STRATA MANAGERS EDUCATIONAL FORUM: SHORT TERM TENANCIES THE CURRENT STATE OF THE LAW – *WHAT CAN YOU DO?*

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JS Mueller & Co Lawyers
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SHORT TERM TENNANCIES
THE CURRENT STATE OF THE LAW

INTRODUCTION

Short term tenancies have long posed problems for community living. The problem most commonly arises in communities where there is a mixture of permanent residents and short term tenants. Issues of noise, damage to common property and inappropriate behavior are often attributed to short term tenants. Short term tenants vary from backpackers to holiday makers to short term workers.

Strata schemes have tried to both regulate short term tenants and prohibit short term tenancies by use of by-laws.

Effectively regulating the behavior of short term tenants has proved difficult. Short term tenants are exactly that, short term, and are not generally around long enough to be effectively subjected to the laborious and lengthy procedures set out in the *Strata Schemes Management Act 1996* ("the Act") for enforcement of by-laws.

Prohibition of short term tenancies has proved equally difficult. Section 49(1) of the Act provides that no by-law is capable of operating to prohibit or restrict a lease relating to a lot thus preventing an owners corporation from prohibiting a lease of a lot based on its duration or term.

As a result of these difficulties the battle against short term tenancies turned to planning law and whether or not short term letting was permitted pursuant to the relevant planning provisions.

This question came before the courts of both New South Wales and Victoria in 2013.

On 2 May 2013 the Land and Environment Court of New South Wales found against short term letting in *Dobrohotoff v Bennic* [2013] NSWLEC 61. On 30 May 2013 the Supreme Court of Victoria found in favour of short term letting in *Salter v Building Appeals Board & Ors* [2013] VSC 279.

BENNIC'S CASE (NSW)

The Facts

The proceedings concerned self contained short term holiday rentals being conducted from a 6 bedroom house at Terrigal on the New South Wales Central Coast by Ms Rhonda Bennic. Ms Bennic bought the

property in March 2011. The property was zoned 2(a) Residential pursuant to the Gosford Planning Scheme Ordinance ("GPSO").

The previous owners conducted short term lettings from the property. Ms Bennic intended to continue to use the property for that purpose to generate income. The property could accommodate a maximum of 12 or 13 persons and was typically rented for up to a week at a time. The property was only rented as a whole, individual rooms were not separately rented. The property was advertised on websites such as "Stayz".

The applicants were a doctor and his wife who resided in the adjoining residence with their 2 children from 2001.

The applicants gave evidence of a history of noisy and disruptive tenants who rented the property both before and after its sale to Ms Bennic. The tenants often engaged in anti-social behavior that significantly adversely impacted the amenity of the Dobrohotoffs. Loud music, flashing lights, bucks and hens nights, sometimes involving strippers or worse and frequent parties, often extending into the early hours of the morning were recurrent themes of the Dobrohotoffs' evidence.

The Dobrohotoffs complained to the Gosford City Council but to no avail. Frustrated by the Council's refusal to take action and exacerbated by the constant disturbance of their peace and quiet, the Dobrohotoffs brought proceedings in the Land and Environment Court. The proceedings were brought under s123 of the *Environmental Planning and Assessment Act 1979* ("EPAA") which allows any person to bring proceedings in the court for an order to remedy or restrain a breach of the EPAA whether or not any right of that person has been infringed by or as a consequence of that breach. The Dobrohotoffs asked the court to make a determination that the use of the property by Ms Bennic for short term letting was prohibited under the council's zoning laws.

Issues for Determination

The issues for determination by the court were whether the property was a "dwelling house" for the purpose of 2(a) Residential Zoning pursuant to the GPSO and, if it was not, was the use of short term holiday rental accommodation prohibited under the GPSO.

Considerations of The Court

The house received development consent when it was constructed. The GPSO specified a number of uses that were permitted without consent and a number of uses that were permitted with consent. All other uses were prohibited. The parties agreed that the only relevant definition was "dwelling-houses" contained in the

list of uses permitted with consent. It was further agreed that if the existing use did not fit within the meaning of dwelling-house it was prohibited development under the GPSO.

The term “dwelling-house” is defined in the GPSO to mean “a building containing one, but not more than one, dwelling”. The term “dwelling” is defined to mean “a room or number of rooms occupied or used, or so constructed or adapted as to be capable of being occupied or used, as a separate domicile”. The term “domicile” was not defined but is the subject of numerous court decisions.

