

Civil and Administrative Tribunal
New South Wales

Case Name: Estens v Owners Corporation SP 11825

Medium Neutral Citation: [2017] NSWCATCD 63

Hearing Date(s): 2 June 2017

Decision Date: 6 July 2017

Jurisdiction: Consumer and Commercial Division

Before: J A Ringrose – General Member

Decision: 1 Pursuant to provisions of s. 150 of the Strata Schemes Management Act 2015 the Tribunal declares that special by-law 1 – Prohibiting Illegal Uses (including short term lettings) which was passed at an extraordinary general meeting of the Owners Corporation on 16 February 2017 is invalid in that the Owners Corporation did not have power to make the by-law.
2 In accordance with the provisions of s. 246 of the Strata Schemes Management Act 2015 the Owners Corporation shall cause a certified copy of the order made herein to be lodged with the office of the Registrar General accompanied by the Certificate of Title comprising the common property in the strata plan and any fee payable for the recording of such order such that the Tribunal order can be duly registered.

Catchwords: Invalidity of special by-law prohibiting illegal uses including short term lettings – by-law capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing related to a lot.

Legislation Cited: Strata Schemes Management Act 2015 ss. 139, 150 and 246.

Cases Cited: Burns v Dennis [1948] 48 SR (NSW) 266

Category: Principal judgment

Parties: Peta Maree Estens – Applicant
Owners Corporation SP 11825 – Respondent

Representation: The applicant appeared in person.
Mr O'Neill, strata manager, appeared on behalf of the respondent.

File Number(s): SC 17/16265

Publication Restriction: Nil

REASONS FOR DECISION

Application

- 1 By an application dated 31 March 2017 the applicant as the owner of lot 1, 11 Russell Street, Woollahra, sought an order pursuant to s. 150 of the Strata Schemes Management Act 2015 to invalidate a by-law because the Owners Corporation did not have the power to make it. A copy of the by-law passed 16 February 2017 was attached to the application and the applicant made reference to a notation from the New South Wales Fair Trading published November 2016 indicating “no by-law is capable of restricting a dealing in a lot including restricting short term letting.”
- 2 It was noted that a mediation session was held on 22 March 2017 where Mr Mann and Mr Budai attended on behalf of the Owners Corporation and the applicant attended in person. No agreement was reached at that stage and accordingly the applicant was at liberty to bring her present application.
- 3 The matter was listed for the Tribunal on 3 May 2017 and the respondent's name was amended to the Owners Corporation SP 11825. The applicant was required to provide all documents on which she wished to rely by 10 May 2017 with the respondent to provide all his documents by 17 May 2017.
- 4 Submissions were provided on behalf of the Owners Corporation on 12 May 2017 and submissions were provided in accordance with the directions by the applicant on 15 May 2017 although it is noted that many of the documents were provided with the original application.

Applicant's Evidence and Submissions

- 5 Strata Plan 11825 is situated at 11 Russell Street, Woollahra and it comprises some five residential lots. It is noted that the unit entitlement of each lot is equal.
- 6 The applicant notes that at an extraordinary general meeting held on 16 February 2017 a quorum was declared present and special by-law 1 was adopted in accordance with ss. 141 to 143 of the Strata Schemes Management Act 2015. Four owners were present at the meeting and three were noted to be in favour of the special by-law.
- 7 A copy of the strata plan indicates that lot 1 forms the basement level of the property with lots 2 and 3 on the ground floor and lots 4 and 5 on the first floor of the building.
- 8 Notice of the extraordinary meeting was given on 2 February 2017 and the special by-law relating to illegal uses was proposed by Mr R Mann. That motion appears to have been the only item on the agenda at the meeting.
- 9 The minutes of the meeting declare that two persons attended and units 1, 2 and 5 were present only by proxy. Unit 2 was declared to be un-financial and accordingly the voting was limited to four units with three votes in favour of the motion and one, being the applicant against the motion. The seal of the Owners Corporation was attached to a document noting the addition of special by-law 1 on 22 March 2017 and the consolidated by-laws were duly registered in the offices of the Registrar General.
- 10 The applicant's evidence includes emails from a Mr Mann seeking evidence of support for the proposed by-law from two of the remaining four owners. Ms Anita Tesoriero of unit 3 indicated that she purchased her apartment in December 2015 but complained that in October 2016 and February 2017 persons were using the washing machine in the shared laundry causing her some disruption of her peace and enjoyment. She also claimed that men were sitting on the deck outside unit 1 relaxing with a beer and she felt uncomfortable as they were strangers apparently watching her.

- 11 In further evidence filed on 15 May the applicant addressed legal issues noting initially that she had rented her home through Air B n B whilst she was traveling interstate or overseas and that over a 12 month period she had only received two complaints regarding misuse of the washing machine in the commercial laundry. She indicated that as a result of these complaints she changed her rules to prohibit pets and limited use of the washing machines. She claims that she always found her apartment in impeccable condition after she returned from letting it as she was very selective with guests she permitted to short term lease her property.
- 12 Ms Estens referred to a Fair Trading release including the notation “no by-law is capable of restricting a dealing in a lot, including restricting short term letting.” She referred to s. 150 of the Act and also attached a part of the NSW Legislative Committee Environmental Planning Report dated October 2016 addressing the “adequacy of the regulation of short term holiday letting in NSW.” Reference was made to page 11 at 1.6.1 noting “nor are we persuaded that the Owners Corporation should be granted the power to prohibit STRA at this stage.” The document further noted; “we regard short term letting of a residential property as residential use of the same character as longer term letting or traditional tenancy. Thus we find that in principal short term letting of a residential property should not trigger a change of use.”
- 13 Included in the later submissions, Ms Estens attached a letter from Elaine Tan dated 1 May 2017. That letter indicated that Ms Tan did not support the special by-law prohibiting short term leasing in the block. Ms Tan referred to s. 150 of the Strata Schemes Management Act and supported the applicant in calling for the by-law to be made invalid as the Owners Corporation did not have the power to make it.
- 14 Ms Estens then included a series of letters which were designed to show that she had been a conscientious and careful landlord in choosing the person to whom she let her property and the restrictions that she put on the letting to ensure that the peace, comfort and privacy of the unit holders was protected.

