

Common Property

Issue 4

Legal news for the strata and company title management industry

February 2009



How much authority do you have?

Understanding delegation of powers and functions

In this issue...

How much authority do you have?	1
Changes to company title constitutions	6
Easement: what is it?	7
Cases observed	9
<i>Quarante Pty Limited v The Owners—Strata Plan No. 67212</i> [2008] NSWCA 258	9

<i>The Owners—Strata Plan No. 58841 v Kazal Brothers Pty Limited</i> [2008] NSWSC 494	9
<i>Coshott v The Owners SP No. 48892</i> [2008] NSWSC 854	10
<i>Chauhan v Jaynrees Services Pty Ltd</i> [2008] NSWSC 969	11
By-laws: what are they and what rights do they give?	13
How to contact us	15

How much authority do you have?

“Strata managing agents must not exercise any functions outside the scope of the management agreement”

The recent Court of Appeal decision in *Quarante Pty Limited v The Owners—Strata Plan No. 67212* [2008] NSWCA 258 illustrates the importance of understanding the scope of delegated powers and functions, and serves as a timely reminder that agents must act within the scope of their authority.

In this matter the Court was concerned with the powers and functions of an owners corporation, executive committee and the strata managing agent. The decision also related to the proper delegation of executive committee powers and the delegation of functions to the strata managing agent.

Factual background

Quarante was the original owner of premises in King Street, Sydney. The strata plan was registered in January 2002 and at an inaugural general meeting it was resolved to appoint a strata managing agent until the first annual general meeting, determine the number of members of the executive committee at one and to appoint an employee of Quarante as the executive committee. Shortly after this meeting, Quarante sold a number of lots in the strata scheme. It was a condition of that contract that Quarante, at its own expense, would refurbish the façade of the building and, for this purpose, \$375,000 was retained from the purchase price. It was a further condition of the contract that if the refurbishment works were not completed within nine months from the completion of the contract, that sum was to be repaid to the purchaser.

Initial strata management agency agreement

The first annual general meeting of the owners corporation was held in April 2002. The strata managing agent was reappointed for a period of two years, and an employee

of Quarante was appointed as the sole member of the executive committee. The owners corporation and the strata managing agent entered into a strata management agency agreement in a form approved by the Institute of Strata Title Management. There was a partial delegation of the owners corporation’s functions, namely, those of the chairperson, secretary and treasurer. Other functions, not relevant to the case, were also delegated. There was no delegation of the functions of the executive committee. The strata managing agent was obliged to provide the owners corporation with “*agreed services*” for which it was to receive a management fee. “*Additional services*”, if provided, were to attract an additional fee. The “*agreed services*” were largely of a



(Continued on page 2)

How much authority do you have?

(Continued from page 1)

routine nature and included paying invoices of the owners corporation. The “*additional services*” included attending to “*routine repairs, maintenance and replacement of owners corporation property*”.

By late November 2002, Quarante had not completed the refurbishment of the façade and was obliged to refund the purchaser the sum of \$375,000. Shortly before the refund, the sole executive committee member and the agent who had the specific management of the owners corporation for the strata managing agent had a conversation to the effect that the original owner considered that it no longer had any obligation to complete the façade works and that it was “*up to the owners corporation to complete those works*”.

Several months later, there was a further conversation between those two persons in which the executive committee member suggested that a way of “*sorting out*” strata levies would be for the owners corporation to pay for the cost of the shopfront façade works. The strata managing agent stated that this would be “*a good idea and I will get the builder to undertake the façade works*”. In March 2003, Quarante entered into a contract with a builder to carry out the façade works which were completed 11 months later. The amount paid by Quarante was approximately \$307,000.

In September 2003, Quarante prepared a sales brochure for potential purchasers of lots in the strata scheme including a statement that the redevelopment of the retail fronts was being undertaken and



would considerably improve the outlook for all parties. There was no information concerning Quarante’s intention to recover the cost of the façade works from the owners corporation.

At the second annual general meeting held in October 2003, one member of the executive committee was appointed. In March 2004, the owners corporation made a by-law for the alteration to common property, in effect giving substance to the façade works. Between March and June 2004, Quarante issued three invoices to the owners corporation for a total sum of \$96,800, such invoices being said to be a claim for contribution towards exterior retail refurbishment works. The first of the invoices was issued the day after the special resolution for the by-law was passed. By the time Quarante issued the invoices, the façade works had been completed.

Further strata management agency agreement

In July 2004, the owners corporation appointed the strata managing agent with a full delegation of functions, including those of the executive committee. At that same meeting, contributions for the sinking fund were determined in an amount which would include “*repair and maintenance—general building*” \$100,000 and certain other lesser but specified amounts. In late July 2005, the strata managing agent wrote to the initial purchaser informing that company that the three invoices (totalling \$96,800) had been paid and had been so pursuant to the by-law (earlier referred to). Quarante subsequently lodged a further claim for the balance of the façade works, which amount was declined. Thereafter, Quarante initiated proceedings for the recovery of this sum while the owners corporation, by way of cross-claim, sought to recover the amounts previously paid.

