

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

OWNERS CORPORATION LIST

VCAT REFERENCE NO. OC237/2016

CATCHWORDS

Validity of Head Lease and Transfer of Lease over common property; Car parking spaces; No evidence of special resolution for grant of lease.

APPLICANT: Darren Balazs
RESPONDENT: Owners Corporation RP9610
WHERE HELD: 55 King Street, Melbourne
BEFORE: Dr Rebecca Leshinsky, Member
HEARING TYPE: Hearing
DATE OF HEARING: 16 May 2016
DATE OF ORDER: 16 May 2016
DATE OF REASONS: 10 June 2016
CITATION Balazs v Owners Corporation RP9610 (Owners Corporations) [2016] VCAT 963

ORDER

- 1 The proceeding is dismissed for the reasons given orally at the hearing.
- 2 No order as to costs.

Dr Rebecca Leshinsky
Member

APPEARANCES:

For Applicant: Mr D. Balazs, in person.
For Respondent: Ms R. Castro, Solicitor.

REASONS

- 1 The proceeding is brought by the Applicant as to whether he has exclusive use of two car parking spaces which are located on common property.
- 2 The Applicant is the owner of Unit 19, 1 Foot Street, Frankston. The Respondent Owners Corporation (“the OC”) is the owner of the common property under Plan of Strata Subdivision RP9610 (“the Strata Plan”).

BACKGROUND

- 3 The Strata Plan was registered on 4 May 1977.
- 4 There are 23 units on the Strata Plan and these are residential dwellings with no car parking spaces available to any individual unit.
- 5 The following notes appear on Sheet 2 of the Strata Plan:
 3. No unit is an accessory unit.
 4. The common property is all the land in the parcel, except the land in units 1-23 (both inclusive).
- 6 From the historical title searches, tendered by the Respondent, it appears that on 4 May 1977, the date of registration of the Strata Plan, Lin-Nes Proprietary Limited (“Lin-Nes”) was the registered proprietor of all of the units within the Strata Plan.
- 7 Contracts of sale were entered into on or around 6 September 1993 by Stephen Waters Enterprises Pty Ltd (“Stephen Waters”) and Tangalooma Nominees Pty Ltd (“Tangalooma”) to purchase all of the units on the Strata Plan.
- 8 Further historical title searches reveal that between January to July 1994, Stephen Waters and Tangalooma became the joint registered proprietors of all of the 23 units on the Strata Plan.
- 9 On 28 January 1994 Stephen Waters and Tangalooma became the joint registered proprietors of Unit 19 on the Strata Plan (“Unit 19”), being Certificate of Title Volume 9204 Folio 271.

Unit 19 Lease of Common Property for Use as Two Car Parking Spaces

- 10 On 21 January 1994 Stephen Waters and Tangalooma executed a lease (“Head Lease”) to grant Anthony Wah Cheung Lun and Josephine Chin Len Lun (“First Lessees”) exclusive use of part of the common property. This exclusive use of the common property was to be for two car parking spaces, for a term of ninety-nine years and at a rental sum of one dollar per year.
- 11 I further accept that the Respondent does not hold a copy of the minutes of a general meeting, postal ballot declaration or any other document confirming that a special resolution was passed in or around 1993 or 1994 to grant to the First Lessees a lease over part of the common property.

- 12 I accept that the Head Lease was signed by Stephen Waters and Tangalooma prior to becoming joint registered proprietors of Unit 19.
- 13 Also on 28 January 1994, but later in time, the First Lessees became the registered proprietors of Unit 19.

Transfer of Lease

- 14 On 3 December 1999 the First Lessees together with Ray Kosh and Marlene Renata Kosh (“Second Lessees”) executed a Transfer of Lease assigning the rights and responsibilities of the Head Lease from the First to the Second Lessees.
- 15 The Transfer of Lease was marked with the Respondent’s common seal, however, it was only witnessed by one unidentified party.
- 16 On 26 June 2000 the Second Lessees became the registered proprietors of Unit 19.
- 17 On 27 November 2006 the Second Lessees provided the Respondent with a copy of the Head Lease. I accept that it was only at this time that the Respondent became aware of the Head Lease and subsequent Transfer of Lease.
- 18 On 7 February 2014, the Second Lessees obtained an owners corporation certificate (“the OC certificate”) from the Respondent which noted in Item 11:

U19 has leased car park spaces from the owners corporation

- 19 The OC certificate was prepared by Melbourne Body Corporate Management Frankston (MBCM), as owners corporation manager for the Respondent, in reliance on knowledge, available documents and information in the Respondent’s register, which included a copy of the Head Lease that was provided by the Second Lessee on 27 November 2006.
- 20 On 13 August 2014 the Respondent received a copy of the proposed Transfer of Lease from solicitors for the Second Lessees requesting that the proposed Transfer of Lease be executed by the Respondent. This proposed Transfer of Lease intended for the car parking spaces to be transferred from the Second Lessees to the Applicant.
- 21 The Respondent on 25 November 2014 resolved at its Annual General Meeting to not execute the proposed Transfer of Lease.

