirmed the admission at hearing.

⁶Financial statements printed 4 June 2018 and Income and Expenditure Transaction List as at 4 June 2018 at Court Book pages 154 to 164

- 27 On 24 July 2018, I determined in proceeding OC940/2018 that the proxies held by Mr O’Halloran were valid and the resolutions of 20 April 2018 had been ratified.⁷
- 28 On 2 August 2018, Excel Strata Management Pty Ltd, the new manager, sent a notice of termination to YBC. It relied on the following grounds:
- a “During the period 1 October 2016 to 30 September 2017 Your Body Corporate Pty Ltd transferred the sum of \$190,835.20 from the Owners Corporation maintenance fund to its administrative fund without the authority of the Owners Corporation.
 - b Your Body Corporate Pty Ltd has prepared and presented for the Owners Corporation and its members approved financial statements for the period 1 October 2016 to 30 September 2017 that are not a true and fair view of the Owners Corporation’s financial position as of 30 September 2017. The said financial statements:
 - (a) Contain and refers to monies not relevant to the operation, income and expense of the Owners Corporation;
 - (b) Are misleading in that they contain bond monies collected and paid out to lot owners not relevant to the operation of the Owners Corporation;
 - (c) Do not separately account for the administrative and maintenance funds;
 - (d) Represent ordinary fees being collected that are substantially different that which have been struck as believed by the Owners Corporation.”
- 29 On 7 August 2018, YBC applied to be de-registered. It was formally de-registered on 7 July 2019. It was re-registered for the purpose of these proceedings on 1 August 2019.
- 30 On 15 August 2018, YBC delivered up the records and funds of the owners corporation in four large boxes and four cheques.
- 31 YBC returned total funds of \$325,423 to the owners corporation. This represented a \$500,000 loss of owners corporation funds in the two-year period under YBC’s management. The developer was right to be concerned.
- 32 In mid-August 2018, Excel Strata Management Pty Ltd received the financial records, but was unable to reconcile the financial records with the funds received. Mr Benson, CEO of Excel Strata Management and a Certified Public Accountant, said he has only on 3 or 4 occasions since 2006, received accounts in such a bad state. His firm completely re-created the financial records of the owners corporation from the bank statements to

⁷ Due to the urgency of the application, reasons for decision were given orally on the final day of hearing. A summary of the findings for decision are attached in Appendix A.

calculate opening balances for the accounts. In the course of its examination of the accounts, it discovered that \$192,465 had been paid to YBC.

Termination of management contract

- 33 YBC contends that its appointment was wrongfully terminated and therefore it was entitled to the payment of \$192,465.
- 34 The owners corporation contends that it sought to terminate the management contract on 2 August 2018 and when it did so, it was entitled to do so for fundamental breach of the management contract.
- 35 The owners corporation relies on two grounds for lawfully terminating the contract:
- a. YBC unlawfully paying itself \$192,465 and;
 - b. YBC failing to properly manage the finances of the owners corporation including failing to keep proper financial records.
- 36 For the reasons that follow, I find that the owners corporation lawfully terminated the management contract on 2 August 2018, with effect from 15 August 2018. YBC was in breach of its statutory and contractual duties to act honestly and in good faith with due care and diligence.

Breach of duty: payment of \$192,465

- 37 At the time YBC paid itself \$192,465 on 11 May 2018, its appointment had not been terminated by the owners corporation. The payment was not due and it was unlawful.
- 38 Even if there had been a wrongful termination of the management contract, no payment was immediately due to it. At best, YBC had a right to bring a legal action. Nothing in law or in the management contract entitled YBC to calculate a damages payout and pay it to itself.
- 39 Further, the management contract did not authorise the payment of a damages claim to the manager.⁸ The management contract authorised the manager to pay funds to itself only for the purpose of;
- a). Payment of the Annual fee and Services for carrying out the Services specified in 2. Fee and Service;
 - b). Payment for performing the Additional Services specified in 2. Fee and Service;
 - c). Payment for the Disbursements fees listed specified in 2. Fee and Services.
- 40 The payment to itself of \$192,465 was a breach of its duty to the owners corporation. The statutory duties of the manager are set out in s 122 of the *Owners Corporations Act 2006* as follows:

⁸ Owners Corporation No 2 PS338183E v Strata Plan Pty Ltd (Owners Corporations) [2015] VCAT 1148

122. Duties of manager

- (1) A manager—
 - (a) must act honestly and in good faith in the performance of the manager's functions; and
 - (b) must exercise due care and diligence in the performance of the manager's functions; and
 - (c) must not make improper use of the manager's position to gain, directly or indirectly, an advantage personally or for any other person.
- (2) A manager—
 - (a) holds all money held on behalf of an owners corporation on trust for the owners corporation; and
 - (b) must account separately for the money held for each owners corporation by the manager.