Respondent's Evidence and Submissions

- 15 Submissions on behalf of the Owners Corporation were provided by Mr O'Neill, strata manager, and they were received on 12 May 2017. Mr O'Neill noted that he was the strata manager and that notice of the extraordinary general meeting was mailed to all owners on 2 February 2017. He noted that a quorum was declared on 16 February 2017 and the special by-law was passed. The by-law was registered with the Land and Property Information on 22 March 2017.
- 16 Mr O'Neill referred to s. 136 of the Act relating to the making of by-laws for management administration control or use and enjoyment of lots. He referred to correspondence between Mr Mann and Mr Carr in relation to objections to the use of the property. He suggested that luggage would be continuously moved in and out of the apartment and common areas leading to a higher rate of wear and tear. He referred to the obligations under s. 258 of the Act to notify the scheme in relation to the change in tenancy but there was no evidence to suggest that this section had not been complied with.
- 17 Mr O'Neill referred to issues of security and control of errant short term occupiers including abatement of noise. There is no evidence that these measures have been required in the letting of the property over the past 12 months.
- 18 Mr O'Neill also referred to a letter dated 15 April 2017 from Ms Tesoriero of lot 3 and he noted further that no section of the Act permitted Air B n B.
- 19 The submissions from Mr O'Neill made no reference to the operation and effect of s. 139 of the Act which is the significant basis upon which the application has been brought.

Decision

- 20 The applicant has brought her application on the basis that the Owners Corporation does not have the power to pass the special by-law restricting the ability of a lot owner to lease or otherwise dealing with her lot. s. 139 of the Act provides:-

139 restriction on by-laws

- (1) by-law cannot be unjust. A by-law must not be harsh, unconscionable or oppressive. Any such by-law may be invalidated by the Tribunal (see s. 150).

(2) by-law cannot prevent dealing in relation to lot. No by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot.

(3) by-law resulting from order cannot be changed. If an order made by the Tribunal under this act has effect as if its terms were a by-law, that by-law is not capable of being amended or repealed except by a by-law made in accordance with a unanimous resolution of the Owners Corporation and, in the case of Leasehold strata scheme, with the consent of the lessor of the scheme.

(4) ...

(5) ...

(6) ...

(7) ...

21 s. 150 of the Act provides:-

150 order invalidating by-law

(1) the Tribunal may, on the application of a person entitled to vote on the motion to make a by-law or the lessor or lease holder of a state strata scheme, make an order declaring a by-law to be invalid if the Tribunal considers that the Owners Corporation did not have the power to make the by-law or that the by-law is harsh, unconscionable or oppressive.

(2) the order when recorded under s. 246 has the effect as if its terms were a by-law repealing the by-law declared invalid by the other (but subject to any relevant order made by a superior court).

(3) an order under the section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

22 The applicant contends that Air B n B letting is a lease within the meaning of s. 139 of the Act. Clearly the notations from the Department of Fair Trading and from the parliamentary committee are expressing a similar view. A lease hold interest is created under relationship of landlord and tenant arises whenever one person (the landlord) gives another (the tenant):-

- (i) the legal right to exclusive possession of the land or property.
- (ii) for a period (term) less than the term for which the landlord holds the property.
- (iii) the term being certain or at least capable of being rendered certain.
- (iv) with the intention of giving the tenant an interest in the land as opposed to a mere privilege. Usually a lease hold interest is granted in return for "rent" (*Burns v Dennis* [1948] 48 SR (NSW) 266).

- 23 The Tribunal is satisfied that the manner in which the Air B n B tenancy is devolved by the landlord is sufficient to constitute a tenancy or lease with a specific commencement date and a specific end date. During that time the tenant has exclusive use of the property and the arrangement is properly described as a lease rather than a licence. It is likely that a licence would also be covered in the use of the word devolution in any event.
- 24 The Tribunal is accordingly satisfied that the by-law which was passed on 16 February 2017 is invalid because the Owners Corporation had no power to pass that by-law by reason of the operation of s. 139(2) of the Strata Schemes Management Act 2015. It follows that the applicant is entitled to the orders she seeks under s. 150 and that the order made by the Tribunal should be registered as required by s. 246.
- 25 It is noted in passing that prior to the determination of the present application Mr Mann gave notice of an extraordinary meeting to be held on 8 June 2017 to address issues which included "to discuss our response to defending the short term letting by-law and to allow \$15,000.00 if we agree to engage a solicitor." It appears that Mr Mann has been the active motivation for the by-law and any motion to defend an order relating to a letting by-law should be considered on a legal basis after informed discussion rather than on the basis of a desire to have such a by-law enforced.

J A Ringrose

General Member

Civil and Administrative Tribunal of New South Wales

6 July 2017

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar