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Avranik Pty Ltd v Lloyd & Anor [2012] VSC 306 (19 July 2012)

Last Updated: 20 July 2012

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

COMMON LAW DIVISION

JUDICIAL REVIEW AND APPEALS LIST

S CI 2011 04008

AVRANIK PTY LTD (ACN 087 219 789)	Plaintiff
v	
RODNEY JOHN LLOYD	First Defendant
and	
TANIA LEE COOPER	Second Defendant

JUDGE:	GARDE J
WHERE HELD:	Melbourne
DATE OF HEARING:	19 June 2012
DATE OF JUDGMENT:	19 July 2012
CASE MAY BE CITED AS:	Avranik Pty Ltd v Lloyd & Anor
MEDIUM NEUTRAL CITATION:	[2012] VSC 306

OWNERS CORPORATION – Rules of owners corporation – Construction of rules – Principles – Licence for car spaces of penthouse unit – Rights of owners and occupiers – *Owners Corporation Act 2006* Parts 10 and 11, ss 140, 141, 152, 153, 162, 165, 167, 205 and Schedule 2 – Appeal from VCAT dismissed – *Victorian Civil and Administrative Tribunal Act 1998*, s 148.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr R. Hay	Donaldson Trumble Lawyers
For the Defendants	Mr M. Shand QC with Mr E. Szabo	Hill Perkins & Co

HIS HONOUR:

1 This is an appeal under s 148 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) by the plaintiff Avranik Pty Ltd (ACN 087 219 789) pursuant to leave granted by Associate Justice Lansdowne on 19 September 2011. The appeal arises from the decision of Member Buchanan of the Victorian Civil and Administrative Tribunal ("the Tribunal") on 4 July 2011 in VCAT reference OC1497/2010 in which the defendants Rodney John Lloyd and Tania Lee Cooper were the applicants and the present plaintiff was the first respondent. The owners corporation was Owners Corporation 1 Plan No. PS408887C ("the owners corporation"). Prior to the coming into force of the Owners Corporations Act 2006 (Vic) ("the Act") on 31 December 2007, the owners corporation was known as Body Corporate Plan No. 408887C.

2 The application to the Tribunal was made by the defendants under s 162 of the Act. They were the owners of a penthouse on the 11th floor of the building at 471 Little Bourke Street, Melbourne.[1] They claimed that when they bought their penthouse unit they also obtained the right to exclusive use and occupation of a car space located in the basement of the building.

3 The facts were not in dispute either before me or before the Tribunal. Based on a chronology provided by counsel for the plaintiff, the facts may be summarised as follows:

1998	471 Little Bourke Street was redeveloped into a hotel and apartments.
26-Mar-1998	Plan of Subdivision was registered and a body corporate created.
1999	In the first part of 1999, the plaintiff agreed to buy the 11th penthouse floor of 471 Little Bourke Street.
10-May-1999	The body corporate amended its special rules. The amended special rules provided for 7 car parking spaces in the basement of 471 Little Bourke Street to be allocated to the owner of the 11th floor.
10-May-1999	The body corporate granted the plaintiff seven licences of common property each of which gave the plaintiff sole and exclusive use and enjoyment of a car space in the basement for a term of 99 years.
11-May1999	The plaintiff was registered as the proprietor of the 11th floor.
Jan-2000	The plaintiff subdivided the 11th floor into seven penthouse units.
Aug-2001	The plaintiff sold one of the seven penthouse units (unit 1102) to Mr Ghorpade.
2004	Mr Ghorpade sold unit 1102 to Mr Cester.
21-Jan-2005	Mr Cester sold unit 1102 to the defendants who became registered proprietors in 2005.

4 On 4 July 2011, the Tribunal declared and ordered as follows:

1. I declare that by operation of rule 2.5.1, the licence for car space 20 which was granted to the first respondent on 10 May 1999 terminated in or about August 2001, on transfer of unit 1102 to Mr Ghorpade.
2. The third respondent must issue to the applicants a licence for car space 20 in the same terms as the licence which the third respondent granted to Avranik on 10 May 1999.
3. The third respondent must remove the barrier preventing access to car space 20.

4. Liberty is reserved to the parties to apply for directions about the further conduct of this proceeding upon reasonable notice to the Tribunal and to each other.

5 There was no challenge before me as to the form of these orders or as to the jurisdiction of the Tribunal to make these orders.

