Company title: the pitfalls

by Dominique Hogan-Doran · January 8, 2013

Company title is a complex type of land ownership. It is a term used where a corporation owns land and the buildings on that land parcel. The land itself may be under either Old System or Torrens title. With the introduction of strata title legislation during the 1960′s, its popularity waned, although there are still over 100 company title residential buildings in Sydney, with the majority in the inner Eastern Suburbs and lower North Shore.

Company title remains a way of allowing multiple occupancy and a form of "ownership" of the one building. The main features of company title include:

- The company owns the land and buildings
- The company's articles of association (commonly registered under the *Corporations Act 2001* (Cth) and its state predecessors) regulate the company including the management of the building and rights of shareholders
- Individual shareholders in the company have the right to occupy a particular part of the building
- Control of the building is vested in the company's board of directors

Drawbacks of Company Title

These features however present drawbacks. Current and future shareholders must consider issues as varied as constraints on ownership, regulations on refurbishment and the absence of the low cost dispute resolution measures that exist under the strata management legislation.

Constraints on ownership arises because shares are personal not real property. This can present problems with lenders, as some do not view shares as sufficient security for a loan. The shares are not readily transferable, as a share sale will usually need approval from the board of directors. Frequently there are strict controls on the property itself, including the need for board approval to lease to particular tenants or to undertake any internal renovations.

Disputes concerning the operation of home unit companies can raise complex questions of law, including allegations of breaches of class rights of shareholders, levying beyond power, breaches of directors duties and minority oppression. In recent years I have advised in relation to the operation of and redevelopments by a number of these companies, including the companies owning the "Macleay Regis" in Potts Point and "Nevada" in Darling Point (including appearing in Supreme Court litigation on behalf of the latter).

Illustration of the difficulties in company title: *Dungowan Flats* in the Court of Appeal

A good example of the extreme to which company title disputes can devolve is demonstrated by the NSW Court of Appeal decision handed down in June 2012 (Dungowan Manly Pty Ltd v McLaughlin [2012] NSWCA 180). Dungowan Manly Pty Ltd, the owner of a residential unit building known as "Dungowan Flats", undertook a major redevelopment of the Flats despite the opposition of two shareholders (the McLaughlins) who were entitled to occupy one of the units. At first instance, the McLaughlins claimed that the Company had breached the contract with them contained in its Articles of Association by proceeding without their

consent and sought damages for breach of contract as well as relief for oppressive conduct. Justice Ward found, on a limited basis, that the McLaughlins' consent had been necessary and awarded damages of $200,000, as well as a sum of $14,769.97 for oppressive conduct.

The Company appealed against both awards and the McLaughlins contended by a cross-appeal that the primary judge should have awarded damages on a broader basis and in a greater sum. The Court dismissed the appeal but allowed the cross-appeal.The variation of rights clause contained in the Articles of Association required the Company to obtain the McLaughlins' consent to the redevelopment because the redevelopment as a whole materially altered the characteristics of the building in which their unit was located, thereby materially altering the character and amenity of their home unit. By pursuing the redevelopment without the McLaughlins' consent and without validly amending the Articles of Association, the Company breached the contract with them contained in the Articles. The redevelopment was not shown to have altered the McLaughlins' rights on the narrower basis identified by the primary judge, namely the replacement of the unit directly below that of the McLaughlins with a carpark and a mechanical car-stacker. On the cross-appeal, the Court held that damages for breach of contract awarded by the primary judge should be increased by removing the two-thirds discounts provided for by her Honour. The Company was required to pay the McLaughlins' costs of the appeal and cross-appeal as the McLaughlins successfully proved the core of their case, and there were no clearly separable issues upon which the Company succeeded.

Unfortunately, conversion to strata is not a complete or easy answer

This demonstrates that there is a great deal of sense in company title buildings converting to strata regulation. Unfortunately, conversion to strata title can be difficult and drawn out, as many buildings are old and poorly maintained and unable to readily comply with current fire safety and building codes. And strata law is not without its own issues. In September 2012, the NSW Government released a discussion paper Making NSW No. 1 Again: Shaping Future Communities – Strata and Community Title Law Reform Discussion Paper (PDF size: 1.32mb) against a background of disputes arising from the increasing number of ageing buildings, securitisation of management rights, inadequate or outdated bylaws, defect disputes and developer liquidations, and overcrowding (particularly in inner-city strata schemes) (for more, see my earlier blog post).

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