(Continued on page 3)

“Statutory procedures relating to payments from the administrative and sinking funds must be complied with”

How much authority do you have?

(Continued from page 2)

Legislation

Sackville AJA, who delivered the judgment of the Court, carefully reviewed the provisions of the Management Act by reference to the executive committee (section 18) and the constitution of the executive committee (Schedule 3). Section 21 relating to delegation was also carefully examined, together with relevant provisions of the Management Act relating to delegation to strata managing agents.

Binding contract

The first question for the Court was the status of the conversation between the sole representative of the executive committee and the strata managing agent in early 2003. His Honour was of the view that the parties to that conversation went no further than agreeing that it would be a good idea for Quarante to arrange for the works to be carried out and for the owners corporation to reimburse Quarante for the cost. He observed that there was no discussion of the likely costs of the works, the mechanisms to enable the owners corporation to exercise control over the cost of the works, the procedure by which and timeframe within which the owners corporation would reimburse Quarante for expenses incurred by it, the means by which the owners corporation was to be put in funds to pay for the work, or the formalities that would be required to implement the idea. The absence of any references to these matters would suggest to “an objective observer” that the conversation of itself was not intended to constitute a binding contract.

Of critical importance in the judgment was the fact that none of the statutory procedures relating to payments from the administrative and sinking funds had been complied with (ie making forward estimates and imposing appropriate levies). His Honour concluded that it was very difficult to

conclude that the parties intended the conversation to impose a binding obligation on the owners corporation to reimburse the original owner for the large, as yet undetermined, costs of the works. Subsequent conduct of the parties following the conversation were taken into consideration. Matters of particular significance were:

- nothing was done to comply with the statutory requirements relating to expenditure for capital works (from the sinking fund);
- the issuance by Quarante of a brochure which made no mention of the recoupment of the costs;
- the October 2003 AGM set aside only \$20,000 for the sinking fund which action was inconsistent with the owners corporation having incurred a binding obligation for the very large cost of the façade works and the July 2004 AGM set aside a total of \$158,000 at a time when the façade works had been completed and that Quarante would have been aware of the total costs it had incurred. Only \$100,000 for general building works had been set aside.

For these reasons, the contractual claim failed and, therefore, it followed that the owners corporation was entitled to be reimbursed for the sums expended.

Strata managing agent’s actual authority to enter into binding contract

Although it was not necessary to decide the case, Sackville AJA examined the issue of the authority the strata managing agent possessed at the time the critical conversation took place. His Honour observed that actual authority arose where a principal grants and an agent accepts authority for the agent to perform specific

(Continued on page 4)



How much authority do you have?

(Continued from page 3)

tasks on behalf of the principal. He further observed that actual authority involved a consensual transaction, although consent may be express or implied. With respect to the instant case, the learned judge noted that Quarante's contention was that it was enough that the agency agreement delegated the functions of the chairperson, secretary and treasurer, noting that one person was the sole member of the executive committee.

His Honour noted, however, that the executive committee is a distinct decision-making body for the purposes of the Management Act. The legislation made detailed provisions for the appointment of the executive committee, the convening and conduct of the meetings, the making of decisions, the keeping of records and the distribution of minutes.

The executive committee exercised functions which went well beyond any functions that could be exercised by an individual office-bearer in his or her own right. His Honour further noted that it would have been feasible for the sole member to take steps necessary to convene a meeting of the executive committee and to cause a resolution to be passed at that meeting authorising the owners corporation to enter into a binding agreement with Quarante. Critically, he observed that no such meeting of the executive committee was ever convened. His Honour observed that the delegation of authority to the strata managing agent was a delegation of the functions of the chairperson, secretary and treasurer and was not effective to delegate the

broader range of functions that could be exercised only by a duly convened and properly conducted meeting of the executive committee. He stated that the single member, who occupied all three individual offices, could have convened a meeting of the executive committee and caused it to pass a particular motion did not mean that the function of the chairperson, secretary and treasurer were co-extensive with those of the executive committee. His Honour observed that they did not. His Honour went on to observe that none of the functions expressly identified in the Management Act authorised the secretary or treasurer of the owners corporation in that capacity to commit it to the agreement relied on by Quarante in the proceedings. His Honour also dispatched the submission that the definition of "additional services", which authorised the commissioning of repairs, maintenance and replacement of owners' common property, did not cover the extensive refurbishment of the façade at a cost of some \$300,000 as routine replacement of common property. His Honour concluded, therefore, that had it been necessary to decide whether the strata managing agent had authority to commit the owners corporation to the agreement, requiring the owners corporation to reimburse Quarante for the cost of the façade works, he would have considered that it had no such authority.