VALIDITY OF THE HEAD LEASE

- 22 The Head Lease was signed in 1994. At that point in time the owners corporation was known as a body corporate and the relevant law to consider in regard to whether the lease was validly formed and executed is the Subdivision (Body Corporate) Regulations 1989 (Vic) (“the Regulations”).
- 23 Regulation 401 (m) provides:

The powers of a body corporate include the power to -

- (m) lease or licence all or part of the common property
- 24 Regulation 402(a) provides:
A special resolution is required when exercising power under –
(a) regulation 401(f), (i), (j) and (m)
- 25 Regulation 105 provides:
"special resolution" means a resolution passed by—
(a) where a vote is taken at a meeting, at least 75% of the votes for the total number of lots affected by the body corporate; or
(b) where a poll or ballot is taken, at least 75% of total unit entitlements of all the lots affected by the body corporate;
- 26 Regulation 618 provides:
(1) The common seal must only be used in accordance with the authority of the body corporate.
(2) In doing anything which has not been delegated at least two members must sign when the seal is affixed.
(3) If the seal is affixed under delegation the document must indicate the delegation.
- 27 Regulation 619 (2) provides:
(2) A body corporate cannot delegate its functions or powers under regulations 601 and 603, anything requiring an unanimous or special resolution or the power to remove a committee or officer.
- 28 In accordance with Regulations 401(m) and 402(a), without a special resolution being passed, the Respondent would not have been able to grant a valid lease to Unit 19 for exclusive use of part of the common property.
- 29 I accept that the Respondent does not hold general meeting minutes, postal ballots or other relevant documents, which can confirm that a special resolution was passed in or around 1993 or 1994 to grant a lease to Unit 19 for use of part of the common property as two car parking spaces.

- 30 The Applicant did not produce any evidence of a special resolution being passed to grant the Head Lease or any subsequent transfer of lease.
- 31 Further, the Head Lease in its actual content does not express that the Respondent passed a special resolution granting the lease.
- 32 I accept that on 21 January 1994, the Respondent did not execute the Head Lease for Unit 19. Rather, it was Stephen Waters and Tangalooma who signed the Head Lease with the First Lessees and this was done before Stephen Waters and Tangalooma were registered as joint proprietors of Unit 19.
- 33 On 21 January 1994 Lin-Nes was the registered proprietor of all of the 23 units and Regulation 619(2) prohibits a body corporate from delegating its functions or powers where a special resolution is required. At this point in time, there is no evidence of any special resolution having been passed by the body corporate, or any other legal entity to grant a lease to Unit 19 for exclusive use of part of the common property.
- 34 I find that there is insufficient evidence to prove that a special resolution was passed by the Respondent to grant to the First Lessees exclusive use of part of the common property for the purpose of the two car parking spaces. Accordingly, the Head Lease is invalid as an instrument to grant Unit 19 exclusive use of part of the common property.

VALIDITY OF TRANSFER OF LEASE

- 35 As I have found the Head Lease to be legally flawed, there can be no valid Transfer of Lease to the Second Lessees.
- 36 I accept that the Transfer of Lease dated 3 December 1999 is marked with the Respondent's common seal and only witnessed by one unidentified party.
- 37 Regulation 618 (2) requires two body corporate members to sign when the seal is affixed. The Transfer of Lease, dated 3 December 1999, has not followed procedure and is therefore in its own right legally flawed and cannot be a valid transfer of lease.

NO ADVERSE POSSESSION OF COMMON PROPERTY

- 38 Section 7C(1) *Limitation of Actions Act 1958* (Vic) provides:

Despite any rule of law or provision made by or under this or any other Act but without limiting section 7, the right, title and interest of an owners corporation, or an owner of a lot affected by the owners corporation, in land which is common property affected by the owners corporation is not affected by reason only of any possession of that land adverse to the owners corporation or the lot owner by another owner of a lot affected by the owners corporation, irrespective of the period of that possession.

39 Accordingly, there can be no claim by the Applicant for adverse possession of that part of the common property that has been exclusively used by Unit 19 for the two car parking spaces.

CONCLUSION

40 Since the registration of the Strata Plan on 4 May 1977 there is no evidence before the Tribunal that a special resolution was passed by the Respondent to lease part of the common property to any of the chain of registered proprietors of Unit 19.

41 The Regulations provide a mechanism whereby a body corporate had to pass a special resolution to grant a lease of the common property, and the *Owners Corporations Act 2006* (Vic) does not provide the Tribunal with a power to cure the Head Lease in the absence of a special resolution.

42 I find that as the Head Lease is not valid, there cannot be a valid transfer of this lease to any subsequent registered proprietor of Unit 19.

43 The application is dismissed.

44 No order as to costs.

Dr Rebecca Leshinsky
Member