- 41 The statutory duties are repeated in the clause 5 of the management contract.
- 42 The payment of \$192,465 to itself, when there was no legal entitlement, authority or consent to the payment, was a gross breach of the manager's statutory and contractual duties. The seriousness of the breach was exacerbated by concealing the payment from the owners corporation.
- 43 Moreover, the conduct was all the more egregious because the money was removed from the owners corporation's maintenance fund. Under the *Owners Corporation Act 2006*, the maintenance fund is protected. The maintenance fund may only be disbursed in accordance with an approved maintenance plan or by special resolution (urgent repairs excepted)⁹. If there is no maintenance plan, the fund cannot be spent until there is a maintenance plan in place or by special resolution.
- 44 The conduct of YBC in removing the owners corporation's funds was a repudiation of the management contract. By removing the funds and returning the records of the owners corporation on 4 June 2018, YBC renounced its obligations under the management contract. The owners corporation was entitled to accept the repudiation and terminate the management contract.
- 45 However, the owners corporation, restrained by Tribunal order from taking any step, and unaware of the removal of its funds by YBC, requested YBC to remain manager until 24 July 2018 or further order of the Tribunal. YBC agreed to remain manager.

⁹ ss 40 to 45 *Owners Corporations Act 2006*

Breach of duty: Failure to maintain proper accounts

- 46 The owners corporation sought to terminate the management contract on 2 August 2019. It was still unaware of the \$192,465 payment to YBC. Instead, as the grounds for termination, the owners corporation relied upon YBC's failure to properly maintain the financial records and transferring approximately \$190,000 from the maintenance fund to the administrative fund.
- 47 I am satisfied that there was a gross failure to maintain proper financial records and manage the financial affairs of the owners corporation. I base this finding on the following matters;
- a) The audit report of 27 February 2018;
 - b) Payment of \$192,465 to YBC was not recorded in the financial accounts presented at the handovers on 4 June 2018 and 15 August 2018;
 - c) The depletion of owners corporation funds from \$825,563.56 to \$325,423 during the course of YBC's management;
 - d) Reducing owners corporation fees when expenses of the owners corporation were increasing;
 - e) Not properly advising owners corporation of the true state of the financial affairs of the owners corporation;
 - f) The requirement for Excel Strata Management Pty Ltd to completely reconstruct the owners corporation accounts from the bank statements for the duration of YBC's management.
 - g) There are currently no funds in the owners corporation's maintenance fund in contrast to the balance of \$268,395.43 at the commencement of YBC's management.
- 48 Notwithstanding the demonstrated deficiencies of YBC's financial management, Stephanie Veneziano had an unfailing belief in their integrity and competence. Mrs Veneziano proudly stated that: owners corporation fees were reduced under their watch; they delivered transparent management; the grounds were well maintained; and YBC represented lot owner interests in grievances against the developer.
- “Your Body Corporate worked efficiently and effectively with owners, the committee, the chairperson, contractors, governing bodies and the Developer representatives for the estate during very difficult times.”¹⁰
- 49 Mrs Veneziano stated because “no maintenance plan existed in order to have maintenance funds, therefore any funds held under the category of “maintenance” were really surplus funds for unforeseen expenses.”¹¹ The

¹⁰ Paragraph 96 Submissions filed by YBC

¹¹ Paragraph 68 Submissions filed by YBC

treatment of the maintenance fund by YBC was inconsistent with the requirements of the *Owners Corporations Act 2006*.

