DISTRICT COURT OF QUEENSLAND

CITATION:	*Sherwood Forest Corporation Pty Ltd v Body Corporate for Centenary Mews* [2021] QDC 166
PARTIES:	**SHERWOOD FOREST CORPORATION PTY LTD** (Plaintiff) **v** **THE BODY CORPORATE FOR CENTENARY MEWS CTS 45608** (Defendant)
FILE NO/S:	BD 2166/18
DIVISION:	Civil
PROCEEDING:	Trial
DELIVERED ON:	5 August 2021
DELIVERED AT:	Brisbane
HEARING DATE:	7, 8, 9, 15 June 2021
JUDGE:	Barlow QC DCJ
ORDER:	**The plaintiff's claim be dismissed.**
CATCHWORDS:	REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – GENERALLY – defendant entered into service contract for common property on community title scheme with plaintiff – plaintiff allegedly breached obligations under service contract – defendant sent remedial action notice to plaintiff – plaintiff remedied some but not all of the issues outlined in notice – defendant terminated on the basis that the plaintiff had failed to comply with notice – plaintiff argued requirements of notice had been varied by verbal agreement – whether remedial action notice valid – whether plaintiff was in breach of service contract – whether requirements had been varied by any subsequent verbal agreement. REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – GENERALLY – defendant entered into service contract for common property on community title scheme with plaintiff – plaintiff allegedly breached obligations under service contract – members of defendant resolved to terminate the service contract – plaintiff argued certain relevant material had not been put before the members prior to decision to terminate which should have been

considered – whether decision to terminate service contract required to be made reasonably under s 94 of *Body Corporate and Community Management Act 1997* – whether decision to terminate contract was made reasonably in any event.

Body Corporate and Community Management Act 1997, ss 10, 94, 100
Body Corporate and Community Management (Standard Module) Regulation 2008, ss 131, 159, 165
Building Fire Safety Regulation 2008, s 54
Civil Proceedings Act 2011, s 58

Ainsworth v Albrecht (2016) 261 CLR 167, considered
Body Corporate for Beaches Surfers Paradise v Backshall [2016] QCATA 177, cited
Body Corporate for the Reserve v Trojan Resorts Pty Ltd [2017] QCATA 53, considered
Burger King Corporation v Hungry Jack's Pty Ltd (2001) 69 NSWLR 558, cited
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, cited
Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (2010) 383 ALR 677; [2010] NSWCA 268, cited
The Sands Gold Coast Pty Ltd v Body Corporate for the Sands [No 2] [2016] QCAT 365, approved
Trojan Resorts Pty Ltd v Body Corporate for the Reserve [2015] QCAT 337, considered

COUNSEL: B W J Kidston for the plaintiff

J P Hastie for the defendant

SOLICITORS: Stratum Legal for the plaintiff

Hynes Legal for the defendant

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Introduction

[1] Centenary Mews is a community titles scheme in Boondall, created on 28 January 2014. It comprises 25 lots (on which townhouses are constructed) and common property. It fronts Bicentennial Road for over 100 metres, along most of which are a wooden paling fence and, in places, garden beds and a hedge. A copy of the plan of the scheme, coloured to show the garden beds and plants on the common property,[1] is appendix 1 to these reasons. The defendant is the body corporate for the scheme.

[2] By an agreement made on 28 January 2014, the defendant body corporate appointed Sherwood Forest as a service contractor to carry out listed duties that, in essence, constituted the maintenance and, where necessary, the repair of the common property. That appointment was for a term of 10 years.

[3] The body corporate contends that it lawfully and effectively terminated that agreement on 12 September 2016, due to Sherwood Forest's repeated failure to carry out its duties adequately and, in particular, its failure to comply with a remedial action notice given to it by the body corporate on 15 June 2016. Sherwood Forest contends that it did not breach the agreement or, even if it did, the remedial action notice was not valid, in any event Sherwood Forest complied with it in the relevant time (or as varied by agreement) and the body corporate did not act reasonably in deciding to terminate the agreement. Sherwood Forest alleges that the body corporate repudiated the agreement and consequently seeks damages.

Relevant statutory framework

[4] Being a body corporate, the defendant is regulated by the *Body Corporate and Community Management Act* 1997 and, at the time, the *Body Corporate and Community Management (Standard Module) Regulation* 2008 (the **Module**).

[5] The body corporate is required by the Act to administer the common property.[2] It is also required to act reasonably in anything it does in fulfilling that obligation, including making a decision.[3] A decision of the committee of the body corporate is a decision of the body corporate, except where the Act requires that the decision be made by a general meeting of the body corporate's members. The committee must act reasonably in making a decision.[4]

[6] A "service contractor" is a person engaged by the body corporate for a term of at least one year to supply services (other than administrative services) to the body corporate for the benefit of the common property or lots included in the scheme. Sherwood Forest was a service contractor for the body corporate under the agreement and the agreement is an "engagement" for the purposes of the Act.

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1 Exhibit 10 at trial. There was also a garden bed abutting the carpark at the north-eastern end of the scheme, extending along the 13 metre eastern edge of the carpark. However, that bed appears not to be on the common property, but on adjoining land. This is apparent from both exhibit 10 and an aerial photograph of the scheme in the first page of the exhibit to an affidavit of the plaintiff's solicitor, Michael Young.

2 Act, s 94(1).

3 Act, s 94(2).

4 Act, s 100.

[7] A body corporate must administer, manage and control the common property and body corporate assets reasonably and for the benefit of lot owners and comply with the obligations with regard to common property and body corporate assets imposed under the module applying to the scheme.[5]

[8] Part 5 of the Module provides for the grounds on which a body corporate may terminate the engagement of a service contractor and the steps it must follow to do so. Those grounds and steps are the only reasons for and method by which a body corporate can terminate a service contract: the ordinary principles of common law by which a party to a contract may lawfully terminate it for breach or repudiation by the other do not apply to bodies corporate with respect to service contracts.[6] Relevantly, s 131 provides that the body corporate may terminate an engagement if the service contractor fails to carry out its duties under the engagement. However, it may only do so if it has given the contractor a remedial action notice in accordance with subsection (4), the contractor fails to comply with it within the period stated in the notice and the termination is approved by an ordinary resolution of the body corporate (that is, in a general meeting).[7]

[9] The requirements for a remedial action notice are specified in subsection 131(4) of the Module. Relevantly, it must state that the body corporate believes that the contractor has failed to carry out duties under the engagement; details of the contractor's failure sufficient to identify the relevant duties; that the contractor must, within the period stated in the notice, carry out the duties; and that, if the contractor does not comply with the notice in the period stated, the body corporate may terminate the engagement.

[10] The obligation to act reasonably, of course, applies to a body corporate's decision to issue a remedial action notice and its decision to terminate a service contractor's engagement.

[11] Also relevant (as they are expressly referred to in the agreement) are sections 159 and 165 of the Module. They relevantly provide that the body corporate must maintain common property and body corporate assets in good condition, including, to the extent that common property is structural in nature, in a structurally sound condition.

[12] The scheme's first community management statement included by-laws that appear not to have been changed subsequently. By-law 3.5 relevantly provides that an owner or occupier of a lot must keep the yard (defined as the external parts of the lot) in clean and tidy condition and maintain the plants in the yard, including regularly watering and feeding, weeding, trimming and replacement if necessary. If the owner or occupier fails to do so the body corporate may enter the lot to carry out those duties, in which case the owner must reimburse the body corporate for the costs of doing so.

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5 Act, s 152(1).

6 *Henderson v The Body Corporate for Merrimac Heights* [2011] QSC 336, [98]. There is no similar regulation of the grounds for and method by which a service contractor may terminate the contract. Therefore, a service contractor may terminate a service contract with a body corporate if the body corporate repudiates it.

7 Subsection 129 of the Module provides that a body corporate may only terminate a service contract if the termination is approved by ordinary resolution of the body corporate.

The agreement

[13] By clause 3 of the agreement, Sherwood Forest relevantly was obliged to carry out what are referred to as the Service Contractor's Duties, to comply with reasonable directions given to it by the body corporate about the performance of those duties and to ensure compliance with the agreement by its own contractors. It could engage contractors, at its own cost, to assist it in carrying out its duties. It could spend up to the "Expenditure Limit" to purchase consumable supplies and materials, to engage trades-persons to carry out "Skilled Work" and for other purposes reasonably necessary to perform its duties.[8] It was obliged to provide all equipment, machinery and tools necessary to carry out its duties and to keep them in good working condition.

[14] The agreement defined "Skilled Work" as meaning "those parts of the Service Contractor's Duties which can only be properly carried out by a skilled tradesman or a tradesman required to hold a licence and would not usually be carried out by a Service Contractor having regard to the practice of other Service Contractors operating in south east Queensland." It also defined "Scheme Property" as meaning "the common property for the Scheme (as defined in the Act) including all buildings, improvements, landscaping and service which are on or part of the Scheme Property."[9]

[15] The schedule to the agreement set out the Service Contractor's Duties. They were extensive, but most relevantly included the following:

> **3. Maintenance and repair – general**
>
> Maintain the Scheme Property in a first class condition consistent with the high quality and standard of the development and in accordance with the Body Corporate's obligations under the Act (see Standard Module, s159 and s165):
>
> (a) regularly clean, sweep, wash and vacuum (where necessary) the Scheme Property, including all walkways, footpaths, access roads, driveways, garbage areas and visitor car parks but excluding rooves [sic] and gutters;
>
> (b) regularly water, fertilise, weed and maintain lawns, gardens and potted plants on the Scheme Property;
>
> (c) regularly spray plants to prevent damage from pests and treat lawns to eradicate weed growth;
>
> (d) regularly test all other plant and equipment;
>
> (e) promptly arrange to repair or replace any service, equipment or part of the Scheme Property which is defective, unsafe, or otherwise requires repairs or maintenance;
>
> (f) buy, or otherwise acquire and install any fixtures, fittings, equipment requirements or other additions to the Scheme Property as the Body Corporate reasonably requires to maintain the Scheme Property; and

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8 "Expenditure Limit" was defined as the relevant limit for committee expenditure under the Module. There was no evidence that the body corporate had ever resolved to impose a particular limit on committee spending. Therefore, under the definition in the Module of "relevant limit for committee spending", the limit was $200 multiplied by the number of lots in the scheme: that is, $5,000.

9 "Common property" is defined, in s 10 of the Act, as the scheme land other than the lots.

(g) replace light bulbs on the Scheme Property as required.

4. Skilled Work

Arrange the engagement of service contractors as required to undertake Skilled Work (but if the cost of the service contract exceeds the Expenditure Limit, the Service Contractor must first obtain the consent of the Body Corporate) and:

(a) supervise the performance of service contracts in accordance with their terms;

(b) check and verify accounts for goods or services payable by the Body Corporate relative to matters which are the responsibility of the Service Contractor under this Agreement and notify the Body Corporate that they are in order for payment.

9. Reporting

Promptly report to the Committee:

(a) anything requiring repair;

(b) any matter creating a hazard or danger;

(c) any correspondence, notices, reports or complaints relating to the Scheme.

Persons involved and their roles

[16] Benjamin McCarthy is the director of the developer and original owner of Centenary Mews. He is also the director of Sherwood Forest. He executed the agreement as the chairman of the body corporate and as the director of Sherwood Forest.

[17] Peter Cameron is the owner and operator of a business called On The Ball Property Maintenance (**OTB**). He was engaged by Sherwood Forest in April 2014 to conduct gardening and general property maintenance work at Centenary Mews (among other schemes) and he continued to undertake that work throughout the relevant period (that is, at the latest up to 30 November 2016). In essence, OTB was responsible to Sherwood Forest for carrying out Sherwood Forest's duties under its agreement with the body corporate. There is no evidence of the exact terms of OTB's engagement, although Mr Cameron said that he was engaged to carry out the tasks set out in annual property maintenance plans that he agreed with Sherwood Forest in 2014, 2015 and 2016. Those plans were for the works that he was engaged to undertake at Centenary Mews and other schemes maintained by Sherwood Forest.

[18] Angus Baker was a director of MacMillan Films Pty Ltd. Despite its name, that company also provided property maintenance services to Sherwood Forest at Centenary Mews and other schemes with which Sherwood Forest had similar agreements. Part of his duties was to supervise Mr Cameron in the works undertaken by OTB. During 2016, the amount of work he did for Sherwood Forest diminished, while OTB's work commensurately increased.

[19] Brady Whitehead is a qualified builder and the construction manager of Vantage Building Group, which was the builder of Centenary Mews.

[20] Jonathan Booker was a non-resident owner of a lot in Centenary Mews. He was a member of the committee of the body corporate from about March 2015 and was elected chairman at the annual general meeting later that year. He remained chairman in September 2016, when the disagreements between the parties came to a head. Mr Booker was the primary contact, on behalf of the body corporate, with Messrs McCarthy, Cameron and Baker.

[21] Robert Weeks has been a lot owner and resident of Centenary Mews since 2014. He has been a member of the committee since 2015. He is now the secretary and treasurer of the body corporate.

[22] Peter Cassels was the director or operator of a business called Cassels Strata, which had apparently been appointed by the body corporate as manager of the scheme and remained in that position throughout the relevant period.

A brief chronology

[23] As I have said, the agreement was made on 28 January 2014. The body corporate's solicitors gave Sherwood Forest a remedial action notice on 15 June 2016. The notice required that Sherwood Forest remedy the alleged breaches of the agreement within 21 days: that is, by 7 July 2016.

[24] On 8 August 2016, the body corporate's committee (comprising Mr Booker, Mr Weeks and another resident owner, Lauren Stanton) resolved to call a general meeting of the body corporate and to put a motion that the body corporate terminate the agreement due to Sherwood Forest's failure to comply with the remedial action notice.

[25] The general meeting was held on 8 September 2016. The owners of six lots attended in person and the owners of another six lots submitted a voting paper. The resolution to terminate the agreement was passed by unanimous vote of those owners.