6 By an amended notice of appeal dated 19 June 2012, the plaintiff stated the question of law in this appeal to be whether the licence for car space 20, which was granted to the plaintiff on 10 May 1999 ("licence"), terminated in or about August 2001 on transfer of unit 1102 to Mr Ghorpade.

7 The plaintiff's grounds of appeal were in substance:

(a) the Tribunal incorrectly declared that the licence for car space 20 which was granted to the plaintiff on 10 May 1999 terminated in or about August 2001, on transfer of unit 1102 to Mr Ghorpade;

(b) the Tribunal incorrectly ordered the owners corporation to:

(i) issue to the defendants a licence for car space 20 in the same terms as the licence which the owners corporation granted to the plaintiff on 10 May 1999; and

(ii) remove the barrier preventing access to car space 20.

8 In written submissions,[2] counsel for the plaintiff identified what were said to be two errors in the Tribunal's reasoning. One related to the construction of Rule 2 of the Special Rules ("Rules") of the owners corporation. The other related to the construction of clause 2.5.1 of the licence.

9 A number of other points were taken before the Tribunal. However, these were not pursued in the notice of appeal or pressed before me.

10 The Rules provided:

1. Use of Common Property and Lots

A member must not and must ensure that the occupier of a member's lot does not:

(a) use the common property or permit the common property to be used in such a manner as to unreasonably interfere with or prevent its use by other members or occupiers of lots or their families or visitors; or

(b) park or leave a vehicle on the common property so as to obstruct a driveway or entrance to a lot or in any place other than a parking area specified for such a purpose by the Body Corporate;

...

2. **Car Spaces**

The Body Corporate must allocate car spaces in the basement area of the common property to members of the Body Corporate from time to time, as

follows:

Lot 1100 – 7 car spaces ("penthouse spaces")

Lot G – 5 car spaces

Lot 100, 200 and 700 – 2 car spaces per lot

Lot 300, 400, 500, 600, 800, 900 and 1000 – 1 car space per lot

Where car spaces are allocated the following provisions apply:

(a) Other than in respect of the penthouse spaces, the right of occupation shall be by way of a non-exclusive licence with the position of car spaces to be allocated by the Body Corporate from time to time.

(b) The rights and obligations of the member(s) who is or are registered as proprietor(s) of Lot 1100 on the plan of subdivision (or any lot created on further subdivision of that lot) are set out in full in Rules 2(b), 2(d) and the licence agreements for the penthouse spaces ("Licences"). The Body Corporate shall on transfer of any lot or re-subdivided lot ensure that the relevant transferee is provided with a copy of the Licences.

(c) Subject to (b) above, the tenant of a member's lot has the right to use (to the exclusion of that member) the car spaces allocated to that member if the tenant's lease so provides.

(d) A member must not and must ensure that the occupier or tenant of a member's lot does not:

(i) make any alteration or addition to the allocated car spaces without written consent of the Body Corporate;

(ii) use the allocated car spaces other than for the parking of motor vehicles which are in day to day use and are not of such dimensions as to overlap the limits of any allocated car space;

(iii) subject to Rule 2(c) not to part with possession of an allocated car space other than to a person entitled to the use and occupation of the member's lot or part of the member's lot;

...

...

15. **Lot 1100**

A member who is an owner of lot 1100 or owner of any lot created on subdivision of lot 1100 ("penthouse member") must not, and must ensure that the occupier of a penthouse member's lot must not, use the penthouse lot

> in any manner that does or is likely to unreasonably interfere with the operations of the hotel or serviced apartment complete which is located in the building located at and known as 471 Little Bourke Street, Melbourne, Victoria, 3000.

11 As to the construction of the Rules, the Tribunal held:

> 21. It is significant that the opening sentence of rule 2 provides that
>
> ... the Body Corporate must allocate car spaces **to members of the Body Corporate from time to time**. (my emphasis)
>
> > These words makes it clear that allocation is not to be a one-off event, done on 10 May 1999 when the licences were granted to Avranik. Rather, the allocation must be made to those who, from time to time, are members of the owners corporation. When there is a transfer of ownership of a lot to which the rules have allocated a car space, the new lot owner becomes a member of the body corporate. It follows that at this point the car space must be allocated to the new member.

