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# SPECTACULAR FAILURES: UNSUCCESSFUL ATTEMPTS TO TERMINATE CARETAKERS

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## SPECTACULAR FAILURES: UNSUCCESSFUL ATTEMPTS TO TERMINATE CARETAKERS

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Is an owners corporation able to terminate the appointment of a caretaker with whom it is dissatisfied? In some cases this is possible. But in recent years, there have been several cases involving attempts by owners corporations to rid themselves of caretakers who they consider are underperforming and these attempts have been spectacularly unsuccessful. In this article, we review one of those cases.

### **World Tower Case**

Meriton Apartments Pty Ltd v Owners Strata Plan No 72381 [2015] NSWSC 202; (No 2) [2016] NSWSC 819; (No 3) [2016] NSWSC 1348

### **The Facts**

World Tower is a high rise building in the Sydney CBD. It was developed by Meriton Apartments Pty Ltd (Meriton). World Tower contains three components: a low rise, mid rise and high rise component.

By February 2004, the low rise component of World Tower had been subdivided by a strata plan. But the mid and high rise components were still owned by Meriton. On 4 February 2004, Meriton entered into a caretaker agreement with itself (as the owner of the mid rise and high rise sections of the building) and with the owners corporation of the low rise section. The agreement appointed Meriton as the caretaker of the building for a term of 10 years for an initial annual caretaker fee of \$1.58 million exclusive of GST.

In April 2004, the strata plan for the mid rise section of the building was registered. On 11 October 2004, the owners corporation of the mid rise section (owners corporation) held its first AGM. Immediately after the first AGM, the owners corporation held an extraordinary general meeting at which it passed a resolution to affirm and become a party to the caretaker agreement with Meriton. The representative of Meriton attended that meeting and held sufficient proxies to control the outcome of the vote on the motion for the owners corporation to affirm the caretaker agreement. However the owners corporation never signed the caretaker agreement.

Between 2004 and 2010, the performance of Meriton as caretaker was reasonably uncontentious. However, in 2010, tensions first appeared between the mid rise owners corporation and Meriton which ultimately led to the owners corporation purporting to terminating the caretaker agreement in July 2012. Meriton did not accept that the caretaker agreement had been lawfully terminated and attempted to continue to provide services under the agreement. However, the owners corporation refused to accept those services and continued to assert that the caretaker agreement had come to an end.

This standoff culminated in Meriton commencing proceedings in the Supreme Court seeking, among other things, a declaration that the caretaker agreement remained on foot and to recover unpaid caretaker fees under the agreement from the owners corporation. The owners corporation issued a cross claim in the Supreme Court proceedings in which it sought an order cancelling the caretaker agreement

on the grounds that Meriton Apartments breached fiduciary duties it owed the owners corporation at about the time the caretaker agreement was entered into in February or October 2004.

### **Was the Owners Corporation Bound by the Agreement?**

The Court concluded that the owners corporation was bound by the whole of the caretaker agreement even though it never signed the agreement. This is because Meriton had provided services under the agreement for about eight years and the owners corporation paid Meriton for those services in accordance with the agreement. This meant that the owners corporation was only entitled to terminate the caretaker agreement in accordance with the agreement or under the general law.

### **Was the Caretaker Agreement Terminated?**

The owners corporation argued that Meriton breached the caretaker agreement in a variety of ways as a result of which it was entitled to terminate the agreement. It said that Meriton did not account to it for security deposits it received for swipe cards it issued, denied access to contractors to the common property, used a store room to provide maintenance services beyond its occupation entitlements under the agreement, failed properly to manage lift bookings for owners and tenants moving into and out of apartments in the mid-rise section of the building, misused swipe cards, levied excessive charges over and above the fees to which it was entitled under the agreement, replaced the locks to a plant room denying the owners corporation access to the room and excluded owners corporation representatives from World Tower building committee meetings.

Ultimately, the Court concluded that Meriton did not breach the agreement at all or in a sufficiently serious way or in a way that was not promptly remedied as a result of which the owners corporation was not entitled to terminate it. Therefore, the Court ruled that the owners corporation's purported termination of the caretaker agreement in July 2012, when it had no basis for that termination, was wrongful and amounted to a repudiation of the agreement.

### **What was the Consequence of the Wrongful Termination of the Agreement?**

Meriton claimed that it was entitled to be paid its full remuneration under the caretaker agreement for the period between July 2012 (when the owners corporation purported to terminate the agreement) and February 2014 (when the agreement expired by the effluxion of time). The owners corporation said that if it wrongfully terminated the agreement, Meriton was only entitled to claim damages for its loss of profit, not its full remuneration, for that period. The Court agreed with the owners corporation. It concluded that

Meriton was only entitled to be awarded damages for its loss of profit between the time the owners corporation wrongfully terminated the agreement and the expiry of the agreement.