[26] On 12 September 2016, the body corporate's solicitors wrote to Sherwood Forest informing it that the body corporate thereby terminated the agreement.

[27] On 21 September 2016, solicitors for Sherwood Forest wrote to the body corporate's solicitors, asserting that the termination notice was a fundamental breach of the agreement. On 30 November 2016, they again wrote, stating that Sherwood Forest accepted the body corporate's repudiation of the agreement and thereby Sherwood Forest terminated it.

The body corporate's concerns

[28] It is convenient to deal with the issues by reference to the allegations in the remedial action notice, as that notice crystallises the real issues between the parties. In essence, it raised five principal concerns, namely that:

(a) the garden beds and plants had not been adequately maintained;

(b) there was graffiti on the driveway near the visitor carpark that was not removed;

(c) the boundary fence along the roadway had not been adequately maintained, with palings warping and becoming detached and not being re-fixed or replaced sufficiently frequently;

(d) a stormwater detention pit (referred to by witnesses as a bio-pit) near a carpark concrete slab was causing erosion under the slab which appeared, at least to a lay person's eye, to raise possible safety issues; while some steps were taken to reduce the erosion, no qualified person had been engaged to review and report on the safety or otherwise of the slab; and

(e) the fire hydrant in the complex had not been tested.

[29] I shall deal with the evidence of each of these in turn.

The gardens

[30] Mr Booker gave evidence that, between late 2014 and the issue of the remedial action notice in June 2016, he observed that hedges and other plants in Centenary Mews were not trimmed frequently enough and, when they were trimmed, they were often trimmed unevenly. As an example, he said, on 4 December 2015 he sent an email to the body corporate manager (Cassels Strata), attaching some photographs. In the email, he said:

> I was talking to Peter regarding a few issues.
>
> The gardens are infringing on the carparks and pedestrian walkway behind the complex. Also, the fence needs attention.[10]

[31] Unfortunately, the photographs attached to that email are not exhibited to Mr Booker's affidavit. However, Mr Cameron gave evidence that Cassels Strata passed on Mr Booker's email to him. He exhibits a photograph of a bush that he said was attached. He also exhibits a photograph of the bush after he had trimmed it, although he does not say when he did that.[11] Another photograph of the bush, apparently taken by Mr Booker on the same day as the first, was annexed to the remedial action notice.[12] Mr Booker's photographs clearly show that the bush was intruding substantially into one of the carpark bays, as well as onto the footpath on the other side of the garden bed. However, while the carpark is clearly part of the common property of the scheme, as I have already said the garden bed and the footpath appear to be on the adjoining land.

[32] Mr Booker also exhibited to an affidavit photographs of plants and garden beds that he took on 26 May 2016.[13] However, all of those photographs other than, perhaps, those on page 27 and at the top of page 28 of the exhibits appear to

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10 Booker affidavit sworn on 4 June 2021 (**Booker #2**), [24], JB-19. Peter appears to have been Mr Cameron.

11 Cameron affidavit sworn on 1 June 2021 (**Cameron #1**), [7]-[8], PC-17, PC-18, PC-19.

12 The photograph is part of annexure 4 to the notice and appears at p 55 of the exhibits to the affidavit of Dean Leslie.

13 Booker affidavit sworn on 27 May 2021 (**Booker #1**), pp 21-28 of the exhibits.

be of garden beds in between the front areas of the units. The photograph at the foot of page 27 is clearly of part of the common property. Mr Booker said that the photographs from pages 22 to 28 (apart from that one) were gardens in front of the units.[14] Mr Cameron also said that the photograph at the top of page 28 was of a garden bed at the front of lot 25 (one of the lots on the northern side of the internal driveway).[15]

[33] Sherwood Forest contends that, even if it did neglect the garden beds between and in front of the lots, they were not on the common property but were within the areas of the individual lots. Therefore, it submits, it was not obliged to maintain those beds (even though its contractors actually did work on them), as its obligations under the agreement were limited to the "Scheme Property" – that is, the common property.

[34] I have already referred to exhibit 10 and to the aerial photographs of the scheme exhibited to Mr Young's affidavit. Exhibit 11 is a copy of an operational works landscape plan for the scheme and an early plan of the proposed development that together show the lot areas and the garden beds within and outside those areas. Mr Cameron marked on it, in differently coloured highlighters, small and large garden beds to which he referred in a file note of 15 December 2015. Exhibit 12 is a copy of the development plan of the scheme lodged with and approved by the Brisbane City Council. It shows clearly the boundaries of the then proposed lots. They are consistent with the final plan of subdivision comprising exhibit 10.

[35] I am satisfied, from those items of evidence, that the garden beds in between the units on the southern side of the driveway and the beds in front of units on the northern side were not on the common property, but were within the areas of the individual lots. That being so, under by-law 3.5 the owners and occupiers of the lots were responsible for the maintenance and upkeep of those beds. Although the body corporate was entitled to maintain them (at the owners' individual expense) if the owners or occupiers did not, I agree with Sherwood Forest's submission that its own obligations under the agreement were limited to the maintenance of gardens and plants on the common property. The agreement did not require that it maintain any gardens or plants within individual lots, even if the body corporate decided to maintain those areas. Therefore, to the extent that the body corporate's complaints concerned plants and beds between or in front of the lots, even if Sherwood Forest did not maintain them it was not in breach of the agreement.

[36] However, some of the areas about which the body corporate complained were clearly on the common property. I shall discuss the evidence about those areas in considering whether Sherwood Forest breached its obligations to maintain them.

[37] After the remedial action notice was issued, OTB undertook considerable work on all garden beds and the plants in them. After that work was done, Mr Booker, on behalf of the body corporate, was clearly satisfied that OTB had fixed all the problems with the gardens. On 4 July 2016, Mr Booker wrote an email to Mr Cameron, in which he said:

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14 T3-49:11-12.
15 T2-78:32-37.

> Morning Peter,
>
> The Body Corporate Committee are satisfied with the Garden Remediation work completed at the complex over recent days.
>
> We believe that the gardens will now be easier to maintain now that the gravel has been installed, especially in front of unit 18 which is subject to vehicle intrusion.
>
> Thanks again for a great outcome with the gardens.
>
> regards,
>
> Jon Booker - Chairman

[38] There was no qualification to this email. It is clear evidence that, by then, OTB – and therefore Sherwood Forest – had addressed the body corporate's concerns about the gardens and had therefore remedied that aspect of the remedial action notice.[16] The previous state of the gardens is therefore only relevant to the question whether the body corporate acted reasonably in subsequently deciding to terminate the agreement. I shall address that issue later.

Graffiti

[39] At some time before February 2015, somebody spray painted some graffiti at the entrance to the visitor carpark, just to the east of unit 1. Mr Booker took a photograph of the graffiti on 5 February 2015. He took another photograph of it on 29 May 2016, by which stage it appeared to have faded slightly.[17] In an email on 7 July 2016 he wrote that, on 6 July, it was still apparent.[18]

[40] Mr Cameron said that the graffiti was difficult to remove. Shortly after it appeared, Mr Baker attempted unsuccessfully to remove it by pressure cleaning it. In April or May 2015 Mr Cameron tried scrubbing it and washing it with cleaning agents. In June or July 2015 he tried using a specialised graffiti remover spray. He was concerned not to use more abrasive attempts to remove it as they risked damaging the concrete surface and leaving a permanent unsightly mark. He did not take any further steps to remove it until June or July 2016. After the remedial action notice was issued, he met with Mr Booker on 21 June 2016. According to Mr Cameron, at that meeting he recommended and Mr Booker agreed that Mr Cameron would engage another contractor to use a high pressure hose, if that was unsuccessful he would use hydrochloric acid and if that did not work he would grind the concrete lightly.[19]

[41] In July and August 2016, he made further attempts to remove it and he finally completed the removal, by grinding, some time between 23 August and 17

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16 Although Mr Booker asserted later that one of the hedges was not adequately trimmed (page 73 of Booker #1) and Mr Cameron accepted that it needed trimming on 6 July 2016 but it was not trimmed until 3 August (T2-47:7-17), given Mr Booker's unequivocal email I consider that the body corporate cannot rely on that hedge as evidence of a failure to comply with this obligation within the time required.

17 Those two photographs are at Booker #1, JB-5, p 30.

18 Booker #1, JB-14, p 70.

19 T1-109:30 to T1-111:8; T2-47:40 to T2-48:31.

September 2016.[20] I accept that evidence. In cross-examination, he agreed that there was no reason why the graffiti could not have been ground off in 2015: he just didn't think of it.[21]

The boundary fence

[42] Mr Booker gave evidence that, on about 14 May 2015, he noticed that there were loose and warped palings to the front fence of the scheme which caused it to look unsightly and unkempt. He said, in an email to Cassels Strata, that he had spoken to Mr Baker about it.[22] Mr Booker gave evidence to the effect that, over the period from then to July 2016 and later, there were frequently fence palings that had become warped and loose and that were not repaired or replaced promptly. He exhibited many photographs, taken respectively in April 2015, October 2015 and April 2016,[23] showing loose and warped palings. Also, in April 2016, he arranged for separate contractors to supply and install 12 new palings and to repair 30 existing palings. The body corporate paid for that to be done.

[43] Mr Booker said that, on 6 July 2016 (the day before the expiry of the remedial action notice), he walked around the property. Among other things, he again saw several palings warping and coming away from the fence. He took photographs of those palings on that occasion. They were also exhibited to his first affidavit.[24] They show 14 palings that, to various extents, were pulling away from the fence. Having carefully looked at those photographs, I find that some were in minor stages of warping and pulling away, while at least seven were more obvious and three of those were significantly warping.[25]

[44] Mr Cameron said that, in about early April 2015, Mr Baker asked him to inspect the fence and fasten any loose palings. Mr Cameron did this over several months, but it was an ongoing problem. He estimated that, on a further seven occasions, he personally attended to hammering or screwing in fence palings and he also instructed his employees to secure any that they saw coming loose. He agreed that the repair of loose and warped fence palings was an ongoing issue that he noticed from time to time when he visited the premises. However, he said, he never spent more than five or ten minutes screwing in palings. He did not say that he ever replaced warped palings even though "even with a screw in, they're warped, so they're held in, but they don't look straight because they've been warped by the sun even though they're held in."[26]

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20 Cameron #1, [53]-[56], PC-11, pp 49-52. In cross-examination he said that he finished off the graffiti on 3 August 2016 (T2-47:19-20), but his evidence and the photographs in his affidavit demonstrate that that statement was clearly wrong, as the graffiti remained obvious in a photograph taken by him on 23 August. It was absent in a photograph taken by him on 17 September.

21 T2-49:30-31.

22 Booker #1, [21]-[23].

23 Respectively at Booker #1, p 12 (April 2015), p 13 and pp34-41 (October 2015) and pp 16-21 (April 2016).

24 Booker #1, [70], [73], JB-15, pp 74-77

25 The seven were at p 74, top right and bottom left, p 75, top left and right and bottom right, page 76 bottom left and p 77, top left. The three with significant warping were at p 74, top right and bottom left and p 75, top left.

26 T2-51:16-18.

[45] Mr Cameron did say that both he and his work crews had screws and tools with them when they went to the scheme. He said:

> We were there twice a week. We were looking up and down - we'd walk that fence every time we were there. We'd walk that fence. We'd walk the property because there were garden beds along the front that we were regularly weed spraying. Every week in summer we were mowing and trimming. You know, we had time to do - if we missed a few, you know, that's bad on us but we were certainly - it wasn't due to lack of funding. It was - you know, we were attending to it regularly.[27]

The bio-pit erosion

[46] Mr Booker said that there was a bio-pit located under one of the carpark concrete slabs. At some time in 2015, he noticed that there was erosion under the slab associated with the bio-pit. He took several photographs of the erosion on 10 March 2015 and sent them by email to Cassels Strata.[28] Cassels Strata responded to him, saying that Ekkopoint[29] had sent Mr Booker's email to the builder for action.

[47] Mr Whitehead said that, on 25 March 2015, he received an email from a Mr Beh of Ekkopoint about the bio-pit. In that email, Mr Beh said, "Have you been out to check this out yet mate?" Mr Whitehead exhibits an email chain that shows that, on 10 March 2015, Mr Cassels sent an email to Mr Beh, forwarding Mr Booker's email, asking if it was something the builder could rectify under its warranty and expressing concern that the slab may be damaged if there was further erosion. Mr Cassels followed up that email on 25 March 2015, which led Mr Beh to send his email to Mr Whitehead. The terms of that email lead me to infer that Mr Beh had previously spoken to Mr Whitehead, who had agreed to look at it.

[48] In any event, Mr Whitehead said he inspected the erosion on 26 March 2015. He formed the view that the only thing needed was to fill the area with gravel and to monitor it. He sent an email to Mr Beh (who forwarded it to Mr Cassels), saying he would put some rocks in it to stabilise the area. He arranged for some of his employees to do that and, once it was done, he inspected the works.

[49] Mr Cameron said that, in April 2015, he met with Mr Booker and they discussed the bio-pit. He said to Mr Booker that the cause of the problem was storm water erosion, it had been filled with gravel and he would continue to monitor it. Mr Booker said to him that he agreed with that approach. Mr Booker did not recall this conversation.[30] I accept that it occurred. There was no evidence that Mr Cameron was asked, before the remedial action notice, to engage a "suitably qualified person" to "remediate the erosion". In

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27 T2-65:43 to T2-66:2.

28 Booker #1, [17]-[20], [44]-[46], JB-1, JB-2, JB-9. At [45], he said he took a photograph on 10 April 2015 (JB-9), but that is the same as JB-1, which he clearly took on 10 March. April was clearly in error.

