Tyranny in a body corporate

By Jacinta Morphett, Solicitor, McKean & Park Lawyers & Consultants

Thinking of buying an apartment to live in or already bought one? Buying an apartment and becoming a member of the body corporate can be risky. The essence of bodies corporate, after all, is that the majority rules, not individual choice. There is therefore the ever present risk that your fellow members will join together in resolutions that force you to incur expenses or to accept actions with which you do not agree. The concept of a democracy within a body corporate is fine unless you happen to form part of the minority. Let me give you an example.

The need for an independent administrator

McKean & Park recently represented a group of body corporate members in overcoming a majority owner (Mrs Adams) in a body corporate.[1] Last year, while handling my articles of clerkship, I was fortunate enough to assist with this case. It involved a 14 year running dispute between the owners of six units in Kew. Mrs Adams owned three units. She wished to upgrade her units, which she felt were in need of repair. The remaining members of the body corporate felt that the work she proposed would benefit her units but not those of the other members of the body corporate. Mrs Adams had written a number of times to her co-members attempting to obtain their consents to the carrying out of the work.

Mrs Adams claimed that the other members owed the body corporate in excess of $70,000 each for the repair works she had undertaken on behalf of the body corporate. This claim was disputed by the other members of the body corporate. Using her position as owner of half the units she had elected herself as body corporate secretary. In that capacity, whenever a unit was offered for sale and potential purchasers enquired about usual body corporate matters, Mrs Adams would send a certificate to them indicating the alleged outstanding money owed to the body corporate to her as a debt. As a result, would-be purchasers were dissuaded from purchasing units owned by the other members. Over a period, the other members, attempting to sell their properties, came to realise they were faced with a seemingly immovable obstacle.

The minority interest holders in the body corporate applied to the Supreme Court for the appointment of an administrator. During March 2003 a hearing took place before Justice Bongiorno. Justice Bongiorno found that Mrs Adams had passed 22 motions and resolutions by holding a meeting between herself and no other member of the body corporate. These resolutions were found to be invalid. Justice Bongiorno found that there was a complete breakdown in the governance of the body corporate and it justified the appointment of an independent administrator.

"The concept of a democracy within a body corporate is fine unless you happen to form part of the minority"

Section 38(4) of the *Subdivision Act* 1988 (Vic) (**Act**) provides:

"(4) A body corporate or a member of a body corporate, a creditor of the body corporate or any person with an interest in the land affected by the body corporate may apply to the Supreme Court or County Court for the appointment of an administrator."

The term "administrator" is not defined in the Act, nor does the Act set out any criteria on which the Court should make such an appointment and it does not provide for the consequences of such appointment. Justice Bongiorno therefore reviewed the types of functions an administrator performs in other contexts/situations, for example, the *Corporations Act* 2001 (Cth) provides that where a company is "under administration" the ordinary officers of the company cannot perform or exercise any of their functions.[2]

Justice Bongiorno found the appointment of an administrator implied the removal of the body corporate from its function of managing the common property. Justice Bongiorno also found there would be no requirement for the administrator to consult any unit holder before taking steps in the best interests of the unit holders as a whole. The brake on this was that the administrator would record each decision and where any decision involved spending more than $500, the administrator would provide a copy to each unit holder before imposing a levy on making a payment.

Justice Bongiorno formulated a relatively simple order appointing an independent administrator pursuant to the Act. Justice Bongiorno ordered that by 31 October 2004 the body corporate was to hold elections when the administration period came to an end. In the event of outstanding problems, his Honour would be prepared to extend the period of time for which the administration continued.

The Court imposed a $2000 levy on each unit holder to cover the administrator's initial fees and expenses. This order enabled the body corporate to resume normal functioning and provide appropriate services to the unit holders and care for the common property.

Powers of the Appointed Administrator

Due to this case, it is clear that there is now an effective method by which minority owners can, in certain circumstances, defend themselves against intimidating majority owners.

Having a Court-appointed independent administrator to replace a tyrannical body corporate is significant news for those living or involved in bodies corporate.

For further information, Jacinta Morphett can be contacted on (03) 9670 8822 or by email jacinta.morphett@mckeanpark.com.au. ■

1 *McKinnon & Ors v Adams* (2003) VSC 116.
2 Section 437A.