22. Mr McKenzie for the first and second respondents argued that the words "from time to time" are to be read as referring only to the allocation of car spaces, not to the members of the owners corporation. I find this interpretation strained. It would require the owners corporation to make allocations "from time to time", without any guidance as to when it should do so, creating a sort of Mad Hatter's tea party where car spaces were allocated at random times, chosen without reference to anything.
23. I think, then, that it is clear enough that on transfer of lot 1100 to a new owner, that new owner/member could require the owners corporation to allocate seven car spaces to the new owner/member. But what would happen if the 11th floor (lot 1100) were divided into sub-units (penthouse units) and those penthouse units were sold?

...

25. The effect of rule 2(b) is that if the owner of the 11th floor subdivided that floor, owners of penthouse units so created would have the same rights and obligations as the owner of the undivided 11th floor. This clearly contemplates that the owners of penthouse units would have car spaces allocated as of right.
26. This conclusion is confirmed when one contemplates the language of rule 2(b) on the assumption that the respondents are correct and the assignment of seven licences to Avranik was a one-off event, creating assets with which Avranik could deal at its pleasure:

> (a) The second sentence of rule 2(b) says:
>
> The Body corporate shall on transfer of any lot or re-subdivided lot ensure that the relevant transferee is provided with a copy of the Licences.
>
> If the respondents were correct, what would be the point of this requirement?
>
> (b) The reference in rule 2(b) to "rights and

> obligations" (in relation to car spaces) of new members who are proprietors "of any lot created on further subdivision of that lot" (ie Lot 1100) would be pointless – if the respondents were correct, the member would only have whatever rights and obligations the owner of Lot 1100 deigned to give and chose to impose; the owners corporation could have no say in the matter.

...

32. There are two obstacles to Avranik's claim. The first is the rules which, as I have said, prevail over the licences. The freedom which Avranik asserts is at odds with Rule 2's imperative that "the Body Corporate must allocate... to members of the Body Corporate from time to time".

12 The licence between the owners corporation and the plaintiff contained the following provisions:

> 1.5 The Body Corporate has consented to the Licensee subdividing the Unit into seven (7) further units ("Penthouse Units") and it is a requirement of the Licensee that the right to use the Licensed Area set out in this Licence can be transferred or granted to the occupier or owner of one of the Penthouse Units.

...

> 2.1 The Body Corporate grants to the Licensee as from the commencement date set out in the Schedule the right to sole and exclusive use and enjoyment of the Licensed Area to the exclusion of all member of the Body Corporate and all other persons subject to the terms, covenants, conditions and restrictions contained in this Licence.
>
> ...
>
> 2.3 The Licensee agrees with the Body Corporate that it must not and must ensure that an occupier of the Unit or Penthouse Unit must not:
>
> ...
>
> 2.3.3 Subject to Clause 2.3 and this Licence not to part with possession of the Licensed Area other than to a person entitled to the use and occupation of the Unit or Penthouse Unit;
>
> ...
>
> 2.5.1 This Licence will continue for such time as the Licensee is the owner of the Unit.
>
> 2.5.2 Should the Licensee sell the Unit or any Penthouse Unit, this Licence may be transferred to the purchaser of the Unit or a Penthouse Unit without obtaining the consent of the Body Corporate provided that the Licensee obtains from the purchaser an acknowledgement that the purchaser agrees to be bound by

the terms of this Licence and then forwards a copy of that acknowledgement to the Body Corporate.

2.5.3 This Licence is not transferable except in accordance with Clause 2.5.2.

...

2.9 The Background forms part of this Licence.

13 The licence was executed under seal and contained a schedule as follows:

SCHEDULE

Licensee:	Avranik Pty Ltd ACN 087 219 789 care of Level 1, 535 Bourke Street, Melbourne.
Unit No.:	Lot 1100 on the Plan.
Licensed Area:	The area shown as car space 20 on the attached plan.
Commencement Date:	The day on which the Licensee becomes registered as proprietor of Lot 1100 on the Plan.

The number 20 was written by hand in the schedule.