29 Ekkopoint is a company associated with Mr McCarthy and Sherwood Forest.

30 Cameron #1, [90]-[93].

any event, Mr McCarthy was a qualified engineer and, having inspected it himself, he was not worried about the slab failing.[31]

[50] Mr Booker said that the rocks and gravel did not fix the issue, as water continued to wash out the area. In about May 2016, he took more photographs of the area, which were later attached to the remedial action notice. Those photographs show the existence of rocks and gravel and perhaps some soil erosion where, in March 2015, there had been bare earth and severe erosion. He said that the erosion was readily observable and had been for many months before May 2016.

[51] Mr Cameron said that, on 21 June 2016, he attended a meeting with Mr Booker at Centenary Mews to discuss the issues raised in the remedial action notice. Mr Cameron made notes of the actions to take (exhibit 4), which mentioned the bio-pit. Mr Cameron said relevantly that Mr Booker told him he was concerned about the erosion, he was worried about the stability of the structure and that big trucks would drive over it. He asked Mr Cameron to arrange an expert to inspect it and to provide a report on whether it was okay. Mr Booker said he did not want any more gravel put into it until someone had inspected it. Mr Cameron told Mr Booker he would contact Sherwood Forest about it.[32]

[52] On 22 June 2016, Mr Cameron sent Mr Booker an email, copied to Mr McCarthy, in which he relevantly said:[33]

> Hi Jon,
>
> Thank you for your time yesterday afternoon to meet and discuss the body corporate requirements for the maintenance of Centenary Mews.
>
> The following is a summary of what we agreed.
>
> Please review and confirm the requirements are correct.
>
> …
>
> **Stormwater Detention Pit**
>
> -Area under strip of visitor car parking is being eroded
>
> -Need to have investigated by builder/engineer to determine if all ok
>
> -Do not mulch along the side of this visitor parking area until investigated
>
> -No gravel or mulching required on bottom or on fence side of detention pit, as not visible and would be washed away.

[53] Mr Booker responded by email on the same day,[34] in which he said that, apart from one matter (not presently relevant), every detail of the garden had been covered to the committee's satisfaction. He did not expressly refer to the bio-pit erosion.

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31 T1-75:42-43.

32 T1-108:34 to T1-109:28.

33 McCarthy affidavit sworn 6 June 20101 (**McCarthy #1**), BMC-12A; Booker #1, JB-11. In the email Mr Cameron also set out a lot of detail about work to be done to gardens and plants in the scheme.

34 Booker #2, JB-12, p 68.

[54] On 23 June 2016, Mr Cameron had an email exchange with Mr McCarthy,[35] in which Mr Cameron said he would like to arrange someone "qualified" to inspect the erosion and slab and provide a report to the body corporate. He said that Mr Booker's concern was that the soil under the slab had eroded and large trucks drove over the slab. Mr Booker wanted to have it looked at before anything happened that would be more expensive to address.

[55] On 24 June 2016, Mr McCarthy forwarded to Mr Whitehead his exchange with Mr Cameron.[36] He said he thought it was a job for the original engineers. He asked that Mr Whitehead get a quote or hourly rate and Mr McCarthy would get a purchase order from the body corporate. Mr McCarthy then told Mr Cameron that he was getting the original engineer to provide a quote to inspect for the body corporate.

[56] Mr Whitehead said that he received that email from Mr McCarthy. He did not attend at the scheme until about 4 July 2016. Having inspected the area, he telephoned Mr McCarthy and told him that he had inspected the area, there was no immediate risk to property or people, there was no work required immediately, he would contact the original project structural engineer to confirm his opinions about the area and, once that had occurred, he would arrange for more rocks and gravel to fill the eroded area and provide stabilisation.[37]

[57] Mr Whitehead said that he then made numerous attempts to contact the engineer, but was not able do so before the body corporate's agreement with Sherwood Forest was terminated.

[58] Unfortunately, nobody told Mr Booker about any of the steps taken by Messrs Cameron, McCarthy and Whitehead.

The fire hydrant and water main outlet

[59] Mr Booker gave evidence that there was a fire hydrant at Centenary Mews. He was never asked to approve a quote to undertake the testing of the fire hydrant and, so far as he was aware, it was never tested during 2014 to 2016. He said that, as a former occupational health and safety officer, he was aware of fire safety processes, including the need to test of fire hydrants regularly. He was aware that the month and year of any test would be recorded on a metal tag placed on a fire hydrant after it was serviced.[38]

[60] Mr Booker also said that, shortly after he became chairman of the body corporate, he became aware that the fire hydrant had not been tested, as the tag had not been clipped. He said he raised it with Mr McCarthy in a meeting with him in April 2015, but in cross-examination he appeared not to be sure that he had in fact done so.[39] It was later put to him that he had never raised the issue with anyone representing Sherwood Forest. He disagreed, but he was unable

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35 Cameron #1, PC-16; McCarthy #1, BMC-14, pp 102-103.
36 McCarthy #1, BMC-14, p 102.
37 Whitehead, [15]; McCarthy #1, [105].
38 Booker #1, [32]-[34].
39 T3-40:35 to T3-41:10; T3-51:9 to T3-55:30.

to say when or with whom he raised it before the remedial action notice was issued.[40]

[61] Mr Cameron agreed that the fire hydrant was never tested while he worked at the scheme, but nor was it ever mentioned to him by Mr Booker.[41]

[62] Mr McCarthy agreed that there had been no testing of the fire hydrant while he was involved with the scheme.[42]

[63] I am satisfied that the fire hydrant was not tested during the term of the agreement. I am not satisfied that Mr Booker raised it with Sherwood Forest at any time before the remedial action notice, although it is possible that he mentioned it to Mr McCarthy at their meeting in April 2015.

[64] On 24 June 2016, Mr Cameron sent to Mr McCarthy a quote for an annual service of fire hydrants at the schemes managed by Sherwood Forest, including Centenary Mews. Mr Cameron said that he had checked and such a service could be provided to Centenary Mews by 7 July 2016 (the date of expiry of the remedial action notice).[43] Instead of arranging for that to occur (as it was well within the expenditure limit under which Sherwood Forest could appoint a contractor and seek reimbursement from the body corporate) or sending the quote to the body corporate, Mr McCarthy told Mr Cameron to obtain other quotes. He obtained other quotes on 22 July 2016 and 5 August 2016.[44] All of the quotes were for under $500 and therefore well within the expenditure limit. But nobody engaged a contractor to service the hydrant, nor did anybody send any quote to the body corporate until Mr Cameron sent the last quote to Mr Booker on 6 August 2016. He received no response from the body corporate.

[65] The body corporate also alleges that Sherwood Forest did not test the water main outlet. I am not satisfied, on the evidence, that any such testing was required.

The remedial action notice

[66] On 15 June 2016, the body corporate's solicitors wrote to Sherwood Forest. They said that their letter constituted a remedial action notice concerning the agreement, as the body corporate believed that Sherwood Forest had breached its duties under the agreement. In that notice they set out nine complaints, referring in each case to the relevant item and duty in the schedule and the manner in which they asserted that Sherwood Forest had breached each duty. They required the body corporate to remedy each of the breaches within 21 days of the date of the letter and, if it did not do so, the body corporate may take steps to terminate the agreement.

[67] The notice was sent by email and express post. Mr McCarthy said he received it on 15 June 2016. Therefore, 21 days would expire on 7 July 2016.

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40 T3-65, 3-77, 3-83 to 3-84, 3-95, 3-103.
41 T2-67:1-9.
42 T1-76:8-12.
43 McCarthy #1, BMC-10B, p74.
44 McCarthy #1, BMC-10C (p 77) and BMC-11 (p 87).

[68] Counsel for Sherwood Forest submitted that the notice was inadequate in many respects. It is therefore necessary to consider what such a notice must contain in order to be valid.

[69] The parties' submissions about the requirements for a valid notice relied on different authorities but did not differ in substance. The question does not appear to have been considered by any court other than the Queensland Civil and Administrative Tribunal (**QCAT**). Counsel for Sherwood Forest relied in particular on two decisions of that tribunal, while counsel for the body corporate relied, by analogy, on court decisions concerning the requirements for a valid lessor's notice to remedy a lessee's breach of covenant, under s 124 of the *Property Law Act* 1974 and its equivalents in other jurisdictions. Such an analogy does seem to be apposite.

[70] In QCAT, Member Gordon made the following remarks:[45]

> The authorities are unanimous that the recipient of the RAN must be left with reasonable certainty about what it is necessary to do, although it will be for the recipient to decide how this can be achieved in a manner consistent with the contractual duties.[46]
>
> The view in Queensland … appears to be that a notice which refers to a default which did not in fact happen is not automatically invalid for that reason (provided of course there was some default which was properly identified).
>
> This approach is more consistent with the English authorities, that provided there is a breach identified in the notice and the recipient of the notice is given the chance to remedy that breach, then it does not matter that the notice contains other material which erroneously alleges other breaches; if it does, it simply means that the party giving the notice cannot ultimately rely on that other material. It does not invalidate the notice – the notice complies with the statutory requirements.[47]
>
> The Queensland approach also permits some flexibility when considering notices and is helpful when considering a case such as this. It is possible to envisage a notice for example, which alleges 10 failures of varying importance. Some more trivial failures are found at the hearing not to have happened, or to be outside the contractor's responsibility. The Queensland approach allows such a notice to be regarded in the same way as a notice which has exaggerated the extent of a single breach (it would not automatically be invalid).
>
> All the above matters demonstrate the importance of section 131 notices providing sufficient particulars so that the contractor can identify the duty alleged, and the breach of that duty which is alleged. The notice ought to be specific enough for the contractor to be able to decide whether to challenge the contents of the notice either informally or formally or possibly both. And since the mechanism requires the contractor to carry out the duties which are alleged not to have been carried out within the time given, this also means that the notice must

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45 *The Sands Gold Coast Pty Ltd v Body Corporate for the Sands [No 2]* [2016] QCAT 365, [94], [102] – [104], [110]. The Member's entire discussion from [90] to [110] is relevant.

46 *Fox v Jolly* [1916] 1 AC 1, 11, 13, 22.

47 *Pannell v City of London Brewery Co* [1900] 1 Ch 496, 499, approved in *Fox* at 15; *Blewitt v Blewitt* [1936] 2 All ER 188.

> be sufficient for the contractor to be clear what needs to be done to remedy the matter.

[71] While the member's decision was overturned on appeal, the appeal tribunal did not consider this issue.[48]

[72] The member's remarks derive from and reflect the principles governing the validity of similar types of notice in other contexts. I respectfully adopt them as accurately stating the law applying to remedial action notices under the Module. Additionally, whether a notice is invalid because it asserts some breaches that are later found not to have occurred or wrongly asserts a duty will often be a question of fact and degree. The most relevant factors determining validity will be the extent of the error and the capacity of the notice to give to the service contractor a reasonable opportunity to do what it is obliged to do under the agreement.[49]

[73] Counsel for Sherwood Forest contended that the allegations of failure to comply with duties were insufficiently clear in many respects and, in any event, were not proved on the evidence. It is convenient to deal with each of the complaints separately, as did counsel for each party. In doing so, I shall first set out in full the relevant passages of the remedial action notice.

Did Sherwood Forest breach its obligations?

[74] It seems to me most convenient to deal with each part of the notice at one time, including whether it is valid and whether the complaint has substance in that, at the date of the notice, Sherwood Forest was in breach of its duties.

Scheme property not maintained in first class condition

Schedule item	**Duty**	**Breach**
3	*Maintain the Scheme Property in a first class condition consistent with the high quality and standard of the development and in accordance with the Body Corporate's obligations under the Act (see Standard Module, s159 and s165).*	This duty has been contravened because you have failed to maintain the Scheme Property in a first class condition consistent with the high quality and standard of the development. This is a general duty which, in the Body Corporate's view, has been wholly neglected. The uneven and significantly substandard hedge and plant trimming (**see Annexure 1**) is an example of how you are failing to maintain the Scheme Property in a first class condition as explicitly required by this clause. Owners of lots within the Scheme have incurred costs due to your failure to maintain the Scheme Property to the standard required by this clause. For example, on 30 May 2016, the letting agent for lot 25 wrote to the Chairman advising that they had to arrange a gardener at their cost to attend to unkempt common property gardens prior to a new tenant moving into the lot (**see Annexure 2**). The graffiti located on the common property driveways also constitutes a failure to maintain the Scheme Property in a first class condition (**See Annexure 3**).

48 *The Sands Gold Coast Pty Ltd v Body Corporate for the Sands* [2018] QCATA 160.
49 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 413.

		Further examples of your failure to comply with general duty in clause 3 of the Schedule are evidenced by the specific breaches described below.

[75] The principal bases for the allegation of breach of the duty stated are uneven and substandard hedge and plant trimming and the existence of the graffiti on the driveway. Reliance is also placed on the other matters about which complaint was made in the other parts of the notice.

[76] Sherwood Forest submits that:

(a) neither the notice nor any expert evidence states clearly what amounted to a "first class condition consistent with the high quality and standard of the development", particularly as the scheme was a modestly priced residential townhouse development at the cheaper end of the market and located in an outer suburb of Brisbane;

(b) the chapeau to item 3 of the schedule to the agreement does not set out a separate duty, but rather sets out the standard to which each of the duties set out in the sub-paragraphs must be performed;

(c) the description of the alleged breach was not clear and self-contained, but instead refers to "examples" rather than complete and self-contained allegations constituting the facts relied on to demonstrate the alleged breach;

(d) the body corporate's evidence is insufficient to demonstrate any breach of the duties set out in item 3: the photographs show few points in time over about 18 months, rather than a series of photographs taken regularly;

(e) in any event, it is clear that, after issuing the remedial action notice, Sherwood Forest did all the work to the gardens necessary to remedy any breach and the body corporate expressed its complete satisfaction with that work.

[77] I shall address each of these in turn.

[78] As to the first issue, it is not a matter for an expert to determine the meaning of a contractual term. Neither party suggested that the phrase is a term of art or has an accepted meaning in a relevant industry. The absence of expert evidence is therefore irrelevant.