- 50 Mrs Veneziano defended removing monies from the maintenance fund because administrative fees had been paid into the maintenance fund. There is some validity in that reasoning. It was not a smooth transition from Quantum United to YBC, and, at least initially, YBC was operating without proper bank accounts and records. However, the reasoning has no validity after 20 July 2017, when the auditors had reconciled the accounts instructing YBC to correct the opening balances. YBC did not appear to follow these instructions.
- 51 Mrs Veneziano believed that the resolutions to revoke YBC's appointment and the subsequent legal action against YBC were for personal reasons. She stated that her family had been harassed by members of the owners corporation and this caused her to apply for de-registration of YBC.
- 52 There was a total lack of insight by Mr and Mrs Veneziano into their financial mis-management of the owners corporations funds. Instead, they blamed the committee for overspending and the developer for bringing legal proceedings, incurring legal costs for the owners corporation.
- 53 YBC contended that there was no proper termination of the management contract. YBC argued that the owners corporation was first required to give it a breach notice, and provide a reasonable time to remedy the breach.
- 54 I find YBC repudiated the contract when it removed the funds from the owners corporation account, entitling the owners corporation to terminate the contract. The owners corporation terminated the contract by notice dated 2 August 2018. Although the owners corporation did not rely on the removal funds to terminate the contract, it was justified in terminating the contract for that reason.¹²
- 55 Additionally, the owners corporation was entitled to immediately terminate the management contract for the reasons set out in the notice of termination dated 2 August 2018. The breaches alleged in the notice could not be remedied. Both grounds relied upon by the owners corporation to lawfully terminate the management contract without notice have been proved.

Claim under the Australian Consumer Law

- 56 The claim for return of the Owners Corporation funds against YBC is brought under the following provisions:

¹² “*Shepherd v Felt & Textiles of Australia* stands as authority for the general proposition that a termination of a contract may be justified by reference to any ground that was valid at the time of termination, even though it was not relied upon at the time and even though the ground actually relied on is found to be without substance.” *Sunbird Plaza v Maloney* 166 CLR 245 at p 262

- a. Under the *Owners Corporations Act 2006* as an owners corporations dispute.¹³
- b. Under s 182 of the *Australian Consumer Law and Fair Trading Act 2012* (ACL&FT Act) as a consumer and trader dispute.
- c. Under s 224 of the ACL&FT Act for a breach of the *Australian Consumer Law*¹⁴

57 The claim against YBC under the *Australian Consumer Law* is made under ss 20 and 21 for unconscionable conduct. The owners corporation claims that by removing the funds in the circumstances described in these reasons, YBC has engaged in unconscionable conduct contrary to ss 20 and 21 of the *Australian Consumer Law*. Section 20 provides:

Unconscionable conduct within the meaning of the unwritten law

- (1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.

Section 21 expands the meaning of unconscionable conduct within the meaning of the unwritten law.

- 58 The courts have given statutory unconscionability its ordinary meaning: “showing no regard for conscience; irreconcilable with what is right or reasonable.” However, the conduct must be more than simply unfair or unreasonable conduct. There must be an element of moral taint or unethical conduct contrary to the norms of honesty and fair dealing.¹⁵
- 59 I find that the removal of the owners corporation’s funds, without any legal entitlement, authority or consent, was unfair, unreasonable and tainted by lack of business ethics. The conduct was a breach of ss 20 and 21 of the *Australian Consumer Law*. The claim against YBC under s 236 of the *Australian Consumer Law* is proved in the sum of \$192,465.
- 60 The owners corporation also alleged that the conduct was misleading or deceptive, contrary to s 18 of the *Australian Consumer Law*. Having found that the conduct is unconscionable, it is not necessary for me to make a finding on whether the conduct was also misleading or deceptive.

Claim against Stephanie and Giovanni Veneziano

61 The claim against Stephanie and Giovanni Veneziano is brought under the *Australian Consumer Law*¹⁶. The claim is brought under s 236 which

¹³ The jurisdiction under the *Owners Corporations Act 2006* enables determination of any dispute between a manager and owners corporation and is not limited to breaches of the *Owners Corporations Act 2006*. See *Owners Corporation 4 PS539033E v Bensons Property Group Pty Ltd (Owners Corporations)* [2018] VCAT 1769 (16 November 2018)

¹⁴ The Australian Consumer Law text being Schedule 2 of the *Competition and Consumer Act 2010 (Commonwealth)* applies as a law of Victoria and is known as the *Australian Consumer Law (Victoria)*

¹⁵ See *DCA v Scully* [2013] VSCA 292.

