BROADLEY REES HOGAN | NEWS

E-alert: Costs charged by Resident Manager upheld by Court of Appeal – Body Corporate Management Rights Update

By ,

The Queensland Court of Appeal recently ended a long-running saga in which a resident manager of a Gold Coast apartment Complex had been prosecuted through the Queensland Civil and Administrative Tribunal. While a relief for the resident manager, the decision in *Peterson Management Services Pty Ltd v Chief Executive, Department of Justice and Attorney General*[2017] QCA 89 is a major win for management rights operators in Queensland. Although the decision relates to the now repealed *Property Agents and Motor Dealers Act 2001* (**PAMDA**), it still has relevance to the current legislation, ie the *Property Occupations Act 2014*.

What happened?

Peterson Management Services Pty Ltd (**Peterson**) conducted a caretaking and letting business at the resort. It entered into a letting appointment with a number of apartment owners. As is common practice, the form of appointment contained a schedule of lump sum fees for particular services that Peterson would undertake for the owners.

The Department alleged that Peterson had committed the following breaches of the PAMDA:

1. General cleaning charge – the letting appointments disclosed fixed sum 'general cleaning charges' to be charged by Peterson, for instance, the general cleaning charge for a 1 bedroom unit was stated to be $64.90. However, these charges were more (in some cases over double) the cost actually incurred by Peterson in engaging a third party cleaner to undertake the cleaning.
   The Department alleged that Peterson breached section 133 of the PAMDA, which provided that a letting appointment must disclose: '*(i) the fees, charges and any commission payable for the service; and (ii) the expenses, including advertising and marketing expenses, the agent is authorised to incur in connection with the performance of each service or category of service.*'According to the Department, section 133 was breached because the letting appointments did not disclose what component of the general cleaning charges was actual expenses incurred by Petersen and what component was a 'reward' or a mark-up charged for arranging the service. The Department argued that the intention of the PAMDA is that a letting agent's charge for services, and the expenses charged by third parties engaged to perform the services, should be distinctly stated so that the apartment owner has the opportunity to negotiate or decline the services offered.
2. Foxtel charge – the circumstances of this alleged breach were the same as above. The letting appointments disclosed a fixed monthly charge for Foxtel connection to the apartments. However, the fixed monthly charge was more than the amount that Foxtel charged Peterson per month.
3. Commission charged from Wotif bookings – The letting appointments allowed Peterson to claim a commission of 12% + GST on apartment bookings. The apartments were made available for hire via the Wotif website. When a guest paid for an apartment via the Wotif website, Wotif would collect a 10% commission and then remit the balance to Peterson. Peterson charged the owners 12% commission on the amount of rent collected by Wotif from the guest, and not on the balance rent that Wotif remitted to Peterson. The Department alleged that this was a breach of section 139 of the PAMDA because

Peterson charged commission on a rental amount more than the rental amount that Peterson actually collected. Section 139 read as follows '*(1) This section applies to a real estate agent who performs, for the payment of a commission, a service of selling or letting property or collecting rents. (2) The real estate agent must not claim commission worked out on an amount more than the actual sale price of the property or the amount collected.*'

What did the Court of Appeal say?

The Court found that Peterson had not committed any of the above breaches.

1. In relation to the general cleaning charge and Foxtel charge, the Court found that the lump sums stated in the appointment complied with the disclosure requirements of the PAMDA. The crux of the Court's reasoning is that the apartment owners received the services that they had contracted for at the price that they had agreed to pay. The letting appointments needed to disclose itemised expenses for performing the services (ie the costs charged by the external contractor and the costs charged by Foxtel) *only if Peterson wanted to recover those charges from the apartment owners*. Peterson did not seek to do that – rather it offered a fixed fee for the services and took the risk that over the life of the letting appointments it could outsource those services at its cost and still make a profit. As the Court stated, '*the nature and expenses of the labour, materials and other things the applicant obtained to provide the service was a matter for it to arrange*.'
2. In relation to the commission charged on Wotif receipts, the Court found that the apartment owners had authorised Peterson to appoint Wotif and Wotif was therefore the agent of Peterson. As such, the amount received by Wotif from a guest was 'the amount collected' within the meaning of section 139. On that basis, it was proper for Peterson to charge its commission on the full amount collected by Wotif. Section 139 does not differentiate between rent collected directly by a letting agent and rent collected by Wotif or another provider on behalf of the letting agent.

Points to take away

Firstly, the decision relates to the now repealed PAMDA. Caution should be adopted in applying this decision to the operation of the current *Property Occupations Act 2014*.

Secondly, the decision affirms common practice in the management rights industry of providing fixed fee charges that do not contain itemised breakdowns. Like any other business, the Court acknowledged that letting agents are able to outsource the services that they have agreed to provide for a fixed fee, with the intention of making a profit, provided that the fee is properly disclosed in the appointment. Nonetheless, letting agents should ensure that their appointments are carefully drafted so that their fees and charges are properly described in the appointment and not listed as 'expenses.' If any 'expenses' are to be passed on to the apartment owner (as opposed to being absorbed in the fixed fee), those expenses must be clearly itemised.

For apartment owners, the case demonstrates that consumer protection legislation only goes so far. If you are an apartment owner, it is your responsibility when negotiating with the letting agent to consider all proposed charges and to investigate whether you are getting a good deal.

Should you wish to discuss any matters arising out of this article, please contact the author:

,

,

Broadley Rees Hogan (BRH Lawyers) is an independent boutique firm, specialising in corporate, commercial, property, construction and litigation. Based in Brisbane, we act for clients across the country and internationally – **for an unassuming firm, we know how to deal big**

.

For more information, please visit **www.brhlawyers.com.au** or **contact us** on (07) 3223 9100.