[79] Counsel for Sherwood Forest submitted to the effect that Centenary Mews was not a high-class development, but a run of the mill townhouse development that did not merit continuous attendance of maintenance contractors to keep it in an ideal state of cleanliness and appearance. One indication of its "status" was that the sale prices of lots were not such as to be considered high.

[80] This may all be so, but nevertheless the agreement required that Sherwood Forest maintain it in "first class condition consistent with the high quality and standard of the development." That description was in words no doubt inserted or approved by Mr McCarthy and reflective of his view of the standard of the townhouse developments for which he was responsible. His own words in the

agreement required that the grounds be in "first class condition" and described the development as of a "high quality and standard." Regardless of the market price of lots in the development, those words described the necessary standard of maintenance. Sherwood Forest was bound by those words and had a commensurate obligation to maintain that standard. While that description is vague, it clearly means that the scheme property should be well and regularly maintained.

[81] I agree with counsel for Sherwood Forest that the chapeau to item 3 does not set out a separate duty from the individual duties set out in sub-paragraphs (a) to (g). It does not conclude with the word "including", "comprising" or "encompassing," which might have made it clear that these were only examples of necessary actions or were all-inclusive. I consider that the proper construction of that item is that the sub-paragraphs set out the contractor's duties and the chapeau sets out the standard to which they must be fulfilled.

[82] I do not consider this part of the notice to be vague or unclear in its requirements. Although it refers to "examples" of the alleged breach of the alleged duty, it makes clear that the breaches of the individual duties comprise breaches of the purportedly over-arching duty. Although I have found that there is no separate over-arching duty, this section of the notice clearly enough records that, in the body corporate's opinion, Sherwood Forest's failure to carry out each of the duties referred to in this and the other parts of the notice is a breach of the duties under item 3. The notice makes it clear that each of the duties referred to in this section and later has not, in the body corporate's opinion, been carried out to the required standard.

[83] The last two complaints about this part of the notice require me to review the evidence and draw conclusions about the extent of work on gardens and the graffiti and their state during the relevant period and particularly as at the date of the notice. I have described above much of the relevant evidence, so it falls to me to draw the conclusions.

[84] The garden areas on the common property mostly had hedge-type plants in them. Examples appear in several photographs.[50] There was conflicting evidence given about those areas, particularly by Mr Booker and Mr Weeks on the one hand and by Mr Cameron and Mr McCarthy on the other. The former complained that the beds often had weeds in them (although they appeared to be referring mostly to the beds within lot areas) and that bushes and hedges were not trimmed frequently enough to keep them "consistent with the high quality and standard of the development". The latter said that OTB tidied the garden beds and trimmed the bushes and hedges regularly although, as the plants would grow between each trimming, sometimes they may look a little untidy.

[85] OTB's annual property plans assist me in determining whether the garden maintenance undertaken on behalf of Sherwood Forest was sufficient to

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50 Booker #1, at the top of p 11 and at the foot of p 27, as well as in annexure 1 to the remedial action notice (taken in May 2016). A number of photographs are also exhibited to Mr McMarthy's affidavit, although they all appear to have been taken in or after July 2016, after all garden beds and hedges had been tidied up.

comply with its obligations to the body corporate. Those maintenance plans required OTB to undertake the following work.

(a) In 2014, OTB was to conduct a half hour maintenance visit weekly, make a 15 minute mid-week visit weekly, undertake mowing and edging for half an hour fortnightly in spring, summer and autumn and every four weeks in winter and undertake weed management for half an hour quarterly.

(b) In 2015, OTB was to conduct a 1½ hour maintenance visit weekly, undertake mowing and edging for 1½ hours fortnightly in spring, summer and autumn and every four weeks in winter, undertake weed management for ¾ of an hour every two months and trim plants in garden beds for 1 hour each quarter.

(c) In 2016, OTB was to conduct a 1½ hour maintenance visit weekly, undertake mowing and edging for 1½ hours fortnightly in spring, summer and autumn and every four weeks in winter, undertake weed management for ¾ of an hour every two months and trim plants in garden beds for 3 hours each quarter.

[86] The evidence was that Mr Baker also did some work at Centenary Mews, but the extent and nature of the work done are not obvious. Both Mr Cameron and Mr McCarthy said that, over a period of time, OTB took on more work and Mr Baker did less. The Macmillan Films invoices to Sherwood Forest (exhibit 2) show that it charged for work on a number of schemes including Centenary Mews from November 2014 to August 2015 and from February 2016 to September 2016, but there is no detail of the work done.

[87] Mr Cameron said that, when the hedges needed to be trimmed, he or his employees would trim them. Sometimes, especially in summer, this would be necessary every few weeks and at other times the interval would be longer. He accepted that they always needed to be done.[51] He accepted that, in the photograph on page 11 of the exhibits to Booker #1, the hedges in the top photograph and the bush in the bottom photograph needed to be trimmed and the plants in the top photograph ought not to have been protruding past the edge of the garden bed. He agreed that they were in need of maintenance, but not that they were overdue for trimming.[52]

[88] Mr Booker said that the first of those photographs was reflective of how the hedges frequently appeared.

[89] It is hard to determine the true facts without an extensive library of photographs covering regular intervals during the entire relevant period. All the witnesses were necessarily general in their description of the ongoing situation with the gardens and plants, except where they were presented with photographs. Mr Booker and Mr Weeks took the view that they were maintained less regularly than was necessary. Mr Cameron and Mr McCarthy took the opposite view.

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51 T2-32:1-24.

52 T2-40:31 to T2-41:1.

[90] The best documentary evidence of the amount of work done to the gardens comprises the photographs (although limited as to time) and OTB's obligations under Mr Cameron's contract with Sherwood Forest. Putting aside the garden beds that were not on the common property, the principal issue appears to have been the extent of trimming of hedges and, in one case, the uneven trim of one hedge. Trimming was not expressly referred to in the 2014 maintenance plan, but it was in the 2015 and 2016 plans. It is notable that the time to be spent trimming was tripled in the 2016 plan. The fact that, in 2016, OTB was required to spend 3 hours each quarter trimming plants, as well as 1½ hours weekly in general maintenance, leads to a strong inference that those times were respectively the least that were necessary in order to maintain the common property to the relevant standard and consequently the earlier times were inadequate.

[91] It is relevant that, until late in 2016, OTB did not perform all the maintenance work at Centenary Mews. As I have said, some was undertaken by Mr Baker. OTB progressively took over more work from Mr Baker but, judging by the invoices from MacMillan Films and OTB, this did not occur until well into 2016. Thus, the fact that OTB agreed to do more work in 2016, as set out in its maintenance plan, is indicative that the work done up to then was inadequate to maintain a suitable level of appearance of the development.

[92] The 2016 maintenance plan provided that OTB was required to trim hedges and other plants for three hours each quarter, not necessarily all on one occasion. It could be expected that hedges would grow at different rates from each other and at different times of the year. They may well need trimming almost weekly at times, in order to maintain a first class and high quality appearance. Mr Cameron's evidence was that they were trimmed as needed. I accept that evidence as what he thought was done, but there was a clear difference of opinion as to the extent to which trimming was needed. He did not say that he or his employees took trimming equipment with them on each occasion they went there. Rather, they took from his equipment store whatever equipment he thought would be needed on each occasion.[53] If they were diligent in their weekly general maintenance visits, they may bring trimming equipment on the occasion following an inspection that revealed plants needing a trim, but I am not satisfied that they did so. I consider it more probable than not that they undertook trimming sporadically, rather than in a planned manner. I conclude that OTB's obligation, as required by Sherwood Forest, was not adequate to satisfy Sherwood Forest's obligation to the body corporate.

[93] Mr Booker also criticised what he referred to as uneven trimming of hedges. Mr Cameron said that any unevenness could be attributed to the fact that they would not grow evenly. I do not consider that minor unevenness would be inconsistent with the relevant standard. I have not seen any photographs showing any more than minor unevenness after trimming. Therefore I am not satisfied that, when it did trim plants, Sherwood Forest did so in a haphazard or severely uneven manner that did not meet the necessary standard.

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53 T2-24:18-22.

[94] The photographs to which I have referred assist me in concluding that the bushes and trees were not trimmed regularly enough to maintain them to the standard required by the agreement. They were allowed to grow haphazardly and at times to such an extent that they intruded on areas outside the respective garden beds and they appeared untidy and unkempt. They were not trimmed sufficiently frequently to maintain the property to the high standard required. Sherwood Forest did not require OTB or MacMillan Films to trim them as and when required, nor sufficiently frequently to maintain a sufficiently high standard of appearance.

[95] That fact justified the body corporate in issuing a remedial action notice concerning that obligation. I will address later whether the notice that was issued gave sufficient details to comply with the Module.

[96] Other complaints made by the body corporate were that the common property gardens had been neglected leading to their degradation, they had not been regularly watered, fertilised and weeded, weed growth had not been eradicated and the plants had not been regularly sprayed to prevent pests.

[97] Most of the evidence about these matters in fact concerned the garden beds and plants in the individual lots, not on the common property. But some concerned the gardens and plants on the common property. The main complaints about those beds (apart from inadequate trimming) were that there was weed growth and that the bark mulch had deteriorated over time and needed replacing or topping up.

[98] Mr Cameron said that, whenever he or his crew attended, they would walk the entire property and spot spray weeds. He produced an invoice for some of the weed spray that his business used (although not only at this scheme). On occasions, they may miss a weed behind plants, but they would pull out those when they saw them. Weeding was one of their main duties and was constant.

[99] Mr Cameron was not there on every occasion and his agreement with Sherwood Forest only required the gardens to be weeded for half an hour quarterly in 2014 and then for ¾ of an hour every two months.[54] That would most likely be entirely inadequate for the proper maintenance of the gardens and would be likely to require a considerable time to rectify if addressed only every two months. I consider it far more likely, and accept Mr Cameron's evidence, that he, at least, sprayed and pulled out weeds whenever he walked around the scheme.

[100] Mr Cameron also said that he and his crew would pick up any rubbish they saw on every occasion they attended. Instead of sweeping, they would use a leaf blower to tidy all walkways, driveways, access roads, garbage areas and visitor car parks. His evidence in that respect was not challenged and I accept it.

[101] Mr Cameron said that, after the plants were established, there was sufficient rain that there was no need to give supplementary water. Also, slow release fertiliser was in the soil in new garden beds and there was no need to add

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[54] As with trimming, I consider those to be aggregate times within the periods stated, not a single occasion each quarter or two months.

fertiliser later. He regularly examined the plants and they showed no signs of infestation nor any need for pest spray. Mr Cameron was not challenged on this evidence and I accept it.

[102] As for mulch, it seems to have been accepted by the plaintiff that, at least by December 2015, the mulch on many of the garden beds was looking old, in places was missing and at least it needed replenishing, if not replacing. Mr Cameron said that he and Mr Booker agreed, at a meeting on 15 December 20i5, that Mr Cameron would put off fixing the mulch until closer to winter.[55] Mr Cameron made a note of things discussed that day, which did not mention putting off mulching until winter. Mr Cameron accepted that it was an important point that he should have recorded, but he denied that his recollection was faulty. He said it was a big job to get it done and he told Mr Booker that he was too busy in summer to do it, so he would have to do it after he had got through summer, in winter when it had quietened down.[56]

[103] Mr Booker denied that he agreed to such a delay. He said there was no discussion about time but he assumed it would be done straight away.[57] When his evidence was tested, he said the body corporate had been waiting for nearly two years to have something done and he would have expected it to be done straight away.[58]

[104] Having seen and heard both witnesses, I consider that Mr Cameron had a better and more accurate recollection of what was said than Mr Booker. Mr Cameron was concerned that he could not organise the job in summer, while Mr Booker assumed that it would be done promptly. I accept that Mr Cameron said, and Mr Booker agreed, that it need not be done in summer, but there was no reason to put it off to winter, as opposed to early autumn. I consider that Mr Cameron has inadvertently reconstructed the delay he proposed to suit the time at which he ultimately did the job (in June 2016). In any event, to put off, for six months or more, the mulching of garden beds that were already in need of it would be inconsistent with Sherwood Forest's obligation to maintain the gardens to the required high standard.

[105] At the time the body corporate issued the remedial action notice, the garden beds on the common property (as well as those within the lots) had not been re-mulched and the existing mulch, with its uneven spread, detracted from the appearance of the scheme (as Mr Cameron conceded).

[106] Therefore, I find that Sherwood Forest did not maintain the hedges and other plants to the required standard over the time it was engaged by the body corporate. In those respects, it breached its duties under item 3(b) to maintain regularly the lawns and gardens on the scheme property to the required standard. That breach persisted at the date of the remedial action notice.

[107] However, insofar as part of the complaints made in this section of the notice is that owners of lots, in particular the owner of lot 25, had incurred costs in rectifying garden beds outside their units, that is not the basis for any proper

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55 T1-104:28-46.
56 T2-33:40 to T2-34:45.
57 T3-38:31-33.
58 T3-66:1-25.

complaint. There is no evidence that owners other than the owner of lot 25 incurred any such expenses. The complaint about lot 25 was that the owner had engaged a gardener to cut back the bushes at the front of the lot. The exhibits[59] show that the only bushes in front of lot 25 were in fact within the boundary of the lot. They were therefore the responsibility of the owner of the lot. They were not the contractual responsibility of Sherwood Forest.

[108] I shall deal with the graffiti separately, as it is also the subject of a separate complaint.

Graffiti

Schedule item	**Duty**	**Breach**
3(a)	Regularly clean, sweep, wash and vacuum (where necessary) the Scheme Property, including all walkways, footpaths, access roads, driveways, garbage areas and visitor car parks but excluding rooves and gutters.	We are instructed this duty has not been completed in two (2) years despite the clear wording of the clause. The existence of unremoved graffiti on the Scheme Property, specifically on the visitor car parks/driveway (see Annexure 3) constitutes a breach of clause 3(a) of the Schedule.

[109] There is no evidence that Sherwood Forest did not regularly clean, sweep, wash or blow the common property over two years, as asserted in the notice. The only part of this complaint about which there was evidence is the graffiti.