14 A table attached to the licence showed the car park numbers and dimensions:

Carpark Number (refer plan)		Dimensions in Metres (Width x Depth)
1.	17 & Pt 18	4 x 6
2.	20	2.7 x 6
3.	21	2.7 x 6
4.	22	2.7 x 6
5.	23	2.7 x 6
6.	24	2.7 x 6
7.	25	2.850 x 6

15 As to the construction of the licence, the Tribunal held:

33. The second obstacle is found within the licences themselves. Clause 2.5.1 of each licence provides that “The Licence will continue for such time as the Licensee is the owner of the Unit”.
34. What is the effect of this clause? First, what it does not mean. On its face, the clause means that the licences ended when Avranik subdivided the 11th floor. This is because the licences define “Unit” as being “Lot 1100 on the Plan” (ie the original plan of subdivision). Upon registration of Avranik’s plan subdividing lot 1100 into seven penthouse units, lot 1100 ceased to exist. As it did not exist, Avranik could not be its owner. As the licences only “continue for such time as the Licensee [Avranik] is the owner of the Unit” (lot 1100), the licences ended when Avranik’s subdivision was registered. Consequently, from the time the subdivision was registered, Avranik had no licences to transfer.
35. While that may be the effect of clause 2.5.1 on its face, I do not believe, when one considers the licence as a whole, that such can be the intended result. Its practical effect would be that Avranik could only transfer the licences to a purchaser of the undivided 11th floor. That would

be an absurd result, in view of the licences' recording (clause 1.5) that Avranik was going to subdivide the 11th floor. Further, the immediately following clause, clause 2.5.2, says that "this Licence may be transferred to the purchaser of the Unit **or a Penthouse Unit**" (my emphasis). This clearly contemplates that the licence will not die on subdivision of the 11th floor, since if it did die on subdivision, Avranik would never be able transfer to the purchaser of a penthouse unit.

36. So what effect does clause 2.5.1 have? While subdivision of the 11th floor may not have ended the licences, clause 2.5.1 must have some effect and I think that it is clear enough that the intended effect is that on Avranik's transfer of a penthouse unit, Avranik's licence relating to that penthouse unit came to an end.
37. The first and second respondents' submission about rule 2.5.1, was as follows: "Similarly, as the continued ownership of a penthouse unit has been established, the licence itself remains in place. See clause 2.5.1." True, Avranik has retained ownership of at least one penthouse unit, but it seems to me to be far-fetched to say that the clause contemplates that Avranik could sell 6 penthouse units, fail to transfer any of the six relevant licences, but by retaining one penthouse unit, Avranick [sic] could keep all seven licences alive.
38. To my mind the aim of the scheme created by the rules and the licences was that, on sale of a penthouse unit, Avranik would be free to transfer the relevant licence to the purchaser. If Avranik did not do so, the owners corporation would be required by rule 2 to allocate a car space to the purchaser.

16 The licence agreement for each of the penthouse units was in a standard form. Only the number of the car space remained to be inserted into the schedule.

17 At the time of the hearing before the Tribunal, the plaintiff retained at least one penthouse unit. The plaintiff contended before the Tribunal and before me that if it held one unit it was entitled to retain all seven of the car spaces allocated to the penthouse units.

18 Section 205 and Rule 5 of Schedule 2 of the Act provide for the Rules to have continuing force notwithstanding that they were enacted prior to the commencement date of the Act.

19 Section 141 of the Act provides that the rules of an owners corporation are binding on the owners corporation, the lot owners, any lessees or sub-lessee of a lot, and any occupier of a lot. It was not in dispute before me that the Rules were binding and governed the rights of the owners corporation and the respective lot owners.

20 Part 10 of the Act contains a scheme whereby a lot owner or an occupier of a lot or a manager may make a complaint to the owners corporation about an alleged breach by a lot owner or an occupier of a lot or a manager of an obligation imposed on that person by the Act or the regulations or the rules of the owners corporation. Section 153(3) precludes the owners corporation from taking any action under Part 10 or applying to VCAT for an order in relation to an alleged breach unless the dispute resolution process required by the rules had first been followed and the owners corporation is satisfied that the matter has not been resolved through that process. There was no dispute before me about compliance with s 153(3).

21 Likewise, Part 11 of the Act empowers VCAT to hear and determine a dispute or matter relating to an alleged breach by a lot owner or an occupier of a lot of an obligation imposed on that person by the Act or the regulations or the rules of the owners corporation. Section 165 empowers VCAT to make any order it considers fair including any order of the types listed in (a) to (m) of s 165(1) or in s 165 (2) or (3). Section 167 provides that in making an order VCAT must consider each of the matters listed in (a) to (e). These matters are:

(a) the conduct of the parties;

(b) an act or omission or proposed act or omission by a party;

(c) the impact of a resolution or proposed resolution on the lot owners as a whole;

(d) whether a resolution or proposed resolution is oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or lot owners;

(e) any other matter VCAT thinks relevant.