The definition of “dwelling” has two limbs. The first concerns the actual occupation or use of a room or rooms as a separate domicile and the second deals with the hypothetical test of whether a room or rooms are “so constructed or adapted as to be capable of being occupied or used” as a separate domicile.

Firstly, Ms Bennic submitted that in respect of the first limb when consent was given for the building of a “dwelling-house” implicit within the consent was the use of the property for any purpose for which a dwelling-house would ordinarily be used, including for lease by tenants, however short the term.

Secondly, Ms Bennic submitted that as long as the property had the physical characteristics of a “dwelling-house” or “dwelling”, which was the case here, that was sufficient to ground the consent.

In reply the Dobrohotoffs firstly contended that when regard is had to the ordinary meaning of the term “dwelling-house”, the property was not being occupied in the same way as a family group in the ordinary way of life would occupy it. Secondly they refuted the argument that the term “dwelling-house” or “dwelling” was a physical description only of the building. They then went on to submit that
when regard was had to the ordinary meaning of the term “domicile”, the requisite degree of residential permanency was not demonstrable where the maximum tenancy of the property is a week.

The court accepted the submissions of the Dobrohotoffs. Justice Pepper sighted the definition of a “dwelling-house” given by Reynolds JA in *South Sydney Municipal Council v James* (1979) 35 LGRA 432 in which His Honour said that a building is used as a dwelling-house if it is occupied in much the same way as it might be occupied by a family group in the ordinary way of life and that it is not a use or occupation more appropriately described in other categories of residential building.

Justice Pepper also found that the correct reading of the GPSO was that it permitted with consent “development ….. for the purpose of ….. dwelling-houses” so that it was not sufficient for the building to just have the physical characteristics of a dwelling-house, it must also be used for that purpose.

His Honour found that a tenancy granted to persons who are residing in a group situation for periods of a week or less for the purpose of buck's and hen's nights, parties or for the use of escorts or strippers is not consistent with the use or occupation by a family or household group in the ordinary way of life. His Honour also said that the definition of dwelling required regard to the notion of domicile and inherent within that term, as evidenced by a long line of authorities, was the notion of a permanent home or at the very least a significant degree of permanence of habitation or occupancy. He further observed that the decisions supporting this view were consistent with the ordinary meaning of the word domicile which was, "1. a place of residence; an abode; a house or home; 2. *law* a permanent legal residence."

His Honour concluded that tenancies of no more than a week are antithetical to this concept.

The Court's Finding

The Court held that under the GPSO the use of the property as short term holiday rental accommodation was prohibited principally because the use of the property was not sufficiently permanent to comprise a dwelling house for the purposes of the relevant zoning under the GPSO.

The Court found that the rental of the property as holiday accommodation for periods of a week or less to persons using or occupying it other than in the ordinary family or household way, does not constitute a "domicile", does not constitute a "dwelling" and, therefore, does not constitute a "dwelling-house" for the purpose of item 2 in the 2(a) Residential zone. The use of the property not being otherwise permissible, it is prohibited within the zone and it constitutes development in breach of s76B of the EPAA.

Consequences

The definition of purposes for which consent may be given and the list of uses for which consent is not required in a residential 2(a) zone in the GPSO is similar to many other such definitions within other council areas in New South Wales. So, even though the court's findings are specific to the GPSO, those findings will have wider implications for any local environmental plan which adopts similar definitions in residential 2(a) zones.

The judgment will apply where any applicable planning instrument defines as a use with consent "dwelling-houses", defines "dwelling houses" with reference to "domicile", does not define the use "holiday rentals" or a similar term and where undefined uses are prohibited.

Where a planning instrument defines holiday accommodation or short term accommodation it is likely to be expressly identified as permissible or prohibited thereby clearly identifying whether that use is legal or illegal.

It is possible that where the short term letting has been conducted for a lengthy period of time and was, at the commencement of the use of the property for that purpose, permissible under any relevant planning law, the continued use will be permissible under "existing use rights". However, this is less likely to be the case in strata schemes.

While the court was not definitive about what might constitute an acceptably long duration for a lease three months would seem to be a period which is likely to be acceptable.