[110] There is no doubt in my mind that not to clean the graffiti so that it disappeared constituted a breach of the duty to clean the driveway to a sufficient standard. When Mr Cameron finally turned his mind to how to do it successfully, he was able to do so. As I have said, he agreed that there was no reason why the graffiti could not have been ground off in 2015: he just didn't think of it.

[111] It is not disputed that the graffiti remained on the driveway at the date of the remedial action notice. However, Sherwood Forest submits that it did not breach this obligation in not removing the graffiti because:

(a) the alleged breach is the mere presence of graffiti. No warranty is given that the common property would always be in a first class condition (whatever that might be). Rather, item 3 required maintenance and repairs etc to be carried out so as to bring the Scheme back up to the required standard;

(b) Mr Cameron had made attempts to remove it and, in doing so, had managed to fade it, so he had done all that was required;

(c) in any event, the removal of graffiti is Skilled Work, as defined in the agreement. Therefore Sherwood Forest was not obliged to carry out the work and its failure to do so is not in breach of the agreement. The body corporate did not assert that it breached the agreement in this respect by failing to engage a suitable contractor to do the work.

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59 Particularly exhibits 10 and 12.

[112] I do not accept the first of these submissions. The alleged breach is failure to clean the driveway in a manner that removed the graffiti. The graffiti was present for well over a year and clearly its presence was not consistent with a first class condition of a development of a high standard. It was Sherwood Forest's obligation to keep the driveway sufficiently clean to maintain that standard, whether or not the body corporate raised concerns about it.

[113] Similarly, I reject the second submission. While Mr Cameron did make some efforts to clean the graffiti, they were obviously inadequate. Ultimately, when pressed to do so by the issue of the remedial action notice, he obtained the equipment that enabled him to carry out the work to remove the graffiti. It was only then that Sherwood Forest complied with its obligation.

[114] I also reject the third submission. There are two elements to the definition of Skilled Work: first, it can **only** be properly carried out by a skilled tradesman or a tradesman required to hold a licence; secondly, that it would not be usually carried out by a service contractor having regard to the practice of other service contractors operating in south east Queensland.

[115] As to the first of these, there was no evidence to that effect. Indeed, the evidence is to the contrary. While Mr Cameron apparently engaged someone else to use a high pressure hose, there was no necessity for that equipment only to be used by someone particularly skilled in its operation. Furthermore, that equipment was not successful in removing the graffiti. It was necessary to grind the graffiti off the driveway – a task that Mr Cameron himself performed. That demonstrates that the work could be carried out by a person other than a skilled tradesman.

[116] As to the second element, there was no evidence that the use of a high pressure hose or a grinder, or the task of removing graffiti, was not work that would usually be carried out by a service contractor.

[117] I find that Sherwood Forest breached its duty to clean the driveway to the required standard, by failing to remove the graffiti. That breach continued at the date of the remedial action notice.

Failure to water, fertilise, weed and spray the gardens

Schedule item	**Duty**	**Breach**
3(b)	*Regularly water, fertilise, weed and maintain lawns, gardens and potted plants on the Scheme Property.*	The common property gardens have been completely neglected thus leading to their degradation. They have not been regularly watered, fertilised and weeded as required by this clause (**see Annexure 4**). Further, we are instructed that, at best, token hedge trimming has occurred at very irregular intervals. Accordingly, you have failed to maintain the Scheme Property in a first class condition.
3(c)	*Regularly spray plants to prevent damage from pests and treat lawns to eradicate weed growth.*	Further to the breach outlined with respect to clause 3(b), you have failed to regularly spray plants to prevent pests and you have also failed to eradicate weed growth (see Annexure 4).

[118] I have accepted Mr Cameron's evidence about the extent to which he and his crew weeded, watered and fertilised the gardens, as well as cleaning the

driveways and other common areas to remove rubbish, leaf litter and the like. I also accept Mr Cameron's evidence that they sprayed plants to the extent necessary to treat pests. I consider that the work done in this respect was adequate and to the required standard. In those respects, therefore Sherwood Forest complied with these obligations.

[119] I have already dealt with the inadequate trimming of hedges.

[120] Apart from the inadequate maintenance of the hedges, therefore, Sherwood Forest complied with these obligations.

Testing plant and equipment

Schedule item	**Duty**	**Breach**
3(d)	*Regularly test all other plant and equipment.*	In contravention of this duty, you have failed to regularly test all plant and equipment. Specifically, we are instructed that you have never tested the fire hydrant and water main outlet.

[121] The plaintiff's first submission is that this complaint is not clear enough to satisfy the requirements of a remedial action notice but, in the absence of any submission beyond that statement, it is difficult for me to deal with it. In any event, it is clear enough, as the duty and the alleged failure of that duty are set out in unambiguous terms.

[122] As I have said, there is no evidence that the water main outlet required testing. This complaint really boiled down to the failure to test the fire hydrant.

[123] Sherwood Forest contends that it had no obligation itself to test the fire hydrant because:

(a) there was no legal requirement to test the hydrant regularly;

(b) in any event, to test a fire hydrant was Skilled Work; and

(c) the body corporate did not assert that Sherwood Forest breached the agreement by failing to engage a suitable contractor to do the skilled work of testing the hydrant.

[124] Sherwood Forest did not plead the first of these contentions, which it raised only in counsel's closing address. On one view, it should not be entitled to raise the issue. But in any event it does not matter, in my view, whether or not there was a legal requirement to have a fire hydrant tested on any particular regular basis. The obligation was to test equipment regularly. Obviously the regularity of testing required would depend on the type of equipment and its purpose, as well as any legal requirements. It can readily be accepted, in my view, that a fire hydrant should be tested regularly. I consider that testing should have occurred at least annually, given its importance to the protection of buildings in the scheme, whether or not there was such a legal requirement.

[125] Counsel for Sherwood Forest submitted that only a person who holds a licence of a particular type may test a fire hydrant and therefore testing a fire hydrant is Skilled Work. Counsel relied, for this proposition, on:

(a) section 54(1) of the *Building Fire Safety Regulation* 2008, which relevantly provides that the occupier of a building must ensure that maintenance of each prescribed fire safety installation for the building is carried out by an appropriately qualified person;[60] and

(b) the definition of "appropriately qualified person" in schedule 3 of that Regulation as, "for carrying out maintenance of a prescribed fire safety installation of a particular type, means a person who holds a licence of a class or type, or with an endorsement …" under one of several provisions, depending on whether the installation is water-based or otherwise.

[126] "Building" is defined in that Regulation by reference to s 104A of the *Fire Service Act* 1990.[61] That section excludes, from the definition of "building", "a single dwelling house, being either a detached dwelling house or a town, terrace, row, villa or like house attached to another such house or other such houses only by a wall on 1 or more of its sides." Therefore, the townhouses in Centenary Mews are not "buildings" and section 54 has no application.

[127] Neither counsel directed me to any other source of an obligation that the testing of a fire hydrant in a building other than as defined can only be properly (and legally) carried out by a person who has a particular licence.

[128] I accept that it is unlikely (although there was no evidence to the effect) that the testing of fire hydrants would be a task usually carried out by a service contractor. But the definition of "Skilled Work" has two components and it has not been demonstrated that the first of those components applies.

[129] Thus, to test a fire hydrant at this scheme is not, on the evidence before me, "Skilled Work" as defined.

[130] If I were wrong in this conclusion, Sherwood Forest submits that it was not in breach of that obligation in the particular manner alleged against it in the RAN, because its obligation to test plant and equipment cannot extend to testing that constitutes Skilled Work and which, by definition, it could not lawfully do. It may have been in breach of item 4, in not engaging an appropriate service contractor to undertake that Skilled Work, but the body corporate did not assert that it had breached that duty in that respect. Therefore, the body corporate could not rely on such a breach in determining the agreement.

[131] Counsel for the body corporate submitted that there were two separate obligations: one to carry out the stated work and the other to engage a contractor to carry out Skilled Work. The engagement of a contractor was the only way in which Sherwood Forest could carry out its own obligation to test the fire hydrant, but the fact that it was Skilled Work did not limit Sherwood Forest's own obligation.

[132] I agree with the latter submission. The definition of Skilled Work expressly provides that Skilled Work is still part of the service contractor's duties.

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60 "Maintenance" is defined as meaning inspection and testing, or repair, of the installation necessary to ensure that it continues to operate at its original performance level and in accordance with any relevant Australian Standards.

61 Now called the *Fire and Emergency Services Act* 1990.

However, it would be contrary to law for the service contractor itself to carry out Skilled Work if (but only if) it or its employee did not have the relevant licence. If it did have such a licence, it was obliged to carry out the work itself. But if it did not, it was still obliged to carry out the work, but could only do so by engaging a suitable person (at the body corporate's expense). In such a case it was obliged, by item 4, to engage such a contractor. Thus, where something that is to be done is Skilled Work, the obligation under item 3 is, to that extent, to be performed by the service contractor (if it has the relevant licence) or by fulfilling the obligation under item 4.

[133] In another section of the remedial action notice, the body corporate asserted that Sherwood Forest had breached its obligation under item 4. However, that alleged breach was only insofar as it said no contractor had been engaged to "remediate the issues caused by erosion in the bio-pit under the car park slab." It cannot now rely on a separate breach of that obligation, not stated in the remedial action notice, because of its obligation under s 131(4) of the Module to set out details of the contractor's failure sufficient to identify the relevant duties.[62] Therefore, if fire hydrant testing were Skilled Work, there is no relevant complaint that that duty was breached.

[134] But in any event, on my construction a breach of the obligation under item 4 would have resulted in a breach of the obligation under item 3(d).

[135] There is no doubt that the fire hydrant was not tested by Sherwood Forest or any contractor engaged by it at any time during the period of the agreement. Therefore, Sherwood Forest was in breach of its obligation under item 3(d) of the schedule.

Repair of fence

Schedule item	**Duty**	**Breach**
3(e)	*Promptly arrange to repair or replace any service, equipment or part of the Scheme Property which is defective, unsafe, or otherwise requires repairs or maintenance.*	Your breach of this clause is evidenced by the deterioration and neglect of fences at the Scheme (**see Annexure 5**). We are instructed that the photographs contained at Annexure 5 were taken at intervals throughout 2015 and up until 25 April 2016, after you had been notified of the issues. Many parts of the fence are defective and unsafe and in need of repair and maintenance. After many requests and much patience, the Body Corporate engaged contractors to repair the fence. Accordingly, the Body Corporate has suffered financially due to your failure to comply with the provisions of the Agreement.

[136] The first objection to this paragraph of the RAN is that it was not sufficiently clear because Sherwood Forest could not "ascertain whether further repairs to the fence are called for or whether the Body Corporate requires the costs of the repairs it has expended to be reimbursed. If the latter, the amount sought is not identified."

[137] I do not accept that proposition. Sherwood Forest's attention was drawn to the ongoing inadequate repair of the fence. It was a simple task for it to look at

62 See [8] and [9] above.

the fence and see what needed to be done. In any event, Sherwood Forest's contractor, OTB, well knew that the body corporate was not satisfied with the fence palings being left to warp until they pulled away from the posts or rails.

[138] I have described above the state of the fence over time. There was clearly an ongoing problem with fence palings warping and pulling away from the posts and rails. It is possible that the extent of the problem was the result of there apparently (from the photographs in evidence) being no paint, stain or other product on the fence that might prevent or diminish warping, but no evidence was given about the cause apart from it probably happening due to exposure to the elements.

[139] The photographs certainly show quite a number of fence palings warping and pulling away from the rails. Some of them have warped a great deal while others show only minor warping. One photograph shows a paling that has split, having apparently been hammered or screwed in several times.[63] The extent of warping of some palings, together with the need, in April 2016, to replace 12 palings and to repair another 30, demonstrate that the fence as a whole was not being maintained and repaired, nor were palings being replaced. In those senses, the fence was defective and required maintenance and, in some cases, repair. While I accept that Mr Cameron occasionally screwed in warped palings and he believed that his employees did also (although there was no direct evidence that they did), the photographs and the repairs in April 2016 demonstrate that the extent of that maintenance was inadequate. OTB never repaired the fence in the sense of replacing seriously warped palings.

[140] In my view, the evidence is clear that Sherwood Forest did not maintain and repair the fence sufficiently to comply with its obligation. In particular, the extent of warping on the occasions shown in the photographs and the repairs effected in April 2016 illustrate that it was not maintained to a high standard, if at all. Sherwood Forest was obliged continually to check the fence and to repair or replace warped palings. It failed to do so sufficiently.

Failure to engage skilled contractors – the bio-pit

Schedule item	**Duty**	**Breach**
4	*Arrange the engagement of service contractors as required to undertake Skilled Work (but if the cost of the service contract exceeds the Expenditure Limit, the Service Contractor must first obtain the consent of the Body Corporate) and (a) supervise the performance of service contracts in accordance with their terms and (c) check and verify accounts for goods and services payable by the Body Corporate relative to matters which are the responsibility of the Service Contractor under this Agreement*	This Agreement caters for situations in which the services of a skilled tradesperson will be required. Despite this, you have failed to arrange the engagement of skilled tradespeople to carry out particular work. For example, you did not take any steps to engage a suitably qualified person to remediate the issues caused by erosion in the bio-pit underneath the car park slab. Your failure in this regard is entirely unreasonable particularly in circumstances where this clause only requires you arrange and supervise contractors (as opposed to actually carrying out the work yourself).

63 Booker #1, JB-4, p12.

	and notify the Body Corporate that they are in order for payment.	

[141] Again, Sherwood Forest submits that this complaint is not sufficiently clear. It is not said that Sherwood Forest failed to refill the eroded area with rocks and gravel, as it had done in April 2015. The requirement to "engage a suitably qualified person to remediate the issues caused by the erosion" does not specify what was required to "remediate" the issues, nor who would be a "suitably qualified person." It does not, for example, say that Sherwood Forest was asked and failed to engage an engineer to inspect and report on the safety of the situation and, if necessary, how to remedy it.