¹⁶ It was not contended that Stephanie and Giovanni Veneziano were managers or former managers within the meaning of s 163 of the *Owners Corporation Act 2006*. Therefore, the dispute between

enables the owners corporation to bring an action against any person involved in the unconscionable conduct. Section 236 provides:

236 Actions for damages

- (1) If:
- (a) a person(the claimant) suffers loss or damage because of the conduct of another person; and
 - (b) the conduct contravened a provision of Chapter 2 or 3;¹⁷

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention

62 Involved has been given a wide meaning. It is defined by the *Australian Consumer Law* as follows:

"involved" : a person is involved, in a contravention of a provision of this Schedule or in conduct that constitutes such a contravention, if the person:

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced, whether by threats or promises or otherwise, the contravention; or
- (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.

63 In order to be found personally liable under s 236, Mr and Mrs Veneziano must have been intentional participants in the contravention. The necessary intention is proved by their knowledge of and involvement in the unconscionable conduct.¹⁸

64 Mr and Mrs Veneziano, as the controlling minds of YBC, were involved in procuring the contravention of the *Australian Consumer Law*. By Mr and Mrs Veneziano preparing the unlawful invoice, and removing the owners corporation funds, they procured the contravention of the *Australian Consumer Law* by YBC. The funds were ultimately disbursed to an account held by Stephanie Veneziano for the benefit of both Mr and Mrs Veneziano. I am satisfied that they were intentional participants in the contravention of the *Australian Consumer Law*.

65 I find the claim against Stephanie and Giovanni Veneziano under s 236 of the *Australian Consumer Law* is proved in the sum of \$192,465.

them and the owners corporation is not an owners corporation dispute. The claim against Mr and Mrs Veneziano cannot be heard by the Tribunal under the *Owners Corporation Act 2006*.

¹⁷ Sections 20 and 21 are provisions of Chapter 2 – General Protections of the *Australian Consumer Law*

¹⁸ *Yorke v. Lucas* (1985) 158 CLR 661

YBC's claim for damages and payment for additional services

- 66 YBC's claim is in two parts. The first part is for loss of profit of \$92,277.74 for wrongful termination of the management contract. The second part is for payment of \$100,187.26 for additional services under the management contract.
- 67 Initially, YBC justified the payment of \$192,465 to itself on the basis that it was entitled to the balance of fees under the management contract. It later justified the payment by reference to an amended invoice dated 15 August 2018. The amended invoice claimed loss of profit and fees for additional services. The amended invoice was not provided to the owners corporation until 19 June 2019.¹⁹

The claim for loss of profit

- 68 The claim for loss of profit is dismissed because YBC repudiated the contract and the owners corporation lawfully terminated it. YBC is not entitled to damages for breach of contract because the contract was not breached by the owners corporation.

The claim for additional services

- 69 The management contract provided for payment of an annual fee of \$192,465 (calculated as \$235 x 819 lots) payable quarterly in advance. The annual sum was payable for the services and disbursements described under clause 2 of the management contract. The annual fee and disbursements were paid up to 31 July 2018.
- 70 The management contract also provided for payment of additional services, in accordance with an hourly rate of \$165 per hour or a fixed sum per item. The schedule sets out the additional services which may be claimed. Importantly, the contract provides that additional services are to be paid "as when they occur/when used."
- 71 For the years ended 30 July 2017 and 30 July 2018, YBC charged the owners corporation approximately \$10,000 per annum for additional services. The additional fees were largely for attendances at committee meetings and upon solicitors for various Tribunal proceedings. The fees for additional services were charged as and when they were incurred. The last invoice dated 30 July 2018 was for additional work carried out on 20 and 21 July 2018.
- 72 YBC now seeks payment of a further \$100,187.26 for additional services, said to have been carried out during its appointment. The explanation for the delay in invoices was time pressure. This is not a satisfactory explanation.

