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if it walks like a duck

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In April this year the Queensland Court of Appeal definitively answered the vexed question – are costs incurred in recovering unpaid contributions a body corporate debt?

Before considering the court of appeal decision, it is useful to understand the legal context in which it was made. For example last year in the QCAT appeal *The Body Corporate for 399 Woolcock Street CTS 34700 v Sexton & Ors* [2013] QCATA 55 Member Mr Charles Brabazon QC said:

*“... it is impossible to accept that Parliament actually intended that no body corporate had a right to recovery costs, as a **body corporate debt**, without proceedings in a court or this Tribunal.”* (emphasis added)

If recovery costs were a body corporate debt, which is a defined term in the legislation^[1], then a mortgagee entering into possession or a subsequent owner would become liable to pay them^[2]. In practical terms this means that on a sale of the relevant lot the recovery costs would be paid; no buyer wants to assume liability for the seller’s debts.

Over the years there have been a number of decisions which have ascribed more and more of the characteristics of a body corporate debt to recovery costs; for example *Sunseeker*^[3] and *Ramzy*^[4].

For example, bodies corporate can include unpaid recovery costs on notices of contribution sent to owners without jeopardising the validity of the notices. A body corporate can sue for recovery costs without having fully particularised them at the commencement of the claim (though evidence that they have been incurred, the amount incurred and the reasonableness of the amount incurred should all be proven to increase the chances of a successful judgment for recovery costs). Body corporate managers do not need to keep a separate ledger to record unpaid recovery costs, as distinct from unpaid contributions and penalties.

Despite having all these characteristics of a body corporate debt, it was not until the decision of *Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme 36237* [2014] QCA 073 that the Court of Appeal has finally made the law perfectly clear:

- a “body corporate debt” includes recovery costs; and
- a mortgagee entering into possession becomes liable for those costs.

The Court of Appeal recognised the “*severe financial hardship for the body corporate caused by arrears in contributions*” and that “*Ultimately, it is the other lot owners who are meeting their share of the expenditures who will be disadvantaged by the non-payment by one lot owner of that lot owner’s contributions*”. The Body Corporate claimed (prior to the appeal) that those costs exceeded \$300,000; full costs are however yet to be assessed.

In practical terms this landmark decision means that:

- a mortgagee entering into possession or a subsequent owner will become liable to pay recovery costs as a body corporate debt.
- mortgagees entering into possession may choose to pay the recovery costs at the time of entering into possession to avoid further recovery costs or penalties accruing.
- buyers must ensure that all unpaid contributions, penalties and recovery costs are paid at or before settlement lest they become liable for those amounts.

A note of caution however - Mullins J stated *“The advantage given to the body corporate under s143(1)(c) of being able to recover recovery costs as a debt is qualified by the express statement that it applies only to costs reasonably incurred by the body corporate in recovering the amount of the unpaid contributions and any penalty.”*

The message? The recovery costs must be reasonable to be a body corporate debt. Savvy debtors, buyers or mortgagees may demand detail of the recovery costs so they can raise an argument that the costs are unreasonable. Some potential indicators of reasonableness may include the proportionality of the cost to the debt being recovered, the necessity (or lack of it) of the steps taken and the payment history of the defaulting lot owner.

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¹ See the Dictionary Schedule to each Regulation Module

² For example section 145(3) of the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld)

³ *Body Corporate for Sunseeker Apartments CTS 618 v Jasen* [2009] QDC

⁴ *Ramzy v Body Corporate for GC3 CTS 38396 & Anor* [2012] QDC 397