[142] Neither Mr Booker nor Mr Cameron said that anyone had raised the possibility of having the area inspected by someone such as an engineer until the meeting between those gentlemen on 25 June 2016: that is, after the remedial action notice had been issued. It was only then that Mr Booker asked Mr Cameron to arrange for an expert to inspect and report on the slab and said that he did not want the area filled until an engineer had inspected it to make sure the slab was safe and Mr Cameron said he would contact Sherwood Forest about it.

[143] It is unfortunate, as I have said, that nobody told Mr Booker, after the meeting on 25 June 2016, what they were doing to engage an engineer to inspect the area. However, the real question is whether Sherwood Forest was required, and had failed, to do anything to that effect before the remedial action notice was issued.

[144] I consider that, in all the circumstances I have described, Sherwood Forest was under no obligation to engage an engineer until it was instructed to do so by the body corporate. Mr Cameron had agreed with Mr Booker that he would monitor it and had been doing so. Mr McCarthy, an engineer, has inspected it in 2015. Sherwood Forest was not instructed to engage someone else until after the remedial action notice had been issued.

[145] In the circumstances, Sherwood Forest did not breach this duty.

Failure to report

Schedule item	**Duty**	**Breach**
9	*Promptly report to the Committee (a) anything requiring repair (b) any matter creating a hazard or danger (c) any correspondence, notices, reports or complaints relating to the scheme.*	The clause has been contravened because you have failed to report certain matters to the Committee as required. For example, you failed to report to the Committee that the wooden paling fences at the Scheme required repair and maintenance (**see Annexure 5**). You also failed to report to the Committee the erosion occurring in the bio-pit under the carpark slab despite it being a hazard and danger (**see Annexure 6**).

[146] Sherwood Forest submits that this complaint was spent by the time the remediation notice was issued. The body corporate itself was well aware of the two issues about which this complaint was made: the fence and the bio-pit. There was no need to report them.

[147] Counsel for the body corporate submitted that it was Sherwood Forest's obligation to report matters to the body corporate; it was not the body corporate's responsibility to raise issues with Sherwood Forest. Even though the body corporate may be aware of an issue, that did not absolve Sherwood Forest of reporting it.

[148] I do not agree. The purpose of the item is to draw to the attention of the body corporate matters of the nature described in the agreement, about which Sherwood Forest, as the contractor, became aware but of which, so far as it knew, the body corporate may not be aware. Where the body corporate was clearly aware of an issue, there was no obligation on the contractor to report it to the body corporate.

[149] The only matters that the body corporate alleges were not reported to it were the fence needing repairs and the erosion associated with the bio-pit, both of which were well known to the body corporate. Neither of them created a hazard or danger.

[150] Sherwood Forest did not breach this obligation.

Compliance with directions

Clause of Schedule	**Duty**	**Breach**
16	*Generally co-operate with the Body Corporate and comply with and carry out all reasonable directions from time to time given by the Body Corporate to the Service Contractor about the administration and management of the Scheme.*	This clause requires you comply with the reasonable directions of the Body Corporate. We are instructed that the Committee has, on numerous occasions, brought to your attention the various maintenance issues at the Scheme. However, despite these requests, many of the issues raised remain outstanding. For example: □ On 4 April 2015, the Chairman had an onsite meeting with Angus Baker (**Mr Baker**) regarding the fence palings, hedges and gardens. A month later, no work had been done to address the Body Corporate's concerns. This is despite the Chairperson texting Mr Baker about the concerns and Mr Baker replying *'cheers, on to it mate.'* □ On 4 December 2015, the Chairman met Peter Cameron (**Mr Cameron**) onsite and discussed the condition of the gardens, hedges and fences. The Chairman advised that the two youths attending the Scheme to perform work remained on site for a maximum of 15 minutes and performed very little work. Over 5 months has passed and we are instructed that none of the issues addressed with Mr Cameron have been rectified. □ On 18 March 2016, the Chairperson met Ben McCarthy (**Mr McCarthy**) and Mr Baker onsite to discuss the deteriorating nature of the common property with particular attention on the common areas, garden, hedges and fences. A full inspection of the Scheme was carried out. Mr McCarthy and Mr Baker gave assurances that the issues would be rectified and that the two youths who attend the Scheme would have the necessary tools to enable hedge trimming and fence repairs to occur. Two months passed and the said work had not been carried out. The Body Corporate felt it had no

		choice but to engage a separate contractor to repair the fence with the cost being borne by the Body Corporate.

[151] This is another "catch-all" complaint that really relies on similar or identical complaints to the specific ones dealt with above. To that extent, I do not propose to consider them again.

[152] Sherwood Forest contends that, in any event, this duty has nothing to do with maintenance and repair of the scheme property. This item concerns the "administration and management" of the scheme, while items 3 and 4 (and several others) concern the maintenance and repair of scheme property. No complaint is made about any directions concerning the administration and management of the scheme. Rather, the matters said to comprise the breach concern the maintenance and repair of the Scheme Property.

[153] Item 3.1(b) of the schedule requires the contractor to comply with reasonable directions about performance of the service contractor's duties. One of those duties is that in item 9 of the schedule, which is limited to directions about the administration and management of the scheme. There does seem to be a duplication here, but item 9 is more limited than item 3.1(b). Most of the contractor's duties concern the repair and maintenance of Scheme Property, but some may be said to relate to the administration and management of the scheme: those seem to be item 10 (assistance in the preparation of budgets, 11 (attending and giving advice at meetings), 12 (keeping and allowing inspection of records and 14 (reading meters). Item 16 appears to be limited to those types of duty.

[154] I therefore agree with Sherwood Forest's submission that the body corporate has not demonstrated any breach of this duty.

Conclusions on breaches

[155] I have found that Sherwood Forest did breach the agreement, in the ways alleged by the body corporate in the remedial action notice, in four respects:

(a) it did not maintain the hedges and similar plants to the required standard over time and therefore breached its duties under item 3(b);

(b) in breach of item 3(a), it did not clean the driveway to the required standard, by failing to remove the graffiti;

(c) it did not test the fire hydrant, in breach of item 3(d);

(d) it did not maintain and repair the fence sufficiently to comply with its obligation under item 3(e).

[156] Those breaches were extant at the time of the remedial action notice. In order to comply with that notice, it was therefore required to remedy those breaches by 7 July 2016.

Was the remedial action notice nevertheless invalid?

[157] Sherwood Forest contended that, if the court were to find that it breached the agreement in some (but not all) of the ways about which the body corporate

complained, the remedial action notice may still be wholly invalid in that it was "so infected" by the invalid complaints that the consequence was that it did not comply with the requirements under the Module and was therefore invalid.

[158] Counsel for Sherwood Forest relied on the reasons of Thomas J, sitting in the Full Court, in *Clarke v Japan Machines (Australia) Pty Ltd*[64] for the proposition that it is a matter of fact and degree in determining whether an error in a notice (in claiming a breach that the court finds did not exist) vitiates the entire notice even though it also complains of other breaches that the court finds did occur. While an error – or incorrectly claimed breach – will not necessarily vitiate the notice, that will depend particularly on the extent of the error and the capacity of the notice to give the contractor a reasonable opportunity to do what it is obliged to do.

[159] Mr Kidston, for Sherwood Forest, submitted that a body corporate cannot simply "throw up what you can *prima facie* justify and see where it falls." That is likely simply to generate disputes about matters that perhaps ought never to have been alleged. Nor is it the intention of the Module that a service contractor will have to pick through a notice and determine which complaints are legitimate.

[160] Mr Hastie, for the body corporate, agreed that the inclusion of an alleged breach in a notice which a court subsequently finds not to have been committed will not necessarily invalidate the notice. He agreed that it is, at least to some extent, a question of fact and degree, adopting the reasons in *Clarke v Japan Machines*. He also relied on a decision of the New South Wales Court of Appeal,[65] in which the Court was considering the validity of a notice of breach by a lessor to a lessee. There it was said that:

> A s 129 notice is not invalidated if the lessor includes in it specification of breaches that a court later finds were not committed: … In my opinion, it would follow from this that an otherwise valid s 129 notice is not invalidated just because the lessor requires the lessee to remedy a breach that has not in fact occurred, … In such cases, if the lessee does not wish to comply with requirements in the notice to the extent that the lessee considers them excessive, the lessee may take the risk of not complying fully with the lessor's requirements; and if the lessor then purports to forfeit the lease and the matter comes to litigation, the lessee may or may not be successful.

[161] Mr Hastie submitted that that proposition, applying to notices of breach in leases, is directly applicable, by analogy, to notices of breach of service contracts and therefore is of more assistance than the *Clarke* proposition, where the court was considering a demand under a mortgage.

[162] In this case, I have found that four breaches, out of nine identified in the remedial action notice, had occurred. Three of the alleged breaches that I have found were not breaches[66] were of a general nature, although referring to

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64 [1984] 1 Qd R 404, 413.

65 *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* (2010) 383 ALR 677; [2010] NSWCA 268, [327].

66 The chapeau to item 3 and items 9 and 16.

matters that were the subject of the other allegations. The remaining two allegations that were not breaches were limited to specific factual issues. The four breaches were themselves limited to specific factual issues, although the complaint based on item 3(b) went beyond the matter that I have found constituted the breach.

[163] Accepting that the validity of a notice is, to some extent at least, a question of fact and degree, I consider that the notice here was clear enough to inform Sherwood Forest of the matters to which it had to attend within the time allowed by the notice: it must trim the hedges (and otherwise tidy the gardens on the Scheme Property), clean off the graffiti, test the fire hydrant and fix the fence. It might or might not accept that it must also engage an engineer to review the bio-pit erosion and do anything else to maintain the gardens in the Scheme, but it should have been under no misapprehension of the matters that the body corporate required it to do.

[164] Indeed, it is clear from what happened after it received the notice that Sherwood Forest understood what the body corporate required of it. Sherwood Forest took steps to remedy the matters about which the body corporate was complaining.

[165] Thus, the remedial action notice was not invalid. The question now is whether Sherwood Forest remedied the breaches identified in the notice within the time required.

Did Sherwood Forest remedy its breaches, in time or at all?

[166] As I have said above in dealing with the gardening issues,[67] the body corporate made it clear that, by 4 July 2016, the body corporate was satisfied with the work that had been done on the gardens. In that respect, I am satisfied that Sherwood Forest remedied that breach within the time specified in the notice.

[167] As I have also said above,[68] Sherwood Forest did not remove the graffiti until some time between 23 August and 17 September 2016. Therefore, it did not remedy that breach within the time provided in the remedial action notice, although it did remedy it after the committee resolved to call the general meeting and possibly before the general meeting took place.[69]

[168] Sherwood Forest also did not arrange to have the fire hydrant tested during the period specified in the remedial action notice, even though Mr Cameron obtained a quote on 24 June and confirmed that the work could be done by 7 July. Mr McCarthy's explanation for not having the work done within time – that he sought other quotes – is not satisfactory. It was well within Sherwood Forest's discretion itself to accept a quote and to have the work done. Therefore, Sherwood Forest did not rectify this breach within time.

[169] Although Mr McCarthy sent a quote to the body corporate on 6 August, even that action was inadequate. Sherwood Forest's obligation was to have the

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67 Paragraph [38].

68 Paragraph [41].

69 However, Sherwood Forest has not satisfied me that it did remove the graffiti before the general meeting: its evidence in that respect was too vague.

hydrant tested and it could and should have arranged for that to be done and then sought reimbursement from the body corporate.

[170] Therefore, by the time the committee resolved to call the general meeting and at the time of the general meeting, Sherwood Forest remained in default of this obligation.

[171] The only evidence concerning the state of the fence at the end of the period specified in the remedial action notice is that of Mr Booker to which I have referred in paragraph [43] above. He identified only 14 palings out of many hundreds that were in various stages of warping at that time. As I said, only seven were obvious and, of those, only three were significantly warping.

[172] Although only a few defective palings were identified on that occasion, the significant warping and absence of repair of three palings was indicative of the ongoing attitude of Sherwood Forest to leave such repairs for too long, as it had in the past. In circumstances where its contractor, OTB, was required to attend at the premises for a 1½ hour maintenance visit weekly, even this relatively small extent of disrepair should not have occurred and was in breach of Sherwood Forest's ongoing obligation. It demonstrated that it had not remedied that breach.

[173] Therefore, the only breach identified in the remedial action notice that was remedied within the period specified in that notice was the tidying and trimming of the gardens.

Was there any subsequent agreement preventing reliance on the notice?

[174] Sherwood Forest contended that, at the meeting on 21 June 2016 between Mr Cameron and Mr Booker, the body corporate (by Mr Booker) agreed with Sherwood Forest (by Mr Cameron), in a manner binding on the body corporate, that OTB would do certain specified work that would be sufficient to remedy the breaches about which the body had complained in the remedial action notice. Sherwood Forest alleges, in its statement of claim, that there were implied terms of that agreement that:

(a) Sherwood Forest would carry out the agreed work within a reasonable period of time;

(b) if it did so the body corporate would not rely on the remedial action notice for the purpose of attempting to terminate the agreement; and

(c) the parties compromised the dispute between them in respect of whether Sherwood Forest had failed to comply with its duties under the principal agreement.

[175] Mr Cameron's evidence was that he and Mr Booker met on site on 21 June 2016, they walked around the site and he took notes of the work required to be done to deal with the body corporate's complaints in the remedial action notice. The notes are exhibit 4: they identify, mostly in relation to garden beds (including the beds between and in front of individual townhouses that in fact are not on the common property), whether gravel or mulch would be placed on the beds and any trimming of trees and hedges required. They do not mention

the fire hydrant. The only relevant mention of the bio-pit is to record, "Strip along visitors – leave until checked out by builder/engineer." The entry concerning graffiti says, "Rear graffiti. High pressure as part of gutter cleaning quote. If that fails lightly grinding."