22 Two of these matters, namely (c) and (d), require the Tribunal to consider "the impact of a resolution or proposed resolution on the lot owners as a whole" and "whether a resolution or proposed resolution is oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or lot owners". It was plainly intended that orders made by the Tribunal would not be oppressive to, unfairly prejudicial to or unfairly discriminatory against a lot owner or lot owners.

23 Mr Hay, counsel for the plaintiff, contended that the proper construction of the Rules and the licences relating to car spaces allocated on 10 May 1999 was as follows:

(a) if the registered proprietor retained ownership of a lot created from the subdivision of Lot 1100 it was entitled to be the licensee of all licences relating to car spaces allocated to Lot 1100;

(b) the registered proprietor could transfer a licence relating to a car space allocated to Lot 1100 to a purchaser of a lot created from the subdivision of Lot 1100 but was not required to do so; and

(c) subject to the proviso in clause 2.5.1 of the Licence Agreement, if the registered proprietor transferred a licence relating to a car space allocated to Lot 1100 to a purchaser of a lot created from the subdivision of Lot 1100 no consent to such a transfer was required to be obtained from the Body Corporate.

He further submitted that the effect of the proviso referred to in (c) was that the registered proprietor must be the owner of a unit in what was part of Lot 1100.

24 In the submissions, attention was given to the principles which ought to govern the construction of rules of an owners corporation under the Act. Mr Shand QC submitted that the general scheme of the Act so far as owners and rules are concerned is to regulate their legal relations in a manner that is fair and equitable. Section 140 of the Act provides that a rule of an owners corporation is of no effect if it "unfairly discriminates against a lot owner or an occupier of a lot". The term "discriminates" as found in s 140(a) is not defined in the Act and must accordingly be given its ordinary meaning.

25 Having regard to s 140(a) of the Act, it is appropriate to adopt a construction of the rules of an owners corporation which is fair and equitable, and which would avoid discrimination against a lot owner or an occupier of a lot.

26 Section 140(b) provides that a rule of an owners corporation is of no effect if it:

is inconsistent with or limits a right or avoids an obligation under—

(i) this Act; or

(ii) the *Subdivision Act 1988*; or

(iii) the regulations under this Act; or

(iv) the regulations under the *Subdivision Act 1988*; or

(v) any other Act or regulation.

27 Secondly, the principles that relate to the construction of the constitution of a corporation incorporated under the Corporations Act 2001 (Cth) can be applied to the constitution of owners corporations incorporated or operating under the Act. Thus, the rules of an owners corporation should be interpreted as a whole.[3]

28 Thirdly, in Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd,[4] a Full Court of the Federal Court consisting of Weinberg, Kenny and Lander JJ summarised the principles which govern the construction of a company's constitution as follows:[5]

> The constitution should be construed so as to give the document business efficacy. A construction which would make the constitution unworkable should be avoided if possible: *Rayfield v Hands* [1960] Ch 1. In *Holmes v Lord Keyes* [1959] Ch 199, Jenkins LJ said (at 215):
>
> > I think that the articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable.
>
> That decision has been followed in Australia in *Stillwell Trucks Pty Ltd v Nectar Brook Investments Pty Ltd* [1993] FCA 646; (1993) 115 ALR 294 at 300 per O'Loughlin J; *Tosich v Tosich Construction Pty Ltd* (1993) 10 ACSR 590 at 596 per Lockhart J; and Parkin at 236 per Ipp JA
>
> In *Egyptian Salt & Soda Co Ltd v Port Said Salt Association Ltd* [1931] AC 677, Lord MacMillan said (at 682):
>
> > If by this he meant merely that the memorandum must be construed in accordance with the accepted principles applicable to the interpretation of all legal documents no exception need be taken to his statement, but if he meant that a specially rigid canon of construction is to be applied to the memoranda of association of limited companies their Lordships do not agree. A memorandum of association like any other document must be read fairly and its import derived from a reasonable interpretation of the language which it employs.
>
> In Ford HAJ, Austin RP and Ramsay IM, Ford's Principles of Corporations Law (12th ed, Butterworths, 2005), the learned authors write (p 190):
>
> > Because courts have considered the constitution to be a contract they have been construed according to the rules of construction of terms applicable to contracts generally.
> >
> > In the interpretation of constitution courts

> approached them as business documents. They sought to give them business efficacy: *Rayfield v Hands* [1960] Ch 1. Where provisions were ambiguous a construction which produced reasonable business efficacy was preferred over one which produced an unreasonable result: *Holmes v Keyes* [1959] Ch 199 at 215; *Stillwell Trucks Pty Ltd v Nectar Brook Investments Pty Ltd* [1993] FCA 646; (1993) 115 ALR 294; *Norths Ltd v McCaughan Dyson Capel Court Cure Ltd* (1988) 12 ACLR 739 at 746; *Tosich v Tosich Construction Pty Ltd* (1993) 10 ACSR 590 at 596.