Did owners corporation ratify any agreement?

Once again, it was not necessary to decide whether the owners

corporation ratified any agreement purportedly made. His Honour observed that the general rule was the only persons who are parties to a contract, acting either by themselves or authorised agents, can sue or be sued on a contract. An exception to this rule is the doctrine of ratification whereby an act done, for another, by a person, not assuming to act for himself, but for such other person, though without precedent authority whatever, becomes the act of the principal if subsequently ratified by him.

There were three elements of ratification, namely:

- the agent whose act is sought to be ratified must have purported to act for the principal;
- at the time the agent acted, he or she must have had a competent principal; and
- at the time of the ratification, the principal must be legally capable of doing the act which has been ratified.

His Honour noted that it was also necessary for ratification to take place at the time the putative principal ratified the act of agreement, he or she must have full knowledge of the material



(Continued on page 5)



How much authority do you have?

(Continued from page 4)

circumstances under which the agent's act was done. In the present case, Quarante relied on the payment of the

invoices. Crucially, if the strata managing agent, in purporting to enter a binding agreement on behalf of the owners corporation, was acting beyond that agent's delegated authority, the purported ratification of the agreement would also be beyond the strata managing agent's authority. The authority conferred by the management agency agreement to pay invoices did not carry with it the authority for that agent to ratify any purported agreement that caused invoices to be submitted to the owners corporation for payment.

Other acts of ratification relied on by Quarante were also not capable of ratifying the agreement. The by-law, passed in March 2004, had a prospective operation only and did not purport to ratify any pre-existing arrangement. The approval at the AGM in July 2004 of a budget that included \$100,000 for repairs and maintenance was not referable to any pre-existing agreement, let alone to one pursuant to which the owners corporation had already incurred a debt of \$300,000.

Quantum meruit and estoppel

Quarante's claim in quantum meruit was said to have been with the knowledge and at the request of the owners corporation to carry out the façade works. It alleged that it was unjust for the owners corporation to have retained the benefits conferred upon it by the performance of the works without reimbursing it for the cost. The learned judge noted that there was no request ever made by the owners corporation or by any person authorised on its behalf. The strata managing agent had no authority. While

members of the strata scheme would have known that the façade works were being undertaken, they had no reason to know that the cost of the works was to be borne by the owners corporation. There had been no indication given to purchasers that they would be expected to contribute to the cost.

His Honour observed that the statutory relationship between an owners corporation and the lot owners was not merely that of agent and principal, but incorporated elements of a trustee-beneficiary relationship. There was no evidence at the time of their respective purchases that they knew or had the means of knowing that Quarante intended that they, rather than it, should bear the cost of the works. In fact, there was positive evidence that some of the owners could reasonably have assumed that the cost of refurbishment would be met by Quarante as the developer of the building. Accordingly, his Honour was of the view that the owners corporation did not obtain a benefit from the façade works of a kind that would attract the doctrine of quantum meruit.

Conclusion

It is crucial that strata management agency agreements reflect the intended delegated functions and that the agent not exercise any functions which are outside that agreement. It is also critical that a proper distinction be made between the various office-holders and the executive committee and that the latter properly convene its meetings and record its minutes. The statutory requirements must be rigorously adhered to. Advice should be sought in relation to any exercise of a function, particularly where the consequences are legally or financially significant. ■

Ian McKnight is a special counsel with Makinson & d'Apice.

“Proper distinction must be made between the various office-holders and the executive committee”

Changes to company title constitutions

The constitution of a company represents a contract between the company and its shareholders. In the absence of anything like the strata title legislation, the Constitution and the *Corporations Act* 2001 are the documents which define the rights and interests (and the obligations) of the shareholders in a company title scheme.

A change to the constitution of a company title company can be ineffective if it breaches section 246B of the *Corporations Act* which defines the manner in which "class rights" can be varied or cancelled.

What is a class right?

Broadly speaking, a class right is a right which attaches to a particular class of shares and which is different to the rights which attach to other classes of shares.

Example

In a company title scheme, the right of the holder of Share Group 3 to exclusive use and occupation of Home Unit 3 is a right which attaches to Share Group 3 only. This is a "class right" and it identifies Share Group 3 as a separate class of shares for the purpose of section 246B.

Varying or cancelling rights

Under section 246B if a company has a constitution that sets out the procedure for varying or cancelling rights attached to shares in a class of shares, those rights may be varied or cancelled only in accordance with that procedure. The procedure for effecting a change may be altered only if the procedure itself is complied with.

If a company has a constitution that does not set out the procedure for varying or cancelling rights

attached to shares in a class of shares, those rights may be varied or cancelled only by special resolution of the company and, in addition:

- by special resolution passed at a meeting of the members holding shares in the class; or
- with the written consent of members with at least 75% of the votes in the class.

This means that, in addition to a general meeting of shareholders, it is necessary either to have the written consent of all of the shareholders of the class whose rights are to be changed or to hold a separate general meeting of the holders of the shares in that class of shares and pass the motion by a majority of at least 75% of the votes cast by members entitled to vote on the resolution.

Generally speaking, in a home unit company, each class of shares will have only one shareholder.

Importance of class rights

The importance of class rights was recently emphasised by the Court of Appeal of New South Wales in the case of *Wilson v Meudon* [2004] NSWSC 1183.

When contemplating an alteration to its constitution which might vary or cancel a right enjoyed by one or more shareholders, it is essential that the board consider whether the proposed alteration varies or cancels a class right and, if so, to ensure that the company follows the correct procedure in making the alteration.

Whilst the right to use and occupation of a particular home unit is an obvious example of a class right, other rights attaching to all

groups may be class rights such as a right to use, in common with others, a roof deck or laundry.

'Control' over occupiers

The characteristic which many shareholders in company title schemes see as distinguishing their building positively from a strata title building is the right to exercise some control over the occupiers of the other units. This is achieved by requiring that prospective shareholders and tenants be interviewed and approved by the board and, in some cases, absolutely or conditionally prohibiting leasing of units.

This right to lease may be a general right attaching to all shares or it may be a class right attaching to a particular class or group of shares.

A general right applicable to all shareholders can be amended by a special resolution against which some of the shareholders vote (provided that not more than 25% of the shares are voted against that resolution). However if the right to lease an apartment is a class right, then that right can only be varied or cancelled if all of the shareholders of each class consent in writing to the variation or 75% of the class vote in favour of it in a general meeting of members of that class. Such a class general meeting may have only one participant. The attempted removal of a substantial right such as the right to lease may also be objectionable as a fraud on a minority of shareholders. ■

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Easement: what is it?

In the second issue of *Common Property*, at pages 11 and following, there was discussion in relation to Torrens Title and its relevance to strata title and management. On page 12, an example of a Certificate of Title for the common property folio was displayed. In the Second Schedule of that Certificate of Title there were various entries, including entries for covenants. The purpose of this article and articles which will follow will be to explain what the various entries which appear in the Second Schedule of the common property title deed mean and why they are important. The first topic to be discussed is an easement.

“An easement does not provide exclusive and unrestricted use of a piece of land”

Before discussing the various types of easement, it is relevant to provide a definition of it. The High Court, as long ago as 1905, accepted the following:

“An easement may be defined to be a privilege without profit, which the owner of one neighbouring piece of land has of another, existing in respect of their several pieces of land, by which the servient owner is obliged ‘to suffer or not to do’ something on his own land, for the advantage of the dominant owner.”

The land over which the easement passes, or otherwise affects, is known as the “servient” tenement, whilst the parcel of land having the benefit of the easement is known as the “dominant” tenement. There must be four requirements prior to the existence of a valid easement. These are:

- there must be a dominant and servient tenement;
- an easement must “accommodate” the dominant tenement;
- dominant and servient owners must be different persons; and
- a right over land cannot amount to an easement, unless it is capable of forming the subject matter of a grant.

It is important to note that an easement does not provide exclusive and unrestricted use of

a piece of land, for if it did, the ownership of that land could not be in the ownership of the servient owner. There must be a dominant and servient tenement, as it is not possible to have an easement over one’s own land.

The third requirement was that an easement must accommodate the dominant tenement. The characteristics of this element are that the two parcels of land need not be contiguous, the easement is limited to the needs of the dominant tenement, although the fact that other people other than the dominant owner may also derive benefit from an easement is not fatal.

The next characteristic is that the fact that an easement enhances the value of the dominant tenement is significant, but not decisive. An easement must accommodate the business carried out on the dominant tenement rather than the dominant tenement itself and, finally, an easement may accommodate the subdivided parts of the dominant tenement.

Types of easements

The right of way is the most commonly encountered type of easement. A right of way may be granted in general terms or may be of a limited nature. In the absolute discretion of the person granting the easement, the extent of the user may be restricted to certain persons or limited to a particular purpose. The overriding consideration is that the Court must examine



(Continued on page 8)

Easement: what is it?

(Continued from page 7)

the reasonableness of all of the facts when construing a grant of easement. The real test is that it cannot be reasonable for the defendants to appropriate the plaintiffs' land and use it without the plaintiffs' consent as if it was their own. It has been said, by the Courts, that the rights of the parties have to be ascertained from the words of the grant. In construing these words, the Court is entitled to take into consideration the circumstances existing at the date when the grant was made.