[176] Mr Cameron sent an email to Mr Booker the next day, in which he provided more details than had been set out in his notes.[70] Again, there was a lot of detail about works to be carried out to the garden beds, hedges and trees. As to the bio-pit and graffiti, it said relevantly:

Stormwater Detention Pit

- Area under strip of visitor car parking is being eroded
- Need to have investigate by builder/engineer to determine if all ok
- Do not Mulch along the side of this visitor car parking area until investigated …

Graffiti

- Several attempts to clean have been unsuccessful
- We are arranging quote for Gutter Cleaning, plan to include high pressure clean of graffiti as part of quote
- If high pressure clean does not work, will lightly grind the graffiti. Leaving grinding as a last resort as this will leave a mark on concrete

[177] Mr Cameron agreed, in cross-examination, that neither the fence nor the fire hydrant was discussed at that meeting.[71] (Neither of them was referred to in his notes or the email.) He agreed that no time was agreed for completing the works they discussed.[72]

[178] Mr Booker recalled that, at that meeting, he and Mr Cameron discussed the gardens, which he recalled as having already been worked on by OTB.[73] He recalled only one meeting, after the garden works had been done and did not recall a meeting after the remedial action notice had been sent but before the works were done.[74] In that respect, Mr Cameron's notes and the emails exchanged between them on 22 June demonstrate that Mr Booker was clearly mistaken. Indeed, when shown the exchange of emails, he said they had "gone through the complex and said 'gravel there and there and mulch here.'" That can only be an acceptance that such a meeting occurred before the garden works were done.

[179] Despite his recollection of only one meeting, when it was put to him that he had told Mr Cameron to get an expert to inspect the bio-pit area and not to do any work there until it had been inspected, he replied "Well, I imagine I did. Yes."[75] He disagreed that he told Mr Cameron that, if he did all the work that had been outlined in that meeting, Mr Booker would be satisfied that all the

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70 Cameron #1, PC-5, pp 41-43.
71 T2-57:26-38.
72 T2-59:32-34.
73 T3-42:1-26.
74 T3-101:22 to T3-102:15.
75 T3-103:12-16.

things that needed to be done under the remedial action notice had been attended to.[76]

[180] In response to Mr Cameron's email of 22 June 2016, Mr Booker sent an email to Mr Cameron later that day, relevantly saying:

> I am impressed with the detail of your plan to remediate the gardens … I look forward to seeing the end result.
>
> …
>
> Other than that every detail of the garden has been covered to the committee's satisfaction.

[181] It is clear that those gentlemen met on 21 June and discussed what works were to be done, as recorded in Mr Cameron's email of 22 June. However, I do not accept that their discussion and emails led to or constituted an agreement to vary or disregard the remedial action notice or not to rely on it if the works stated were done. Nor was there any agreement (express or implied) that the works were to be done within an unspecified reasonable time. To the contrary, to the extent that they agreed on works to be done, in the absence of an express agreement to extend the time beyond the notice period any agreement would be subject to an implied term that all works would be done within that period. It was, after all, a meeting to discuss what needed to be done to comply with that notice.

[182] Mr Booker later told Mr Cameron, by email, that the committee was satisfied with the works that had been done to the gardens.[77] But that email only referred to the garden works. It did not mention any other works that were to be done to rectify the defaults listed in the remedial action notice. It did not excuse or justify any delay, beyond the period specified in that notice, to complete the other works. Sherwood Forest had no basis to believe that all the necessary works had been done to the body corporate's satisfaction, nor that it was not required to complete the works within the specified period.

[183] I find that there was no "Remediation Work Agreement" as alleged by Sherwood Forest.

[184] I also find that Mr Booker and Mr Cameron agreed that Sherwood Forest would undertake the steps set out in Mr Cameron's email of 22 June 2016 about the bio-pit and the graffiti. However, there was no agreement that those steps need not be completed within the period specified in the remedial action notice. Nor did that agreement constitute any agreement to waive the requirements that Sherwood Forest rectify those issues within that period.

[185] Finally, the absence of any reference, in that meeting, to testing the fire hydrant did not mean that the body corporate agreed not to rely on it. That was a straightforward requirement and, indeed, Mr Cameron took the first step to have that done on 21 June 2016, by seeking a quote and ensuring that the quoting contractor could do the work by 7 July.[78] That is clear evidence that

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76 T3-103:22-25.

77 See [37] above.

78 McCarthy #1, BMC-10B, p 75.

he knew that it had to be done and had to be completed by the date provided for in the remedial action notice.

[186] Consequently, there was no agreement that relieved Sherwood Forest of the obligation to rectify the breaches referred to in the remedial action notice and to do so within the time specified in that notice.

Was the body corporate's decision to terminate reasonable?

[187] The body corporate accepts that it was required to act reasonably in deciding whether to terminate the agreement for breach by Sherwood Forest. It submits that that obligation is an implied term of the agreement and it is unnecessary for Sherwood Forest to rely on s 94(2) of the Act. Of course, it contends that it did act reasonably in making that decision.

[188] Sherwood Forest contends that the obligation to act reasonably arises under s 94(2) of the Act and a number of facts mean that the body corporate did not act reasonably in making the decision. Before dealing with those contentions, it is appropriate to consider what is involved in acting reasonably.

[189] Counsel for the body corporate referred to several cases in which courts have considered a contracting party's duty to act reasonably in dealings under the contract. Those cases are not overly useful, as they concern whether or not a term that a party will act in good faith and fair dealing is implied into a commercial contract.

[190] Nonetheless, the reasons of the Court of Appeal of New South Wales in *Burger King Corporation v Hungry Jack's Pty Ltd*[79] are of some assistance. The Court in that case held that obligations to act in good faith and to act reasonably are similar. They encompass such obligations as a requirement to cooperate in achieving the contractual objects, compliance with honest standards of conduct, compliance with standards of conduct that have regard to the interests of both parties and not acting capriciously or for a purpose extraneous to the contract. However, a party is not obliged to disregard, or to act contrary to, its own legitimate interests. Furthermore, the obligation to act reasonably does not operate to block or avoid the express terms of the contract. These factors are, in my view, relevant both to an implied obligation under the agreement that the parties would act reasonably and in good faith and the express statutory obligation on the body corporate to act reasonably in administering the common property.

[191] Sherwood Forest relied on decisions of QCAT as to the factors relevant to determine whether a body corporate acted in accordance with its obligation under s 94(2). In particular, counsel submitted the following.

(a) The test for reasonableness is an objective one that requires a balancing of factors in all of the circumstances.[80] The test is:

> less demanding than one of necessity, but more demanding than a test of convenience ... The criterion is an objective one, which

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79 (2001) 69 NSWLR 558, [169]-[185].

80 *Trojan Resorts Pty Ltd v Body Corporate for the Reserve* [2015] QCAT 337 at [45]; *Luadaka v Body Corporate for the Cove Emerald Lakes* [2013] QCATA 183, [14]-[16].

> requires the [body corporate] to weigh the nature and extent of the effect of the relevant conduct, on the one hand, against the reasons advanced in favour of it. All of the circumstances of the case must be taken into account."

(b) Section 94(2) involves a balancing of competing interests.[81] This was explained in the *Trojan appeal*[82] at [24] as follows:

> A decision-maker must look at all of the circumstances objectively. That may include a consideration of the manager/letting agent's position, as objectively determined by the decision-maker, if the interests of the body corporate and the lot owners are aligned. It may require consideration of the manager/letting agent's position if that person has rights to use the common property. It may include consideration of the manager/letting agent's position if, as here, the body corporate has to give notice to a financier. If, ultimately, the body corporate must make its decision for the benefit of the lot owners, we do not see how an objective examination of all of the circumstances operates to fetter the exercise of the body corporate's action.

(c) The absence (or triviality) of loss or damage caused by the failure to perform a duty is material to assessing whether or not the body corporate has acted reasonably.[83]

[192] Mr Kidston submitted that, in making their decision at the general meeting, the voting lot owners were, in essence, misled by the committee because the explanatory memorandum accompanying the notice of the general meeting did not inform lot owners of a substantial number of relevant facts. Those facts included that Sherwood Forest had agreed to perform work to remedy the defaults, that it had remedied some of them (particularly the garden issues) within the time allowed by the remedial action notice, that it had taken steps to remedy other defaults, although outside that period – such as by removing the graffiti (after agreeing to take a number of steps to do so), providing a quote for the fire hydrant testing and attempting to have an engineer inspect the slab over the bio-pit, that the body corporate may well become involved in expensive litigation with Sherwood Forest if it were to terminate the agreement and that some of the photographs accompanying the notice were taken about two months before the issue of the remedial action notice. As the members were not informed of all the relevant facts, their decision to terminate the agreement was not reasonable.

[193] The principles relied on by Mr Kidston are correct, so far as they go. But the last of those principles was not limited to the absence of loss or damage. The member of QCAT at first instance in *Trojan* also referred to the absence of evidence that the breach altered or affected the body corporate's interests. In that case, the breach was the resignation of a director of the caretaker and letting agent (Trojan) – a director who took no active part in the day to day activities of Trojan at the scheme. When it was pointed out to Trojan, by the body corporate, that that amounted to an unauthorised assignment of the

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81 *Ainsworth v Albrecht* [2016] HCA 40, (2016) 261 CLR 167.

82 Apparently referring to *Body Corporate for the Reserve v Trojan Resorts Pty Ltd* [2017] QCATA 53.

83 *Trojan Resorts* (first instance) at [56].

contract, the director was promptly reappointed. Nevertheless the body corporate resolved to terminate the contract in reliance on the breach. Nothing had altered or affected the manner in which the caretaker had operated in the interim. Thus the director's resignation had had no effect on the body corporate or the scheme. In was in that context that the member found that the resolution was invalid.

[194] The member's decision was upheld on appeal. The appeal tribunal remarked that the decision of the lot owners at the meeting which considered the resolution was not subject to the requirement of reasonableness, but the body corporate's decisions to initiate the termination, to issue the notice and to put the resolution before the lot owners were subject to the requirement of reasonableness under s 94.[84]

[195] At first blush, this view seems to be supported by the plurality in *Ainsworth v Albrecht*, where their Honours distinguished a case that

> was concerned with the duty of a decision-making body to reach a reasonable decision taking into account competing considerations. A lot owner voting his or her opposition to a motion is not a decision-maker of this kind.[85]

[196] However, that was said in the context of a case in which the real question was whether the lot owners' opposition to a motion put to the general meeting and requiring a resolution without dissent was unreasonable. As the High Court held, that is a different question and one to which the obligation of the body corporate to act reasonably is not relevant.

[197] In this case, the question of the reasonableness of the lot owners' decision is not raised. The question is whether the decision of the body corporate comprising the resolution consequent upon the motion was reasonable.

[198] The appeal tribunal in *Trojan* went on to note that it is the effect of the breach on the lot owners' interests that is the primary focus in determining what was reasonable.[86]

[199] In an earlier decision of the QCAT appeal tribunal, Carmody J said that a determination of whether a decision by a body corporate was made reasonably,

> involves an evaluation of the known facts, circumstances and considerations that tend to have a rational bearing on the issue at hand including predictable future possibilities and risks. In practice, this requires that all relevant matters be taken into consideration and irrelevant ones left out. It is a question to be determined when the decision in issue was made.[87]

[200] The High Court considered the question of a body corporate's obligation to act reasonably in *Ainsworth v Albrecht*. There, the plurality described (although *obiter*) the issue, in considering the obligation under s 94(2), as

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84 *Trojan* appeal, [37].
85 *Ainsworth v Albrecht*, [51].
86 *Trojan* appeal, [48].
87 *Body Corporate for Beaches Surfers Paradise v Backshall* [2016] QCATA 177, [42].

> whether the Body Corporate had failed to comply with s 94(2) of the BCCM Act by achieving a reasonable balance of the competing interests affected by the proposal.[88]

[201] Nettle J, in his separate reasons, said:[89]

> Nor is reasonableness something about which informed views are likely to, or should, differ. Reasonableness does not mean whatever the adjudicator considers to be just and equitable and it does not involve the application of discretionary considerations of the kind that were essayed in *Norbis v Norbis*. The standard of reasonableness is objective and it is to be applied in this case at the time of rejection of Albrecht's motion taking into account all relevant factors including factors which were extant but which the parties may not have identified or appreciated at the time.

[202] Here, the decision of the body corporate constituted by the result of the vote on the motion must be objectively reasonable, taking into account all relevant factors including factors which were extant but which the parties may not have identified or appreciated at the time.

[203] Sherwood Forest contends that, in making the decision in this case, the body corporate did not take into account all relevant factors, because the notice calling the meeting and the explanatory note did not inform the lot owners of all relevant factors, such as those I have summarised above at [192].

[204] The notice calling the general meeting[90] set out the motion and attached a document drawn by Mr Booker, to which he attached some photographs that he had taken of some bushes, fencing and garden beds.

[205] The motion itself was (excluding words that are unnecessary for present purposes) -

> That the Body Corporate resolves to terminate the Service Contractor Agreement (**Agreement**) between the Body Corporate for Centenary Mews CTS 45608 and Sherwood Forest Constructions [*sic*] Pty Ltd … dated 28 January 2014 due to the failure of the Service Contractor to comply with the Remedial Action Notice dated 15 June 2016 …

[206] A copy of the document drawn by Mr Booker (without the photographs) is appendix 2 to these reasons.

[207] I have described above[91] most of Sherwood Forest's criticisms of that document. The balance of them are irrelevant, given my findings of fact, including of what were and were not breaches. Some of the remaining criticisms are incorrect, as the document did state that the gardens had been remediated and it said the other matters had not been dealt with, which was true. It was also correct that the body corporate had engaged another contractor to mend the fence, at additional expense. Some of the photographs were from

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88 *Ainsworth v Albrecht*, [49].

89 *Ainsworth v Albrecht*, [101] (citations omitted).