The Court reached this conclusion because it did not consider that the law allowed an innocent party to an agreement which has been wrongfully terminated by the other party to be awarded its full remuneration for the balance of the term of the agreement when the innocent party does not actually perform its obligations under the agreement during that period (because the other party will not permit it to) or obtain a Court order requiring the other party to allow the innocent party to perform the agreement. Here, the owners corporation locked Meriton out of the mid rise section of the building which meant that Meriton could not provide services under the agreement after the owners corporation purported to terminate it. The Court also refused to make an order for specific performance to require the owners corporation to comply with the agreement and permit Meriton to provide services under the agreement essentially because the relationship between the parties was broken beyond repair, the agreement had expired and Meriton had an adequate remedy for damages for loss of profits.

Ultimately, the Court held that Meriton was entitled to claim its loss of profits between the time the owners corporation wrongfully terminated the agreement and the expiry of the agreement. This was calculated by taking the caretaker fees Meriton would have been entitled to be paid during the period and deducting Meriton's expenses that would have been incurred during that period such as wages, fees paid to sub-contractors for security and cleaning services, rent and overheads. The amount of Meriton's loss of profit was \$282,502.39.

### **The Claim for Breach of Fiduciary Duty**

The owners corporation argued that Meriton's control of the owners corporation when it came into existence, and Meriton's position as developer, meant that Meriton owed fiduciary duties to the owners corporation. These were duties not to place itself in a position of conflict of interest and duty, not to profit from contracts entered into with the owners corporation and not to act to the detriment of the owners corporation. The owners corporation claimed that Meriton breached those fiduciary duties by charging well in excess of market rates for the caretaker services that it provided and by not disclosing to owners that it would make excessive profits under the agreement. The owners corporation claimed that Meriton should account to it for the profits it made under the caretaker agreement owing to its breach of fiduciary duties.

### **Did Meriton Owe Fiduciary Duties?**

The Court accepted that a developer in the position of Meriton owed the owners corporation fiduciary duties. However, the Court considered that the fiduciary duties which the owners corporation claimed

existed were cast too wide. The Court concluded that the key content of the fiduciary duty owed by a developer such as Meriton to an owners corporation it establishes is one to give full disclosure of all material information to an independent board or group of owners. The Court held that if that disclosure



does not take place and a breach of fiduciary duty occurs, the owners corporation will have an opportunity to disclaim or affirm (or take or leave) the agreement in question, but not obtain an account of profits made by the developer through that agreement or the entry into it. Put another way, the Court did not consider that the owners corporation was entitled to take the benefit of services provided by Meriton under the caretaker agreement for the many years since 2004 and, at the same time, claim an account of profits against Meriton.

### **Did Meriton Breach its Fiduciary Duties?**

The question as to whether or not Meriton breached its fiduciary duties turned on whether Meriton provided the mid rise owners with adequate disclosure in relation to the caretaker agreement that was approved at the October 2004 extraordinary general meeting.

The owners corporation complained that Meriton did not disclose to owners what the remuneration of the caretaker would be. The Court rejected this argument because the February 2004 caretaker agreement which did disclose the remuneration of the caretaker was in circulation to purchasers and the notice of the October 2004 extraordinary general meeting informed owners that the agreement could be inspected at the offices of the strata manager.

The owners corporation complained that Meriton did not disclose to owners the identity of the caretaker. The Court disagreed because the off the plan contracts for the purchase of lots in mid rise indicated that Meriton or its nominee would be the caretaker.

The owners corporation also argued that Meriton did not disclose to owners that it would be entitled to charge well in excess of market rates for the caretaker services that would be provided under the agreement. The Court considered that Meriton was only required to make this disclosure if the profits it would make on the agreement would be excessive or not within reasonable limits. The Court concluded that the owners corporation had not demonstrated that Meriton would make excessive profits on the caretaker agreement. Indeed, the Court accepted Meriton's evidence that at the time the caretaker agreement was approved by the owners corporation in October 2004 it considered that it would make a profit under the caretaker agreement based on a margin of 20% which was fairly standard within the industry.

For these reasons, the Court concluded that the owners corporation had not established that Meriton breached its fiduciary duties concerning the caretaker agreement in its capacity as the developer of World Tower.



### **The Wash Up**

In the end result, the Court concluded that the owners corporation wrongfully terminated the caretaker agreement and was liable to pay Meriton damages for its loss of profit between the time the agreement was wrongfully terminated and the expiry of the agreement in the sum of \$282,502.39 with interest. The Court also concluded that whilst the owners corporation demonstrated that Meriton, as the developer of World Tower, owed the owners corporation fiduciary duties in relation to the caretaker agreement, Meriton did not breach those duties.

### **Conclusion**

The Meriton case is another example of an unsuccessful attempt by an owners corporation to rid itself of a caretaker with which it is dissatisfied. The case also highlights the difficulties that an owners corporation will encounter proving that a caretaker has breached a caretaker agreement in a manner that entitles the owners corporation to terminate the agreement and in demonstrating that a developer who causes the owners corporation to enter into an agreement when still in control of the owners corporation has breached the fiduciary duties it owes the owners corporation.

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