Whilst the courts have treated a company's constitution as a contract, the courts have been cautious in applying all of the canons of construction applicable to commercial and business documents: *Simon v HPM Industries Pty Ltd* (1989) 15 ACLR 427. In that case, Hodgson J was addressed on the question of construction of the Articles of Association of a company. He said at 434 he accepted the defendant's submissions which he relevantly recorded (at 433):

> Mr Palmer QC for the second defendant submitted that the rules of construction applied in relation to contracts were applied with great caution to the articles of association of a company; and that the literal meaning of the words should be applied. He referred me to the 4th edition of Gower, Modern Company Law at p21, and to *Grundt v Great Boulder Proprietary Mines Ltd* [1948] Ch 145 at 148 and 159-60. Mr Palmer submitted that the reason why even greater strictness was adopted in relation to articles of association than in relation to a contract was that the articles of association were not purely consensual, but rather an instrument required by a statute to be registered so that third parties can rely on it.
>
> Next, Mr Palmer submitted that the court could not look to previous negotiations or discussions or the like, except where there was ambiguity or in relation to rectification; and he referred me to Volume 1 of the 25th edition of Chitty on Contracts, para 782.
>
> Next, Mr Palmer submitted that if words are unambiguous on their face, the court cannot have recourse to external circumstances or extrinsic evidence so as to produce ambiguity or absurdity: such recourse is available only if ambiguity appears on the face of the documents. Furthermore, where an error is made, such as can be corrected by construction rather than by rectification, the error must appear on the face of the document, and cannot merely consist in inconvenience or even absurdity suggested by external circumstances. Mr

> Palmer referred me to Pearce on Statutory Interpretation, 2nd ed, p 16, and to *Burns Philp Hardware Ltd v Howard Chia Pty Ltd* (1987) 8 NSWLR 642 at 655-57.

...

The Courts have been slow to imply terms into a company's constitution. In *Bratton Seymour*, the Court of Appeal was asked to imply a term which it said was necessary to give business efficacy to the articles of association of a company. After referring to *Scott v Frank F Scott (London) Ltd*, in which the Court decided that it has no jurisdiction to rectify the articles of association of a company even if they did not accord with the proved concurrent intention of the signatories to the articles, the Court of Appeal said (at 697), in those circumstances, the Court could not imply a term into the articles "which arises from the surrounding circumstances not apparent from the articles themselves or from the memorandum".

...

In *Stanham v National Trust of Australia (NSW)* (1989) 15 ACLR 87, the plaintiffs, who were members of the defendant, applied to the Court for a declaration that they were entitled to put motions to an extraordinary general meeting of the defendant which had been called by its council. Young J said (at 90) when speaking of the submission that a term ought to be implied into the articles:

> I am asked to imply such a right because were it otherwise, there would be no sanction at all for non-compliance with rule 53. Although one does regard articles as a contract and applies the general law as to implying terms into them, in my view one must be very careful before implying matters into articles of association or the like for three main reasons.

He gave as those reasons (at 91):

> First, it is far more difficult to imply a term in a case where parties have purportedly spelt out their rights and obligations in an extensive set of articles than it is where there is only a very summarised version of such rights and obligations.
>
> Secondly, it is customary in corporations to place very great store on the actual wording of each of the articles and very often parties govern themselves on the exact grammatical construction of each individual article.
>
> Thirdly, there is always power with articles of association or documents such as the rules of this corporation to amend them by special resolution. Thus if there is a defect in the rules rather than imply a term the court may very well leave the parties to have the majority pass the appropriate

> resolution.
>
> That is not to say that a term cannot be implied in a company's constitution where the true construction requires the implication of a term. The Courts, however, proceed warily before implying a term.
>
> Because the principle of construction relating to commercial and business documents applies, subject to the limitations above, to the construction of a company's constitution, the constitution should not be construed narrowly or pedantically: *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* [1968] HCA 8; (1968) 118 CLR 429. The constitution should be considered as an enduring and flexible document: *Re GIGA Investments Pty Ltd (in admin)* [1995] FCA 1348; (1995) 17 ACSR 472.