90 Exhibit 15. It is undated, but presumably was sent to lot owners shortly after the committee's decision to do so, on 8 August 2016. It was required to be issued at least 21 days before the date of the meeting (8 September 2016): Module, s 74.

91 At [192].

some time earlier, but they were clearly attached as examples of matters that had been issues over some time. They were not stated to be current.

[208] It is true that the document did not state that Sherwood Forest had belatedly made some efforts to remove the graffiti, but that had not been done by the time the notice was sent, nor possibly by the date of the general meeting. But it had not remediated the other issues and, as stated in the notice of the meeting, it certainly did not do so within the time specified in the remedial action notice. Although, by the time of the meeting, Sherwood Forest had provided a quote for testing the fire hydrant, it had not had it tested. Although it turns out that it had been taking steps to have the original engineer inspect the slab and the bio-pit erosion, it had not informed the body corporate what it was doing and, in the face of difficulties getting the original engineer to inspect it, it had done nothing to engage an alternative.

[209] I do not consider it necessary for the document to state that, if the body corporate were to terminate the agreement, it may be faced with expensive litigation by Sherwood Forest and that, if a court found that it had not validly terminated the agreement, the body corporate may be liable to Sherwood Forest for damages. Any sensible lot owner would anticipate such possibilities.

[210] In his cross-examination of Mr Weeks, Mr Kidston put to him that Mr Booker had agreed to allow Mr Cameron time beyond the expiration of the remedial action notice to remove the graffiti and to have an engineer check the car park slab, while not filling the eroded area with gravel in the meantime. The following exchange then occurred.

> if there were legitimate explanations for why the gravel hadn't been inserted and the remediation work carried out, why the graffiti hadn't been removed, and why the – well, those things – do you accept that you would have voted differently, rather than terminating?---Yes.

[211] Mr Kidston relied on that exchange in submitting that Mr Weeks accepted that he may have voted against termination of the Agreement had he been informed of some of the matters referred to above at [192]. No doubt other members (none of whom was called) would have also. Therefore, in passing the resolution to terminate the agreement, the body corporate (by its members) did not take into account all the relevant circumstances and its decision was not reasonable.

[212] I do not accept that submission. The two propositions put to Mr Weeks concerned an alleged agreement that I have found did not occur. Even though Mr Booker agreed that different methods to remove the graffiti could be tried and that an engineer should be asked to review the car park slab and report on its safety, with the erosion not to be filled in the meantime, he did not agree that those steps need not be completed before the expiration of the period specified in the remedial action notice. Therefore the proposition put to Mr Weeks and his response are based on incorrect premises.

[213] The circumstances which the body corporate was entitled to take into account included the history of the adequacy or otherwise of the performance by Sherwood Forest of its obligations under the agreement. Even though the

garden concerns had been remedied during the relevant period, Sherwood Forest's prior inadequate maintenance of the garden was a relevant circumstance. Similarly, its failure to rectify its defaults during the relevant period was relevant to the decision. I do not consider that the decision to terminate the agreement was unreasonable. To the contrary, given Sherwood Forest's past performance and its ongoing failure to carry out its duties, even at the date of the meeting, it was an entirely reasonable decision.

[214] I therefore find that the body corporate validly terminated the agreement by its solicitors' letter of 12 September 2016. Sherwood Forest's claim should be dismissed.

Loss to Sherwood Forest

[215] Notwithstanding that I have found against Sherwood Forest, in case there is an appeal from my decision it is apposite that I consider its claim for damages.

[216] There was not a great dispute about the extent of loss suffered by Sherwood Forest as a result of the termination of the agreement. Sherwood Forest relied on the report of an expert forensic accountant, Mr Lytras. The body corporate did not dispute Mr Lytras' methodology in calculating the loss, but raised a number of matters that, it said, meant that the true loss was a little less. Those matters were not disputed by Sherwood Forest.

[217] Mr Lytras calculated the total loss at $210,000, comprising lost income of $217,275 less savings of costs. He divided that sum between past and future losses, based on a current date of 27 March 2020 and the contract being due to end on 27 January 2024. The parties' submissions were on the basis that the appropriate date to divide between past and future losses, having regard to the actual date of the trial and the possible date of judgment, was 27 July 2021. On that basis, using the figures in Mr Lytras' report, the lost gross revenue amounts to $138,083 past loss and $79,192 future loss, a total of $217,275.

[218] Mr Lytras deducted from that revenue savings in contractor fees to OTB, for which Sherwood Forest claimed when OTB was in fact being paid to work on other schemes after the contract termination. Mr Lytras allowed for three months at $756, but in fact the relevant payments were for four months (December 2016 to March 2017). That saving therefore increases to $3,024.

[219] Mr Lytras also allowed for savings in variable costs that, calculated to 27 July 2021, amount to $2,512 in the past and $2,418 in the future. Thus total past savings were $5,536.

[220] Deducting the savings from the lost gross revenue results in a past loss of $132,546 and a future loss of $76,775, a total of $209,321.

[221] In his written submission, Mr Kidston also asserted that, at the date of termination of the agreement, Sherwood Forest had an accrued entitlement to be paid $6,735.31 for the period 13 September 2016 to 30 November 2016. He submitted that it was convenient to treat that sum as damages for the body corporate's breach. Mr Hastie made no submission to the contrary.

[222] Under the agreement, the annual fee was payable monthly in arrears, so if it were held that the agreement had continued until Sherwood Forest terminated it, three months' fees would have been due. The initial annual fee was $30,000, but the agreement provided for it to increase annually in accordance with the consumer price index. Mr Lytras calculated the monthly fee in 2016 (exclusive of GST) at $2,357.47, although he said that the body corporate had been paying $2,357.76.[92] Therefore, if the agreement had continued until 30 November 2016, the body corporate would have paid, or been liable to pay, fees of $7,072.41. Adding that sum (rounded down) to the other past losses would result in past losses of $139,618.

[223] Mr Lytras did not discount the future loss to account for its receipt in one lump sum. He opined that a discount of 1% to 2% would be appropriate. I agree. A discount of 1.5% would result in damages for future losses totalling about $73,474. On that basis, total damages would be $213,092.

[224] Mr Lytras also did not discount the total losses for the potential that the contracted fees may not have been received, as he considered that they were quite secure under the agreement. Mr Hastie submitted that I should discount the losses for the possibility that the agreement would in any event have been terminated before the end of its full term, due to the past inadequacies of Sherwood Forest's behaviour and the body corporate's dissatisfaction with its performance. Given that dissatisfaction, I consider there to be a real possibility that Sherwood Forest would have defaulted and the body corporate would have validly terminated the agreement in the future. Therefore I consider it appropriate to allow a small discount for that possibility. An appropriate rate is 5%, resulting in damages of $132,637 for past losses and $69,800 for future losses, a total of $202,437.

[225] Finally, Sherwood Forest sought (and the body corporate did not dispute) interest on past losses. Interest awarded under s 58 of the *Civil Proceedings Act* 2011 is in the discretion of the court but the rate or rates of interest to be awarded are generally to be guided roughly by commercial rates. However, the rates awarded are often also guided by the rates set for default judgments, which have varied from 5.5% to 4.1% over the relevant period. Mr Kidston submitted that those rates were appropriate.

[226] Mr Hastie did not dispute that interest should be awarded, nor the appropriate rates. I shall adopt the default rates as a reasonable proxy for commercial rates. Using those rates, interest on the past losses would amount to $31,563.85 as at 5 August 2021 However, to reflect roughly the fact that the losses would have been incurred over time, I shall halve the amount of interest to be awarded. Thus interest to the date of judgment would be $15,781.93.

[227] Therefore, if Sherwood Forest had succeeded in its claim, it would have been entitled to judgment for $218,218.93, including interest of $15,781.93.

[228] I shall hear from the parties as to costs.

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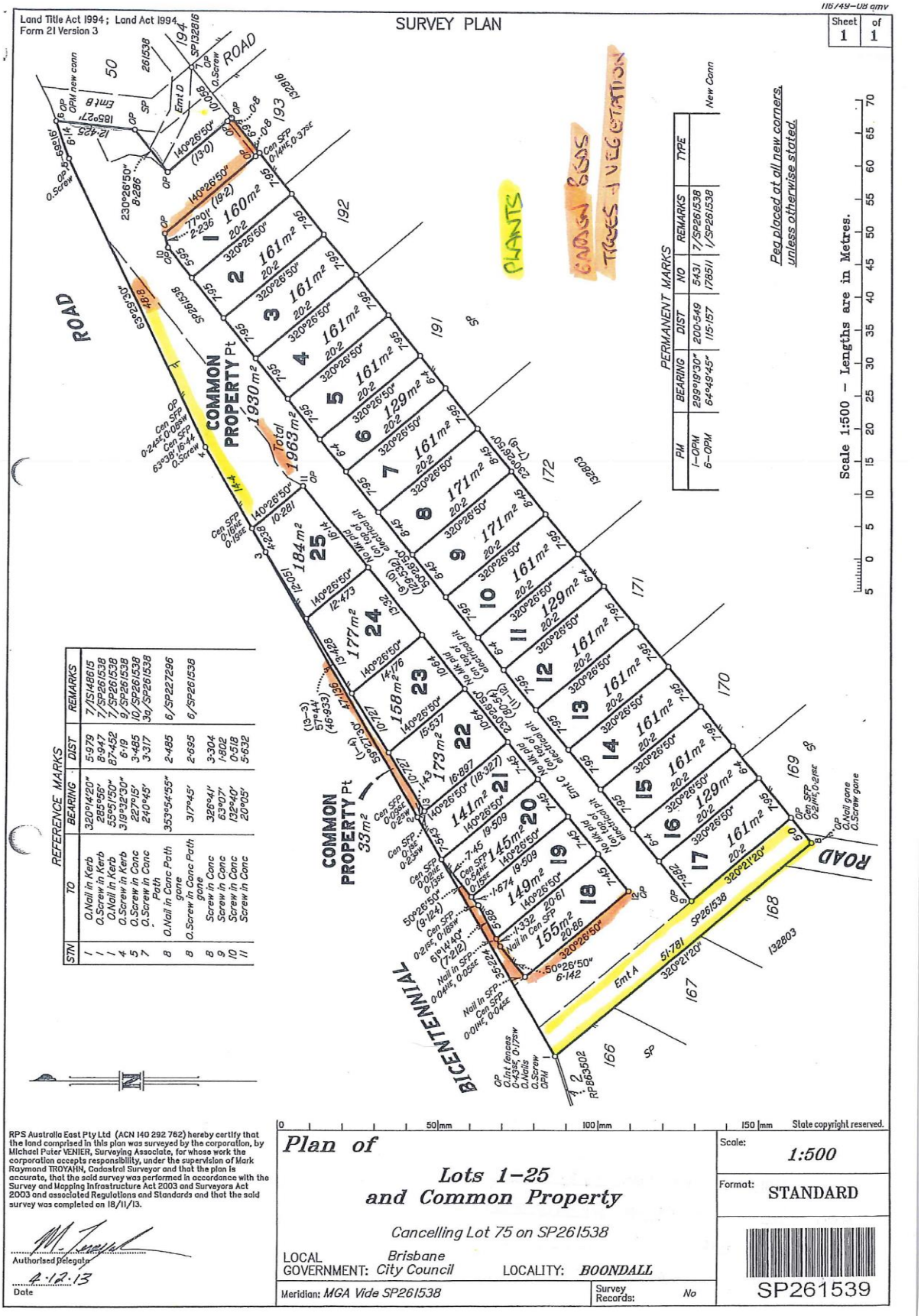
92 The figure of $3,357.76 appears in Mr Lytras' report, but it is clearly a typographical error, as annexure 6 to the report - an extract from Sherwood Forest's accounts - shows that it was being paid $2,357.76.

Appendix 1 – Coloured and Notated Plan of Scheme



Appendix 2 – Document drawn by Mr Booker for EGM Notice

CENTENARY MEWS COMPLEX - 25 Bicentennial Road, Boondall

To the unit owners of the Centenary Mews Complex, 25 Bicentennial Road, Boondall

Over the nearly 18 months I have been Body Corporate Chairman, I have tried to engage the service contractor/gardener to perform the work they are contracted to fulfil at the complex.

In this time I have had onsite meetings with the owner of Sherwood Forest Contractors, Ben McCarthy who also owns Ekkopoint Properties; Angus Barker the manager of Sherwood Forest Contractors & Peter Cameron the Gardener. While all assured myself and the committee that they would comply with the Service Agreement and perform their duties, this has not been the case. Whether you are an owner living onsite or have a unit as an investment, the value of your unit can only be enhanced if it presents well by the complex being well maintained.

After waiting for over a year to have the front fence repaired, the committee was forced to engage other contractors to perform fence repairs. Some owners have been forced to engage other gardeners to come onsite and perform necessary work.

The committee; aware that we had an obligation to the owners to see value for money, had no option but to issue a Breach Notice on the service contractors to force them to perform the work they were paid to do. Of the 5 main issues contained in the Breach Notice, only the gardens were remediated. None of the other important issues were addressed. Over 6 weeks have passed since the Breach Notice was issued, well beyond the 21 days to comply. In the last 2 weeks one gardener has appeared onsite for nearly 5 minutes each time, achieved little. It is back to normal it seems from the gardeners perspective.

One potentially serious issue is the undermining of the roadway near the Biopit. The service contractor was advised of this over a year ago, and we are concerned that further erosion is compromising the integrity of the roadway. The service contractors agreed to have the issue inspected by qualified personnel and to advise the body corporate committee as to the best course of action. Many months down the track this has not occurred. We will now have to bypass the service contractors and follow up this issue before a potentially expensive repair bill is upon us all.

A considerable portion of the body corporate fees go to the service contractors ($30,000 per year + CPI), for an extremely limited result. The committee sees no option but to terminate this Service Contractor Agreement & look for a far better outcome for all owners at Centenary Mews. I have included some photos which need no explanation & encourage you to return the attached voting slip agreeing with the motion.

Jon Booker – Centenary Mews Body Corporate Chairman & Treasurer