

Common Property

Newsletter for professionals in the facilities management sector.



By-Laws: A Blank Cheque



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I have taken nearly 6 months to talk about this case. We represented an owners corporation in a Court of Appeal decision handed down in the case of *Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971* [2011] NSWCA 159.

The facts of this appeal were as follows:

- A land developer in the Tweed Coast area sold land to a developer that called themselves Resort Corp.
- There was a deal done between the developer and the land owner where the land owner would receive 4 contracts in return being a:
 - (a) Caretaker Agreement;
 - (b) Letting Agreement;
 - (c) Securities Agreement; and
 - (d) Facilities Agreement.
- It was the Facilities Agreement that was at the centre of this appeal.
- When buyers entered into contracts to purchase units in the resort, the contracts of sale carried a requirement that they granted power of attorney in proxy to the developer to support the delivery of these 4 contracts to the land owner.
- The facility was a gymnasium that was 15 minutes from the resort known as Santai. Hence, the gymnasium was not on the common property of the Owners Corporation.
- The Owners Corporation gained the authority to enter into this contract by creating a by-law which gave them the power to enter into the facilities agreement.

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The Owners Corporation argued that there is no function of the Owners Corporation that permits the entering into of contracts which were not on the common property. It was further argued that a by-law could not be created unless it had a basis or link (nexus) within the functions of the Owners Corporation.

The court of Appeal accepted the argument that there must be some link between the by-law and the functions set out in chapter 3 of the Strata Schemes Management Act 1996 (SSMA). Justice Young indicated that this nexus only needs to be slim. Two things seemed to sway the Court of Appeal's decision:

- That all owners knew of the facilities agreement when entering into their contract for sale of land.
- This is the type of contract which a resort may require to engender the use and enjoyment of the properties by their lot owners.

In relation to the first point, we are somewhat shocked. We undertake conveyancing for a number of strata units and we are well aware that lot owners do not understand everything that they are advised of when entering into a contract for the sale of land. Most of all, when they are purchasing off-the-plan, as these people were doing, it's almost impossible for them to understand the ramification of these contracts without a clear vision of how it would operate.

In relation to this second aspect, evidence was introduced to the court that there were less than 60 visits per annum to the gymnasium. This meant that the Owners Corporation were paying approximately \$1500 per visit. Justice Young said that maybe a *tennis court in London* would not be permissible under the by-laws, but didn't go on to indicate what the boundary limit may be. Perhaps a tennis court in New Zealand or a tennis court in Brisbane? Well we don't know after Justice Young's decision.

What it indicates is that, provided that there is some slim connection with the functions of an owners corporation and it is applicable to the strata scheme, owners corporations under the SSMA have a blank cheque in making by-laws. We don't know what the limitations are. It's only when this decision is challenged in the High Court, or heard again by the Court of Appeal, that this principle will be revisited.

***Cheers,  
Bailey Compton  
and The team at ACP/Leverage!***



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