Obstruction of a right of way

The issue of an obstruction of a right of way is one which will be encountered by persons living in strata and community scheme. A right of way may exist, for example, for access along a driveway to another complex at the rear of the first parcel of land. The easement, over the front parcel of land (called the servient tenement) is for the benefit of the parcel of land at the rear (called the dominant tenement). A question may arise whether the driveway may be obstructed by persons in the front block. The test would appear to be that, to cause an obstruction, there must be something done which would have the effect of hindering the passage of anyone wanting to pass. The obstruction must be substantial if it is to be actionable. The law is not concerned with trivial obstructions, such as rutted ice and snow on a right of way. It is possible, however, for an obstruction to constitute a nuisance which may be separately actionable by persons affected.

Other issues can arise in relation to the use of an easement, for

Who is responsible for repair of a right of way?

The issue of the duty to repair a right of way is one of considerable interest. Ordinarily, one might expect to find the obligation to repair and easement in the terms of the easement itself, however, a difficulty can arise where the easement is silent in respect of this issue. The traditional view is that the duty to repair a right of way, in the absence of the matter being dealt with in the terms of the easement itself, is on the person having the benefit of the easement. It would seem reasonably well settled law that the grantee (ie the person having the benefit) must protect the servient tenement from unnecessary injury.



instance, whether a person is obliged to open and shut gates. In the latter case it was considered to be unreasonable to expect people to open and shut gates given the steepness of the right of way. It would appear that the test is one of reasonableness.

Other forms of easements

Easements can take other forms. Examples of easement are:

- rights to support;
- easement of light;
- easement of air;
- fencing easements.

Registration of easements

In the May issue of *Common Property*, there was discussion concerning the Torrens Title system. Ordinarily, easements will be registered on the folio of the lands of the servient and dominant owners. They will be created by way of a transfer, which may vary, in form, depending on the precise mechanism by which the easement is created.

'Compulsory' easements

It is possible to compel another person to grant an easement. By virtue of section 88K of the *Conveyancing Act 1919*, a Court (either the Supreme Court or Land and Environment Court) will make an order granting an easement if three conditions are satisfied, namely, the

use of the land having the benefit of the easement will not be inconsistent with the public interest, the owner of the land to be burdened by the interest can be adequately compensated for any loss or other disadvantage from the imposition of the easement, and that all reasonable attempts have been made by the applicant for the order to obtain the easement but had been unsuccessful.

These easements, usually referred to as "easements of necessity", are most common where a new construction is being carried out or a particular problem arises on the dominant tenement giving rise to the need for an easement over another property, for instance, the discharge of stormwater.

Conclusion

Care should always be taken in interpreting the terms of an easement. This is particularly so where there is an issue regarding repair, upgrade, obstruction or particular use. Advice should always be sought as soon as practicable rather than have an unnecessary dispute arise. Easements, as they are rights over other lands, give rights to separate land and the various rights need to be carefully perused and construed. ■

Ian McKnight is a special counsel with Makinson & d'Apice.

Cases observed

“In deciding whether to grant an injunction, the Courts will consider a number of factors, such as delays, prejudice and the strength of the case”

There have been a number of recent decisions of the Court of Appeal and the Supreme Court which deal with a range of issues affecting strata schemes including the delegation of powers and functions to strata managing agents; exclusive use by-laws; applications for injunctions; and actions to recover expenses incurred in recovery of levies.

Court of Appeal

Quarante Pty Limited v The Owners—Strata Plan No. 67212 [2008] NSWCA 258

Delegation of executive committee powers and functions to strata managing agent

For a detailed discussion of this case, please see the lead article in this issue of *Common Property* on page 1 titled “How much authority do you have?”.

Supreme Court

The Owners—Strata Plan No. 58841 v Kazal Brothers Pty Limited [2008] NSWSC 494

Defendant proposing to erect doorway contrary to architectural code in strata

management statement; delay in bringing application to injunct work; application for injunction declined on balance of convenience

The owners corporation was one of a series of strata plans situated at the bottom end of Macquarie Street, Sydney, affectionately known as The Toaster. The conglomerate consists of residential and retail/commercial units. The defendant in the proceedings obtained a development consent with respect to its lot which involved changing the façade of the lot. The architectural code, part of the strata management statement, required that consent must be obtained from the building management committee when a change was to be made to an external appearance. The defendant wished to erect a different type of doorway which appeared to alter the façade. The owners corporation argued that it never had the consent of the building management committee in accordance with the architectural code to carry out an alteration to the façade.

Relevant legislation

Young J referred to section 28W of the Development Act. He noted that



(Continued on page 10)

Cases observed

(Continued from page 9)

subsection (5) provided that a strata management statement had no effect to any extent to which it is inconsistent with any condition imposed on a development consent relating to the site of the buildings to which the statement relates with an order under Chapter 5 of the Management Act. There was an argument as to the applicability of this subsection. His Honour noted that it was one that was to be determined at the final hearing of the matter, noting that the present application only involved an application for the imposition of an injunction, to prevent the defendant from carrying out the works to the doorway.

SMS

The judge noted that the strata management statement appeared to have a number of inconsistent provisions and was difficult to construe.

Delays

His Honour noted that if questions of law or construction presented themselves in applications for interim injunctions, the Courts were often reluctant to intervene but would rather postpone a final decision if the circumstances permitted it. In the present case, his Honour noted that there was an arguable case, however, it was not the strongest one. This was a matter which a Court would take into account on the balance of convenience.

Another highly important consideration in the present case was that the applicant appeared to have taken 10 days from the time they knew about the proposal to

change the doorway until the matter was brought before the Court. This was a further factor which the judge had regard to, considering that the delay had been unreasonable.

Prejudice

The final consideration upon which the judge had regard was the absence of prejudice to the parties if the work proceeded. He noted that in the event that the door was constructed and it was subsequently found to have been erected in the absence of a requisite consent from the building management committee, then, in the circumstances of the case, the Court could order the doorway to be removed and the original façade reinstated. In these circumstances, therefore, there was no prejudice to the parties. In the light of the foregoing, therefore, the judge refused to grant the injunction to restrain the construction of the doorway.

Conclusion

In situations where owners corporations are seeking to obtain injunctions from Courts, careful regard needs to be had whether the case is a strong one or otherwise, avoid unnecessary delay and move very promptly, and examine the issue whether prejudice will be suffered by the non-intervention of the Court in granting an order. Great care should be exercised in deciding whether to make an application for an injunction. Considerations of the merits of the case, delays and prejudice should be weighed very heavily against considerations of costs.

Coshott v The Owners SP No. 48892 [2008] NSWSC 854

Expenses of recovery of levies and section 80 of the *Strata Schemes Management Act*

The plaintiff had previously been sued in respect of outstanding levies. He had been ordered to pay all outstanding levies together with all expenses involved in the recovery of those levies. The instant case arose as a result of the owners corporation taking action in the Local Court to recover expenses subsequently incurred in recovering outstanding levies, being subsequent to the initial proceedings to recover the levies. The plaintiff brought an action in the Supreme Court to attempt to deny the owners corporation the ability to recover the expenses.

Applicable legislation

The Court was concerned with section 80 of the Management Act. Section 80, so far as relevant, provides as follows:

"An owners corporation may recover as a debt a contribution not paid at the end of one month after it becomes due and payable, together with any interest payable and the expenses of the owners corporation incurred in recovering those amounts. ..."

The issue was whether the words "together with" and "expenses" indicated that the owners corporation must sue in the one action for the unpaid contributions, interest and expenses incurred in recovering those amounts.

(Continued on page 11)



“The written consent required for an exclusive use by-law is only that of the lot(s) affected by the by-law”

Cases observed

(Continued from page 10)

Previous *Coshott* case

In 2006 the plaintiff had endeavoured to resist, in Supreme Court proceedings, the “expenses” incurred in attempting to recover outstanding levies. The Supreme Court, on that occasion, held that section 80(1) enabled the owners corporation to recover the expenses of recovery of an unpaid contribution in a distinct action if that should prove either necessary or desirable. Adams J approved of that previous opinion, in the present case. The judge held that the owners corporation could institute latter proceedings for expenses which arose as a result of attempting to recover outstanding levies. It was not necessary for the owners corporation to bring an action as a “once off” action.

Conclusion

An owners corporation is not debarred from bringing different and separate actions to recover all expenses incurred in relation to the recovery of outstanding levies. It is essential, therefore, that all expenses are carefully recorded and noted so that they might be recovered at an appropriate occasion. It has again been held that expenses, such as additional management fees and legal costs, may be recovered against a defaulting owner.

Chauhan v Jaynrees Services Pty Ltd [2008] NSWSC 969

Exclusive use by-laws

This was a case involving contractual obligations. The defendant in 2003, by virtue of a contract for sale, sold lot 3 to the plaintiff. Lot 3 had the benefit of exclusive use rights of an area of common property, being a balcony area.

The contract provided that: the purchaser would vote in favour of a resolution to grant to lot 4 an exclusive use right then benefiting lot 3; a proxy was to be provided to the

defendant; a licence was to be granted by the plaintiff to the defendant whereby the defendant was to have the use of the balcony area; and the plaintiff was to sign all necessary documents to give effect to the creation of the by-law for the exclusive use of the balcony for lot 4. (In effect the existing by-law would be amended by removing the benefit for lot 3, to that of lot 4.)

The licence was granted. By virtue of the licence, the defendant could not “dispose of or deal with” the licence without the consent of the plaintiff. It also provided that the plaintiff would do all things and sign all documents necessary to grant the exclusive use rights in respect of the balcony to the defendant as the owner of lot 4 simultaneously with the surrender of such rights as enjoyed by lot 3.

Dispute

The defendant alleged that the plaintiff had not fulfilled its obligation under the contract and licence. Proceedings were commenced in 2006. The judge upheld the argument that the defendant was entitled to the benefit of the balcony. He ordered that the plaintiff execute a relevant proxy.

Later, however, the plaintiff realised that there was a loophole. Section 52 requires the plaintiff to give a written consent before a by-law conferring a privilege on the plaintiff could be amended. Although the defendant had asked for this consent, it had not been provided, and, at the appropriate meeting to consider the amendment of the by-law, the point was taken and the resolution was not passed.

There was a flurry of correspondence after this meeting. It emerged that lot 4 had been leased, that consent for a sublicense of the balcony had been sought, a further lease of lot 4 had been negotiated, including a licence of the balcony and a requirement for consent. Finally the plaintiff requested a new licence as a condition for consent.

(Continued on page 12)

Cases observed

(Continued from page 11)

The present proceedings were then commenced. The plaintiff sought orders that the original licence had been terminated and that it was entitled to the benefit of the use of the balcony. The defendant sought orders that the plaintiff execute relevant proxies and consent, delivery up of the balcony and damages (for being excluded from the balcony).

Arguments

The plaintiff submitted that there had been a repudiation of the licence (by the defendant) on the grounds that the defendant had granted sublicences. The plaintiff also argued that the Development Act gave only limited powers to use common property and that there could be no rights created in common property other than in accordance with that Act.

Nature of right of exclusive use

His Honour dealt with the second argument first. He observed that in *North Wind Ltd v Proprietors—Strata Plan 3143* (which was concerned with the predecessor to the Management Act), the judge considered that the rights flowed from a by-law were probably contractual. He then stated, in obiter dicta, that the rights under the Management Act appeared to be statutory, and that the rights were probably proprietary sui generis. He proceeded to comment that the problem with ascribing a contractual character to the right is that it would make it a chose in action and “*the better view appears to be that one cannot at law deal with or assign a chose in action otherwise than transferring it in whole ... There can*

only be partial assignments of a chose in action in equity. However, if the matter is treated as a proprietary right, then there would seem to be no difficulty in granting licences or sub-licences.” The argument based on the Development Act as to the validity of the licence affected the case.

Repudiation of licence

His Honour then considered whether the licence (giving the defendant a right to use the balcony) had been repudiated. He observed that the difficulty was deciding whether as a matter of fact there had been repudiation. Repudiation was not to be lightly inferred. For instance, the mere fact that a tenant had been in substantial arrears of rent for a substantial period was not enough to constitute repudiation of a lease.

The judge quoted with approval the majority of the High Court in *Koompahtoo Local Aboriginal Land Council v Sanpine* (2007) 82 ALJR 345:

“(Repudiation was) ... conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party’s obligations ... The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.”

His Honour noted that, in essence, the contractual arrangements between the plaintiff and the defendant were such that the defendant owned the exclusive use area. Hence, there was no breach of

the licence with respect to consent. The other arguments put, namely, that the defendant, as a trustee company, was unable to perform its obligations, and that it intended to use the area as a café, were not sustained. His Honour held that there was no repudiation of the licence.

Consent

The judge considered that the rights of the parties were such that the plaintiff must do everything to bring about an alteration of the by-law, including the giving of consent. The plaintiff contended that whenever a resolution is put up which affects the common property, there must be the written consent of every owner. Significantly, while it was possible to semantically argue this, the judge was of the opinion that “*section 52 (1) applies so that only the written consent of the lot or lots concerned is required, namely the lots in which special privileges relate to under the by-law, and in this case this means lot 3.*”

Conclusion

Although not forming part of his reasons for the decision, the judge was of the view that the rights conferred by an exclusive use by-law were proprietary in nature. This is in line with other cases. Accordingly, such rights must be carefully considered by an owners corporation and precisely drafted to ensure clarity. They should not be granted lightly. Finally, consent required is that of the lots affected by the by-law, and not necessarily by the owners generally.

Ian McKnight is a special counsel with Makinson & d’Apice.

By-laws: what are they and what rights do they give?

In the first issue of *Common Property*, we discovered how by-laws might be enforced. But what are by-laws and what rights (or benefits) do they provide?

It is important to understand the answer to these questions so that by-laws and their importance and significance may be properly appreciated and, further, why in certain circumstances, the owners corporation should make by-laws.

By-laws may be created in one of two ways, first, by means of a special resolution pursuant to section 47 of the Management Act or, secondly, by means of a special resolution pursuant to section 52 of the Act.

By-laws for administration, management or control

By-laws created by virtue of section 47 relate to the administration, management or control of an owners corporation.

In the Court of Appeal decision of *White v Betalli* [2007] NSWCA 243, the power of an owners corporation to make a by-law for the administration, management or control of an owners corporation is made pursuant to section 47. The subject matter of by-laws and, it is submitted, the source of power for making by-laws is to be found in section 43. That section sets out the various subject matters with which by-laws might be concerned. Provided that the subject matter of the by-law are matters appropriate to the type of scheme concerned, then they will be a valid exercise of the owners corporation's powers.

