Bylaws – Mixed Use Development Act

(Subtitled "Car Parking – a Win for Residents") **Prepared by Phil Pennington, partner, Gadens**

Gadens partner Phil Pennington has provided an update on car parking rights, where the Supreme Court of Queensland has decided that the rights of commercial owners to control a visitor carpark in a mixed use development were not 'set in stone'. Cathedral Place is a large mixed use complex in Fortitude Valley, and was developed under legislation that preceded the Body Corporate and Community Management Act. The management structure of the complex involved the "Community Body Corporate "(which in the current legislation would be called the "principal" body corporate) and six precinct bodies corporate (in today's language, "subsidiary" bodies corporate). The visitor carpark was located primarily on principal common property. When it was still controlled by the developer, the principal body corporate put the control of the visitor carpark in the hands of the commercial subsidiary scheme via a bylaw, which then put in boom gates and ticketing machines, resulting in visitors to the complex having to pay parking fees. Ten years later the principal scheme voted by a 5-1 majority to cancel the visitor carpark bylaw, but whether that was legal depended on what 'type' of bylaw it was.

The Queensland Supreme Court decided that, of two possible types of bylaws, which under the Mixed Use Development Act are called "community property bylaws", and "restricted community property bylaws", this was the former type. This meant that a 'comprehensive resolution' was required when it was brought in, and the same level of voting could be used to remove the bylaw. A comprehensive resolution requires 75% of voting entitlements in favour. The commercial subsidiary body corporate had argued that it was a restricted community property bylaw, requiring a resolution without dissent to approve it in the first place, and accordingly that standard of voting for its removal. The Court arrived at its conclusion by looking at two issues. First, "what did the records actually say?" The body corporate records indicated it was passed as a "comprehensive resolution", and that when it was submitted to the Government Minister for approval it was called a "community property bylaw". The commercial subsidiary scheme on the other hand pointed out that in the "title" of the motion it was called a restricted community property bylaw, and that as there was only one person present at the "meeting" of the principal scheme, it was open to the Court to be satisfied that it been passed as a resolution against which there was no opposition ie a "resolution without dissent".

The Court would have none of that. It said; *"One might as well describe a company resolution, notified and passed as a general resolution, as a special resolution simply because it achieved a majority required for a special resolution".* So this will serve as an important reminder to all of us in the body corporate industry that proposals for bylaws, and changes to them, need to be prepared with some care.

The second issue was whether the bylaw satisfied the criteria to be a "restricted community property bylaw". To be valid, it had to restrict the use of the common property to one or more of a defined group of users – and they could include members of the principal scheme or owners or occupiers of lots. The problem with the bylaw though was that the bylaw didn't restrict the use of the area in that way. Relying on both these grounds, the court concluded the bylaw was validly cancelled.

Another objection to the bylaw is worth studying. The Court looked at whether in passing this bylaw while it controlled the principal scheme, the developer had preferred its own interests compared to the interests of the principal body corporate, in breach of the legal principle called *"fraud on exercise of power".* In *Houghton v Immer (No 155) Pty Ltd*, a 1977 New South Wales case, lot owners who lacked sufficient voting power to block a common property redevelopment proposal obtained compensation when this principle was applied. And in *Community Association DP No. 270180 v Arrow Asset Management Pty Ltd & Ors*, a 2007 New South Wales Supreme Court decision, for similar reasons the original property developer was found liable to account to lot owners for profits on the first grant of the management rights to a third party.

The central enquiry when questions like these arise is '*has the ability to control the affairs of the Body Corporate been used for another purpose?'* That can be seen in the following passage from the judgement in the current case;

If the resolution had resulted in the appropriation of Cathedral Place's rights then the result would have been that Mr ….(name omitted for privacy), on behalf of CPD, exercised his power to secure a particular gain for CPD, in apparent discharge of its contractual obligations to the original purchasers of lots in Cathedral Village, which did not arise fairly out of Cathedral Place CBC's power to control its own community property pursuant to s 206 of the MUD Act and would have been able to be set aside.

The Judge in the current case carefully emphasised that appying the *"fraud on a power"* doctrine would not have imputed any immoral or dishonest connotation to the conduct of the developer or its representative, and was merely a reference to a power being exercised unjustifiably. Ultimately, the Court did not have to make a finding on the issue because it had already decided the bylaw had been validly revoked.

Phil Pennington, one of the partners of Gadens lawyers who advised the Community Body Corporate and resident owner groups, says the case demonstrates the need for property buyers to carefully check what a developer is promising them under their contracts. He says this final passage from the Court judgement illustrates that;

"Although one can sympathise with the unit holders in Cathedral Village for not having obtained what they were promised by CPD, it is not open to them to seek to obtain what they were promised by attempting to prolong the revocable licence given by the original passage of by-law28 by Cathedral Place CBC."

The Supreme Court decision can be accessed at: http://www.sclqld.org.au/qjudgment/2012/QSC/301

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