29 Having regard to the provisions of the Act and to these decisions, a number of principles arise which govern the construction of the constitution of an owners corporation. A construction which gives effect to these principles should be preferred. The principles are:

(a) The rules should be read as a whole.

(b) The rules should be read fairly and their import derived from a reasonable interpretation of the language which they employ.

(c) The rules should not be construed narrowly or pedantically, but as an enduring and flexible document.

(d) The rules should be construed in a manner which would avoid discrimination against a lot owner or occupier of a lot.

(e) The rules should be construed in a way that gives them business efficacy. A construction which would make them unworkable should be avoided if possible.

(f) A construction which is inconsistent with or would limit or avoid an obligation under any Act or regulation would render the rule of no effect and should be avoided if possible.

(g) Whilst terms can be implied where the true construction requires the implication of a term, courts proceed warily before implying a term.

30 I now apply these principles to the construction of the Rules. Rule 2 of the Rules directs the owners corporation to allocate car spaces in the basement area of the common property to members of the owners corporation from time to time including the 7 "penthouse spaces" as they are described in the rule. Given that there are seven penthouse units and given that penthouse spaces were provided to meet parking demand generated by the occupiers of the seven penthouse units, it is appropriate to adopt a construction of Rule 2 that would see one penthouse space allocated to each penthouse unit. Nothing was suggested in argument that any one penthouse unit had any greater demand for car parking than any other unit. This is confirmed by the licences which allocate one penthouse space to each penthouse unit and by the table attached to each licence which does likewise. This construction would be fair, avoid discrimination between unit owners and occupiers, and be efficacious in terms of the operation of the owners corporation and the use of common property. It would also construe the Rules in a flexible, efficacious and enduring manner.

31 The use in Rule 2 of the expression "from time to time" in the immediate context of the reference to "member of the Body Corporate" also suggest that the Rules were intended to have the effect that as membership changes the owners corporation will allocate and re-allocate penthouse spaces to the owners of penthouse units as they may be from time to time.

32 Two other references support this view. First, under Rule 2(a), the right of occupation of penthouse spaces is exclusive, whereas car spaces provided to the lots are provided by way of non-exclusive licence. The fact that penthouse spaces are exclusive means that they can be individually allocated to penthouse owners and occupiers. Secondly, under Rule 2(c), the tenant of a member's lot has the right to use the car spaces allocated to that member if the tenant's lease so provides. This suggests, as might be expected, that the car space allocated by the owners corporation is intended to be used by the occupant of the unit so contributing to or meeting the parking demand generated by that occupancy.

33 Likewise, Rule 15 contemplates that an owner of Lot 1100 or the owner of any lot created on subdivision of Lot 1100 or the occupier of a penthouse member's lot must not, use the penthouse lot in any manner that does or is likely to unreasonably interfere with the operations of the hotel or serviced apartment complex. This rule proceeds on the assumption that the penthouse members or their occupiers will be the occupiers of the penthouse spaces.

34 Counsel for the plaintiff sought to rely on Rule 2(b) pointing out that it provided that the rights and obligations of the member(s) who were registered as proprietor(s) of Lot 1100 on the plan of subdivision (or any lot created by further subdivision of that lot) are set out in full in Rules 2(b), 2(d) and the licence agreements. However, it is clear that this is a drafting error in the Rules. It was not contested in argument that Rule 15 also clearly affects the rights and obligations of the member(s) who are registered as proprietor(s) of Lot 1100 on the plan of subdivision or lots created on further subdivision of that lot.

35 The second part of Rule 2(b) requires the owners corporation on transfer of any lot or re-subdivided lot to ensure that the relevant transferee is provided with a copy of the licences.

36 The licence is a contract between the owners corporation and the plaintiff. It should be construed in accordance with the principles set out by the High Court of Australia in Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd:[6]

> This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

37 The licence defines the expression "Unit" to mean Lot 1100 and the expression "Penthouse Unit" to mean one of the seven penthouse units into which it was intended to subdivide Lot 1100. Clause 1.5 of the licence refers to the fact that the owners corporation has consented to the plaintiff subdividing Lot 1100 into seven penthouse units providing in substance that it was a requirement of the owners corporation that the right to use the car space can be transferred or granted to the occupier or owner of one of the penthouse units. Whilst some argument was directed to the use of the words "can be" in clause 1.5, in my opinion, these words are intended to be facilitative and contemplate that on sale the licence for the penthouse space will either be transferred to the new owner under clause 2.5.2 of the licence or terminate under clause 2.5.1 and be re-allocated to, or used by the purchaser of a penthouse unit or tenant under Rules 2 or 2(c).