By-laws made pursuant to section 47 may be wide-ranging, dealing with such diverse matters such as the keeping of animals, the display of washing, the regulation of driving through a strata scheme or, as in *White's* case, the creation of a fetter

on title of another lot, in the manner of a covenant.

Special privilege or exclusive use by-laws

By-laws made under section 52 relate to the granting or creation of special privilege or exclusive use or enjoyment with respect to common property for the benefit of a lot or lots.

It has been suggested that the granting of special privileges or exclusive use rights have a contractual basis. This argument arises from one of the first cases to be decided under the old *Strata Titles Act 1973* in *Northwind Pty Limited v The Proprietors – Strata Plan No. 3143*, a decision of Rath J. In this case, the learned judge appears to have understood the predecessor to section 52 to mean that an exclusive use by-law had the effect of a statutory contract. The case concerned the question whether the registered proprietor of a lot in a strata plan who had the exclusive use and enjoyment of an area which formed part of the common property could obtain an injunction to restrain the defendant which had constructed, or was constructing, works which encroached into the airspace above the exclusive use area. His Honour was of the opinion that the by-law had contractual effect because of the mutual covenants contained in the predecessor section to section 44. In *Young v The Owners – Strata Plan 3529* [2001] NSWSC 1135, Santow J considered the question whether the entitlement, in that case, of the plaintiff in relation to the common property was proprietary or merely contractual right. The right in question was a right, together with all other owners in the strata scheme, to use a

(Continued on page 14)

“*Exclusive use by-laws confer a proprietary right*”



By-laws: what are they and what rights do they give?



(Continued from page 13)

swimming pool. His Honour had regard to section 20 of the Development Act and stated that it followed that the relevant rights of the plaintiff in the common property were proprietary, being rights owned by them beneficially as tenants in common in the common property. His Honour then said that the rights which flowed from the estate or interest in the common property so held are delineated by the by-laws. These by-laws define the nature of its use and enjoyment, any constraints upon it and any conditions applicable such as payment for maintenance and the like. The relevant rights, in common property, remained proprietary in nature, although the detailed articulation stemmed from the by-laws. In *White v Betalli*, at first instance [2006] NSWSC 537,

White J observed that the fact that rights conferred by by-laws have contractual effect does not mean that they cannot also have a proprietary effect. His Honour stated that “*It is axiomatic that a contract in relation to property can give one party a proprietary estate or interest in the property of the other contracting party*” (see paragraph 62). In that case, the right to use a watercraft storage area over another lot by the first lot purported to create an interest or estate in the proprietor of lot 1 which was enforceable against the proprietor of lot 2. This reasoning was not departed from in the ultimate decision of the Court of Appeal.

In the further Court of Appeal decision in *The Owners of Strata Plan 3397 v Tate* [2007] NSWCA 207, the Court was concerned with the proper

interpretation of a by-law relating to a lift. McColl JA reviewed the decision in *Northwind, Young's case* and *White v Betalli* at first instance. Her Honour concluded, at paragraph 55, that “*subsequent decisions have held that Rath J's characterisation of the exclusive use by-law as having contractual effect did not preclude the conclusion that such by-laws also confer a proprietary right, even though their "detailed articulation stems from the by-laws"*”. Her Honour went on to consider that the interpretation of by-laws would be determined by the principles relating to statutory interpretation, rather than contractual principles. This is a highly relevant consideration in owners corporations making by-laws.

Conclusion

Having regard to the highly important nature of by-laws, that is, that they can create a proprietary interest, an interest which can subsequently be sold, it is most important that an owners corporation give proper consideration to their drafting and formulation. Advice should always be sought as to the preparation of by-laws in that they regulate an owners corporation and can create proprietary interests in the common property thereby excluding the interest of owners not referred to in the by-law and where those owners would ordinarily have an interest in that common property, were it not for the existence of the by-law. ■

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Common Property

Issue 4

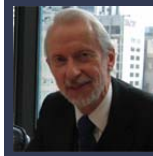
Legal news for the strata and company title management industry

February 2009

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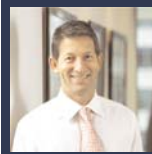
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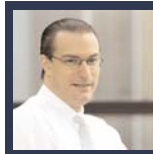
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Back issues

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Issue 3, August 2008

- Meeting etiquette —the p's and q's for an owners corporation meeting
- Recent amendments to the strata legislation
- Minorities: how are they protected?
- Cases observed
- Recordings in the Strata Roll—useful tips

Issue 2, May 2008

- They cannot vote but can they speak?
- Strata scheme and owners corporation: what's the difference?
- Management of building management committees
- Cases observed
- Torrens Title and its relevance to strata title and management
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