SALTER'S CASE (VIC)

Facts

Paul Salter was an owner and manager of 3 units in a strata scheme called Watergate located at the Docklands in Melbourne. Mr Salter ran a letting management business at Watergate. He was also the chairman of the Victorian Accommodation Services Association. Mr Salter let out a number of lots within the strata scheme on a short term basis through his letting management business conducted from the building.

On 14 and 15 April 2011 Inspector Genco of the City of Melbourne Council issued building notices to Mr Salter pursuant to s106 of the *Building Act 1993 (Vic)*. The notices relevantly provided that the use of apartment S909 for short term accommodation as a hotel as defined in Class 3 of the *Building Code of Australia* ("BCA") within a residential apartment contravened the occupancy permit for the building which stated that it was a Class 2 apartment.

The notice went on to say that the building was a danger to the life and safety of any person using the building in that the occupant characteristic, fire safety needs and reaction to fire and other emergencies had varied from that for which the building was originally designed.

At the heart of the second allegation is the fact that the BCA sets out different fire safety requirements for Class 2 residential apartments and for Class 3 hotels and serviced apartments.

After submissions by Mr Salter the Inspector issued a building order pursuant to s111 of the *Building Act* requiring Mr Salter to evacuate the building within 30 days and effectively cease short term lettings from

apartment S909 or, alternatively, make an application to convert unit S909 from a Class 2 apartment to a Class 3 hotel or serviced apartment.

Mr Salter appealed this decision to the Building Appeals Board ("BAB") which dismissed his appeal. He then appealed the decision of the BAB to the Victorian Supreme Court.

Issues for Determination

Section 40(1) of the *Building Act* prohibits a person from occupying a building in contravention of the current occupancy permit. Regulation 112 of the *Building Regulations 2006* provides that buildings must be classified as set out in the BCA. Regulation 1011(1) provides that a person must not change the use of a building unless the building complies with the requirements of the regulations applicable to the new use.

Part A3.2 of the BCA deals with the classifications of buildings and structures. Relevant classifications are as follows:

"***Class1a*** *– a single dwelling being –*

(i) a detached house; or

(ii) one of a group of two or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit; or

Class 1b

(i) a boarding house, guest house, hostel or the like –

(A) with a total area of all floors not exceeding 300m² measured over the enclosing walls of the Class 1b; and

(B) in which not more than 12 persons would ordinarily be resident; or

(ii) 4 or more single dwellings located on one allotment and used for short-term holiday accommodation, which are not located above or below another dwelling or another Class of building other than a private garage.

Class 2*: a building containing 2 or more sole-occupancy units each being a separate dwelling.*

Class 3*: a residential building, other than a building of Class 1 or 2, which is a common place of transient living for a number of unrelated persons, including –*

(a) a boarding house, guest house, hostel, lodging house or backpackers accommodation; or

(b) *A residential part of a hotel or motel;*"

The two central issues before the BAB and which were considered by the Court were firstly, whether apartment S909 fell to be classified as Class 2 or Class 3 and secondly, whether there had been a change to use resulting in relevant danger.

Considerations of The Court

The panel of the Building Appeals Board drew a number of conclusions:

- a "dwelling" is not only defined by the physical characteristics required by the BCA, but also by a sense of connection by the occupants.
- a Class 2 apartment cannot be used for short term accommodation such as "serviced accommodation" as offered by Mr Salter.
- the use of the apartments for commercial short term stays is not a use which is permitted under the existing occupancy permit for Class 2.
- the operation of such an enterprise within a residential Class 2 building is deemed to change the use and therefore a new occupancy permit is required.
- stays less than 3 days are short term stays (but the Board did not consider it necessary to specify a particular duration for short term stays).

Mr Salter contended that the BAB misconstrued the definition of Class 2 and the BCA by importing into the word "dwelling" a temporal requirement and erred in law by concluding that building notices were validly issued because the changed use resulted in a danger to the life and safety of any person using the building.

Justice Beach found that the BAB misconstrued the BCA when it imported into the word "dwelling" the temporal requirements which it set out. His Honour noted that "dwelling" is used in 2 places in clause A3.2 of the BCA. It is used in the definition of class 1b buildings and again in the definition of class 2 buildings. He noted the definition of class 1b buildings provides for single dwellings used for short term holiday accommodation. To import the temporal restriction would lead to the word "dwelling" being interpreted differently within the same clause of the BCA. He found that there was no rational basis for giving the word "dwelling" a more limited meaning in the clause 2 definition.

The building orders contemplated the apartments being used in conformity with the BCA if they were leased for a minimum of 30 days. His Honour pointed out that the respondents failed to explain why a property let out for a minimum of 30 days on the one hand was classified as Class 2 but would be classified as Class 3 if let out for 29 days (or some lesser period). His Honour also questioned how an apartment might be classified where it is let out for more than 30 days on many occasions but those occasions are intermingled with tenancies of less than 3 days. He considered this to be an unlikely construction of the BCA. His

Honour rejected the BAB's construction of clause A3.2 and considered that the use still came within the term "dwelling".

In relation to the change of use argument he found that a building notice could only be served if the building was a danger to the relevant people set out in the Act. He found that there was no evidence before the BAB that the apartments themselves constituted a relevant danger.

The Court's Findings

The Court found that the decision of the BAB should be quashed and the matter sent back to the BAB for determination in accordance with the law. The clear intimation from the Court was that the BAB should follow the Court's reasoning and make a final determination that a Class 2 building can lawfully be used for short term and holiday accommodation.

Consequences

In Victoria, where building usage is determined by reference to the building classes contained in the BCA, the use of Class 2 buildings for short term lettings and short term accommodation fit within the definition of dwelling contained in that clause. It means that in Victoria short term letting is permissible in BCA Class 2 residential apartments.

THE TWO APPROACHES

While at first blush it may appear difficult to reconcile the view of Justice Beach in the Victorian Supreme Court that the BAB misconstrued the BCA when it imported into the word "dwelling" a temporal requirement (@ paragraph [47]) and the view of Justice Pepper that the rental of a property as holiday accommodation for periods of a week or less to persons using or occupying it other than in the ordinary family or household way does not constitute a "dwelling" and therefore does not constitute a "dwelling-house" (@ paragraph [60]) the legislation which each judge considered was different.

The BCA, which formed part of the Victorian legislation, contained an ancillary definition of "dwelling" in Class 1b which expressly included short-term holiday accommodation thus facilitating an interpretation of that expression which included short-term accommodation in Class 2 apartments.

The GPSO, which was considered in NSW, introduced the term "domicile" into the definition of "dwelling house", a term which does not appear in the BCA and which has its own history of legal definition.

The thing to take from these cases is that whenever the question of legal use of premises arises a detailed analysis of the relevant planning legislation must be undertaken.

REGULATING SHORT TERM TENANCIES

Conduct

Short term tenants are here today, gone tomorrow and effectively beyond any practical means of control through Chapter 5 of the Act but owners are always present. Is it possible to make a lot owner responsible for the conduct of tenants and therefore seek to control that conduct through sanctions against the owner.

There is a diversity of views among lawyers as to the extent to which a landlord can be held liable for the sins of his tenants.

A decision in the Downing Centre Local Court on 22 February 2011 *Jean Whittlam v Sara Hannah & John Hannah (2011) Downing Centre Local Court 63913/11* received significant press coverage and suggests that there may be a panacea for lot owners affected by offensive noise from short term tenants.

Whittlam's case

Mrs Whittlam lived in a unit in Double Bay. Mr and Mrs Hannah owned the unit directly above Mrs Whittlam's unit. The Hannahs did not live in the unit but let it out as a furnished rental property. There were numerous different tenants changing regularly. There was a consistent problem with the noise created by those tenants. Mrs Whittlam took proceedings against the Hannahs, as owners of the unit, for orders pursuant to section 268(4) of the *Protection of the Environment Operations Act* 1997 ("PEOA"). The PEOA permits the Local Court to make an order in favour of an occupier of premises affected by offensive noise against the person alleged to be making or contributing to that noise or the occupier of the premises from which the noise is emanating. The Court may make an order directing the offender to abate the offensive noise within a time specified in the order or an order directing the offender to prevent a recurrence of the offensive noise.

The Magistrate found that the landlord was a person contributing to the noise of the occupier. Her Honour did so because the owners were able to control who they leased to and for how long and because they could terminate the lease if breaches occurred.