¹⁹ YBC's Amended Points of Claim paragraph 20 and developer's Points of Defence dated 20 September 2019

73 The owners corporation fairly and properly conceded the following fees for additional services were payable:

a.	Pro rata management and disbursement fees to 15 August 2018	\$7909.52
b.	Travel time on 15 August 2018	\$330
c.	Affixing common seal x 2	\$36.30
d.	Major works (5% of total)	\$1,231.13
e.	Travel time	\$3,300
	Total	\$12,806.95

74 The remaining fees claimed in the 15 August 2018 invoice are not proved for the following reasons;

- a. The invoice of 15 August 2018 is not a genuine invoice. It was not delivered to the owners corporation until 19 June 2019. Mrs Veneziano said the amended invoice of 15 August 2018 was delivered in one of the four boxes of documents delivered to the owners corporation. I do not accept that evidence. Mr Benson said he did not see the amended invoice in the documents delivered to him. YBC's first "affidavit and defence" dated 2 April 2019 did not refer to or attach the amended 15 August 2018 invoice. The "affidavit and defence" is a substantial document of 25 paragraphs and 24 attachments. Paragraph 5 sets out in 4 paragraphs the defence to retaining \$192,465 of owners corporation funds. No mention is made of the 15 August 2018 invoice or any claim for additional services. I find that the invoice of 15 August 2018 was not created until after 2 April 2019. It was not delivered to the owners corporation until 19 June 2019;
- b. The invoice was not created in the ordinary course of business. It was created to justify retention of the \$192,465 unlawfully removed from the owners corporation's account;
- c. The invoice for additional services was created outside the time limit provided by the management contract without a satisfactory explanation. The delay in providing the invoice has prejudiced the owners corporation's ability to challenge the items claimed;
- d. The hours claimed were not proved. The hours are not calculated by reference to a time sheet or contemporaneous diary records. Instead, the hours are estimated. I am not satisfied that the hours claimed are correct. For example, 19 hours is claimed for responding to telephone calls and emails after YBC's termination. The number of telephone calls or emails has not been stated. I do not accept 19 hours has been expended in responding to telephone calls and emails after 15 August 2018.

- e. The delay in invoicing prejudiced the owners corporation's ability to re-negotiate the 2017 management contract. If the owners corporation was aware that \$50,000 in additional fees would be claimed for the 2016 year, it may have decided not to re-appoint YBC or varied the terms of the contract;
- f. YBC claimed more than 100 hours for additional accounting and banking services. I reject these claims on the further ground that the accounting and banking services were not carried out to a satisfactory standard. The accounts had to be reconstructed by Excel Strata Management Pty Ltd.
- g. YBC claimed fees for additional services which were covered by the annual fee. The work covered by the annual fee cannot be claimed as additional services. An example is the claim for \$7,623 (@\$24.20 per lot) to add 315 lots to Owners Corporation No. 1. This work is not an additional service because it is covered under the annual fee to "maintain roll of owners names and addresses". The claim was made under "establishment of records and setting up of owners corporation." This item does not allow a fee when new lots are added to the owners corporation.
- h. Some of the fees claimed are not payable under the management contract. For example, 19 hours for responding to telephone calls and emails after the contract had been terminated cannot be claimed.
- i. Having regard to; Mrs Veneziano's untruthful evidence of when the invoice of 15 August 2018 was created; the exaggerated number of hours claimed; the failure to invoice for additional services as and when they were incurred, I am unable to determine if any hours or fees claimed (apart from those conceded by the owners corporation) are properly due and owing.

75 I allow \$12,806.95 on the claim in proceeding OC1478/2019. The \$12,806.95 is to be set-off against the interest owing by YBC to the owners corporation allowed below. The claim by YBC will be dismissed.

Claim for interest

76 The owners corporation claims interest of \$25,508.46 calculated at the penalty interest rate to the date of hearing. Sections 184 of the *Australian Consumer Law and Fair Trading Act 2012* and 165(2) of the *Owners Corporations Act 2006* empower the Tribunal to make an award of interest based on the rate fixed under s 2 of the *Penalty Interest Rates Act 1983*. The claim against YBC is made under ACL&FT Act and the *Owners Corporations Act 2006*. Interest calculated at the penalty interest rate is appropriate and I allow it against YBC.

77 The claim for interest at the penalty interest rate against Mr and Mrs Veneziano has not been articulated. The claim against Mr and Mrs L

Veneziano has been brought under s 236 of the *Australian Consumer Law* and s 224 of the ACL&FT Act. Neither of those provisions empower the Tribunal to award interest at the penalty interest rate. Under s 236 of the *Australian Consumer Law*, the Tribunal may award compensation for loss and damage. Loss and damage includes loss and damage in the nature of interest. If the owners corporation has suffered a loss of interest, it must prove the loss and damage. There being no evidence of actual loss of interest, the claim against Mr and Mrs Veneziano for interest is dismissed.

MEMBER L. ROWLAND