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WHY SNOOZING IS LOSING: SUPREME COURT UPHOLDS REPEAL OF EXCLUSIVE USE BY-LAW

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Introduction

In *Khadivzad v The Owners - Strata Plan 53457* [2019] NSWSC 157, the NSW Supreme Court upheld the validity of the repeal of a common property rights by-law even though the owner of the lot benefitted by the by-law did not consent to the repeal. Read on to find out why.

Common property rights by-laws and the need for consent

A common property rights by-law is a special type of by-law that confers on the owner of a lot special privileges over common property such as exclusive use of part of common property. While a by-law normally can be made, amended or repealed by a special resolution passed by an owners corporation's general meeting, a common property rights by-law can only be made, amended or repealed with the prior written consent of the owner of the lot benefitted by that by-law. However, there is one exception to the need to obtain that consent.

Section 143 of the Strata Schemes Management Act 2015 provides to the effect that after 2 years have passed from the making, amendment or repeal of a common property rights by-law, it is conclusively presumed that all conditions and preliminary steps precedent to the making, amendment or repeal of the by-law were complied with and performed.

The by-law in question repealed without consent

The common property rights by-law in question conferred on the owner of lot 9 exclusive use over a car space on common property. In 1999, the owners corporation passed a special resolution repealing the by-law. Lot 9's owner did not consent to the repeal. The repeal was registered on the common property title in 2001 within the then 2 year period during which changes of by-laws had to be registered. Under the Strata Schemes Management Act 2015, that period has been reduced to 6 months.

In 2000, between the passing of the repeal and its registration, Mr and Mrs Khadivzad became the owners of lot 9. Late in 2000, the Khadivzads retained a lawyer who wrote a letter to the owners corporation effectively objecting to the repeal of the by-law without the consent of the Khadivzads or the previous owner of lot 9. However, no legal proceedings resulted and the dispute was not pursued any further until Mr Khadivzad commenced Supreme Court proceedings in 2018 seeking orders to the effect that the common property rights by-law benefitting lot 9 remained valid.



Issue for the Supreme Court to decide

The Court had to consider whether the letter from the Khadivzads' lawyer in 2000 was a challenge to the repeal of the by-law within the 2 year period of the general meeting that passed the repeal so as to prevent the presumption in section 143 applying. The Supreme Court held that a lawyer's letter raising a dispute is not a challenge for the purpose of section 143 because the mere writing of a letter of complaint cannot itself affect the validity or effectiveness of a by-law or its amendment or repeal, and does not initiate legal proceedings that might lead to a by-law, its amendment or repeal being declared invalid.

The Supreme Court also held that obtaining the written consent of the owner of the lot concerned is a condition and preliminary step precedent to the making, amendment or repeal of a common property rights by-law.

The result was that the Supreme Court held the by-law in question was validly repealed even though the owner of lot 9 had not consented to its repeal because more than 2 years had passed between the repeal being made and the commencement of legal proceedings.

Lessons

The decision highlights the risks an owners corporation faces if it passes, amends or repeals a common property rights by-law without the consent of the owner of the lot benefitted: its action may be challenged.

The decision highlights the risks an owner of a lot faces if the owner does nothing when a common property rights by-law benefitting their lot is passed, amended or repealed without their consent: the by-law, its amendment or repeal will be deemed valid if legal proceedings are not commenced within 2 years.

The decision is also a reminder that lawyer's letters of demand or complaints generally have no legal effect unless and until they result in legal proceedings.



About JS Mueller & Co Lawyers

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

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