Having found that the application was properly brought against the owners and having found that offensive noise did exist, Her Honour considered the remedies which were sought by Mrs Whittlam. Those remedies were that the owners must:

- Install new floor coverings with an appropriate acoustic rating.
- Install hydraulic door closers on all doors in or to the lot.
- Install rubber feet on all of the legs of the furniture within the lot.
- Not cause or permit any musical instruments or electrically amplified sound equipment to be used in such a manner that emits noise that can be heard within a habitable room in Mrs Whittlam's lot whether or not a door or window was open and during specified hours.

The Magistrate made the second and fourth orders.

While this case is only a Local Court decision and while it deals with a statute other than the Act, it still constitutes some authority for the proposition that landlords are able to control who they lease to and for how long and have the power to terminate the lease if breaches occur and can be made liable by legislation for the actions of their tenants.

These elements may be applied to appropriately constructed by-laws which are delegated legislation (*Dainford Taylor v Smith* [1985] HCA 23; 155 CLR 342).

Prohibition of Short Term Tenancies

Section 49(1) of the Act prevents a by-law from prohibiting a lease based on its term or duration but an alternative approach is to focus not on the period of the lease but on the nature of the use to which the property is put.

This approach must have regard to s28 of the EPAA, commonly referred to as the "by-law buster". Section 28 states as follows:

> *(1) In this section,*
> ***"regulatory instrument"** means any Act (other than this Act), rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made.*
>
> **(2)** *For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.*

(3) A provision referred to in subsection (2) shall have effect according to its tenor, but only if the Governor has, before the making of the environmental planning instrument, approved of the provision.

(4) Where a Minister is responsible for the administration of a regulatory instrument referred to in subsection (2), the approval of the Governor for the purposes of subsection (3) shall not be recommended except with the prior concurrence in writing of that Minister.

(5) A declaration in the environmental planning instrument as to the approval of the Governor as referred to in subsection (3) or the concurrence of a Minister as referred to in subsection (4) shall be prima facie evidence of the approval or concurrence.

(6) The provisions of this section have effect despite anything contained in section 42 of the Real Property Act 1900 .

Relevantly s28 allows a council, through an environmental planning instrument, to provide that a by-law will not apply to approved development specified in the environmental planning instrument. The by-law buster clause is contained in many, but not all, planning instruments. Where it is included in the planning instrument no by-law can prohibit a use which is permitted under the planning instrument.

Accordingly, where such a clause applies a by-law cannot prohibit an approved use but, where such a clause is not contained in the relevant planning instrument, it is possible to restrict the use of a lot, not by reference to the lease or its term but by reference to the type of use to which the lot is put (*Hamlena Pty Ltd v Sydney Endoscopy Centre Pty Ltd* (1990) 5 BPR 11,436).

Where the use to which the lot is put is one which is prohibited by the planning instrument, including uses requiring consent and for which consent has not been obtained, the owners corporation, or any lot owner, may bring an action in the Land and Environment Court for an order that the use be prohibited under s123 of the EPAA. However, the prospect of mounting a Land and Environment Court challenge is one which may not appeal to owners corporations which are more comfortable with the less formal, no costs jurisdiction of the Consumer, Trader and Tenancy Tribunal ("CTTT").

But where a use to which a lot is put is prohibited in a planning instrument, that use may also be prohibited by an appropriately worded by-law. Where such a by-law is in place, engaging in the prohibited conduct within a lot becomes both a breach of the law which prohibits that conduct, in this case the planning instrument and the EPAA, and a breach of the by-law. The breach of the by-law is actionable pursuant to the Act and orders can be made by an adjudicator pursuant to s138(1) of the Act.

Where an order is made that a lot owner comply with the by-laws by, for example, ceasing to enter short term tenancy agreements, that order may then be enforced in the same way as any other order made by an adjudicator or Tribunal member.

CONCLUSION

The conduct of short term tenants in a strata scheme may be regulated by by-laws which make the owner responsible for the actions of the tenants.

Forms of lot usage, including casual occupancy, may be prohibited in a strata scheme through by-laws where the use is:

- Prohibited by the relevant planning instrument
- Requires approval under the relevant planning instrument and there is none
- Is not prohibited by the relevant planning instrument and the relevant planning instrument contains no s28 EPAA clause restricting prohibition.

Adrian Mueller
Partner I Senior Lawyer
BCOM, LLB ,FACCAL
adrianmueller@muellers.com.au

About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

02 9562 1266
enquiries@muellers.com.au
www.muellers.com.au