38 Finally, clause 2.3.3 of the licence prohibits the plaintiff subject to clause 2.3 and the licence from parting with possession of the car space other than to a person entitled to the use and occupation of Lot 1100 or a penthouse unit. This clause makes it clear that the penthouse spaces are not for general use and the possession of them cannot be given to any person other than one entitled to the use and occupation of Lot 1100 or a penthouse unit.

39 Counsel for the plaintiff also contended that the Tribunal erred in the construction of clause 2.5.1 of the licence. He acknowledged that on a literal interpretation of clause 2.5.1, the plaintiff's rights under the existing licence would cease. However, he sought to avoid the consequences of a literal construction of clause 2.5.1 by contending that the reference to "the Unit" in clause 2.5.1 could only be a reference to a situation in which the registered proprietor remains as the owner of any one of the penthouse units. He contended that any other view would involve the absurdity that the reference to "the Unit" in clause 2.5.1 of the licence is to the un-subdivided whole of Lot 1100.

40 I do not accept the plaintiff's argument as to the proper construction of clause 2.5.1. As the Tribunal said at [37] of the reasons, it would be far-fetched to interpret clause 2.5.1 so that the plaintiff could sell six penthouse units, fail to transfer any of the relevant licences but by retaining one penthouse unit keep all seven licences alive.

41 I accept the submission of Senior Counsel for the defendants that the construction advanced on behalf of the plaintiff is artificial, and if a literal construction is not to be adopted that the better construction is that the licence will continue for such time as the licensee is the owner of the particular penthouse unit to which the licence relates. This recognises the nexus between each penthouse space and ownership or occupation of each penthouse unit.

42 A further problem with the construction advanced by the plaintiff concerning clause 2.5.1 relates to time. The plaintiff does not deny that clause 2.5.1 takes effect. Rather its effect is postponed so that it is only when the plaintiff sells the last penthouse unit, that the penthouse spaces will revert to the respective owners of the penthouse units. Clearly, it makes no sense that each owner or occupier of a penthouse unit will be allocated the respective penthouse space, but it may be years later that the licence of the penthouse space actually catches up with the change of ownership or occupancy. An interpretation of clause 2.5.1 which produces this result should not be accepted, as against a construction that has the effect that a purchaser of a penthouse unit is entitled to a transfer of a penthouse space contemporaneously with the acquisition of the penthouse unit.

43 Clause 2.5.3 provides that a licence is not transferable at all except in accordance with clause 2.5.2. Clause 2.5.2 is facilitative and permits a licensee who sells the Unit or a penthouse unit to transfer the licence to the purchaser of the Unit without obtaining the consent of the owners corporation provided that the licensee obtains an acknowledgement from the purchaser that the purchaser agrees to be bound by the terms of the licence and forwards a copy of that acknowledgement to the owners corporation. If this is not done, the effect of clause 2.5.3 when taken with clause 2.5.1 is that the licence expires with the result that the owners corporation will issue a new licence under Rule 2 of the Rules.

44 For these reasons, I am of the opinion that the grounds of appeal relied on by the plaintiff cannot be sustained. In my view, the arguments of the plaintiff are not correct and that as a result the Tribunal did not err as contended by the plaintiff. The Tribunal's order and decision will stand and the appeal will be dismissed.

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[1] The 11th floor consisted of seven two-level penthouse units.

[2] Written submissions dated 3 November 2011.

[3] *McLaughlin v Dungowan Manly Pty Ltd* [2007] NSWSC 197; (2007) 61 ACSR 335 [47] (Barrett J); *Santos Ltd v Pettingell* (1979) 4 ACLR 110, 118 (Rath J).

[4] [2006] FCAFC 144; (2006) 156 FCR 1.

[5] Ibid [232] – [236], [239] and [241] – [244]. See also *Bundaberg Sugar Ltd v Isis Central Sugar Mill Co Ltd* (2006) 24 ACLC 1550 [28]-[29] (Chesterman J); *McLaughlin v Dungowan Manly Pty Ltd* [2007] NSWSC 197; (2007) 61 ACSR 335 [47] (Barrett J).

[6] [2004] HCA 52; (2004) 219 CLR 165 [40] (citations omitted).

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