

Living in a Company Title Building – What are the rules?

Life in a company title building can feel like life in another shared building, e.g. a strata building, but the regulatory framework is entirely different, which will soon be realised when disputes arise.

People wishing to pre-empt or address issues in company title buildings should familiarise themselves with the unique issues pertaining to company title buildings.

Key differences doing company title and strata include:

- A company title corporation is typically incorporated under the Corporations Act 2001 and will be regulated by that act. A strata owners corporation is a statutory corporation created under the Strata Schemes Development Act 2015 (or predecessor legislation) and regulated by that act and the Strata Schemes Management Act 2015, which differs significantly from the Corporations Act 2001. The differences range from the fairly trivial, e.g. how they execute documents to the extremely important, e.g. the nature of what the member owns and control of funds.
- A strata scheme includes lot owners who actually own their lots, i.e. the cubic airspace and a shared interest in the common property. In contrast, a company title corporation shareholder typically holds shares entitling them to occupy a particular space within the building, the building being owned in its entirety by the corporation. This reduces the security of the member's tenure and obscures the boundary between lot property and common property, because technically neither exists in a company title context, necessitating reliance on the constitution for regulation of use of shared facilities.
- A strata scheme will have reasonably strictly regulated administrative and capital works funds. That is not the case with company title corporations, which have much greater control over funds after collected as levy contributions.
- A company title corporation will typically have a constitution (possibly but not necessarily involving adoption of replaceable rules under the Corporations Act 2001) which is in practical terms a contract between the members from time to time of the company. This can be amended and conversely provisions can be entrenched (made more difficult to amend), subject to some restrictions in relation to issues such as oppression & infringement of class rights. Their relationship will be regulated by this contract and relevant Corporations Act 2001 provisions. In contrast, a strata owners corporation will not have a constitution and will be regulated by the strata management legislation and its by-laws.
- A company title corporation constitution may also make provision for by-laws (more commonly referred to as house rules), but these operate in a very different way to strata by-laws. They are typically made and enforced by the board and shareholder scrutiny is often lax. They are much more flexible, in terms of both the potential scope and the speed and ease with which they can be made and amended. On the other hand, if made carelessly, they can have dubious validity and invite challenges and worse challenges which would need

to be resolved by a superior court, rather than the Local Court. Examples would include claims of breach of fiduciary duties, oppression, infringement of shareholder rights and applications for external administration or liquidation.

However, it would be a mistake to treat the relationship between parties under a statutory contract such as a company constitution (and by analogy strata by-laws) as equivalent to the relationship between contracting parties under a contract, particularly where the relationship goes beyond an investment in shares and involves the holding of assets for the benefit of members, as occurs in a company title corporation context. Key considerations here:

- Corporations Act 2001 Section 136 permits amendment of a constitution without unanimous consent (which would be required with a conventional contract), by special resolution and subject to some restrictions, e.g. potential actions in relation to oppressive conduct or infringement of class rights.
- Corporations Act 2001 Section 140 effectively makes the constitution enforceable as a contract between the shareholders from time to time (and Strata Schemes Management Act 2015 Section 135 makes similar provision in relation to by-laws). However, this is a special kind of contract known as a statutory contract and the courts interpret and enforce them differently to conventional contracts and e.g. certain remedies might not be available. That will be less of an issue for company title corporations, at least for disputes heard by the Local Court, due to statutory provisions which might lead to a different approach to the approach which might be taken by superior courts.
- As to interpretation, the full Federal Court in *Lion Nathan Australia Pty Ltd v Coopers Brewery Limited* (2006) 59 ACSR 444 updated the (historically somewhat different) principles for interpretation of statutory contracts, although leaving some significant differences as compared with interpretation of conventional contracts:
 - A company constitution has the nature of a commercial contract and should be construed to give it reasonable business efficacy and not narrowly or pedantically.
 - Company constitutions must be read as a whole, having regard to the purpose that they were intended objectively to serve.
 - In construing a company constitution, it is appropriate to have regard to the surrounding circumstances known to the parties and the purpose of the relevant provision in accordance with the principles for construction of commercial documents outlined by the High Court in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, but the range of circumstances considered may be narrower than for other commercial documents, as the public aspect of a corporate constitution may constrain the scope of the matters considered by the court.
 - The principles applicable to implied terms in contracts apply to company constitutions, but the courts have been constrained in making such implications.
- As to remedies:
 - Contractual remedies focus on requiring compliance with the contract by the defaulting party or providing compensation to the innocent party (consistent with the concept that the contract constitutes a bargain between the parties), while

statutory contract remedies focus on assessment of the validity of the action (consistent with the concept that the statutory contract as a public aspect).

- Accordingly, availability of an award of damages for breach of a statutory contract is dubious and a more typical remedy for breach of a statutory contract would be determination that an action is void or invalid. There is New South Wales Court of Appeal authority for the availability of damages in the context of a company home title dispute involving redevelopment infringing class rights, but in the same case it was noted that the availability of damages for breach of a statutory contract was dubious *Dungowan Manly Pty Ltd v McLaughlin* (2012) 90 ACSR 62. CA Section 1324 does give the court power to make a range of orders consequent on contravention of the CA, including injunctive relief and damages
- Some breaches might be considered procedural irregularities and saved under CA Section 1322.
- The remedy of rectification is not available in the context of corporate constitutions, e.g. where a drafting error occurred such that the constitution does not reflect the true agreement of the relevant parties, but injunctive relief may be available in some circumstances to restrain reliance on provisions of the constitution at odds with that true agreement *Re Medefield Pty. Ltd.* (1977) 2 ACLR 406.; *Simon v HPM Industries Pty Ltd and Others* 7 (1989) ACLC 770.
- The position may be different for company title disputes heard by the Local Court, given the scope of orders made available to the Local Court under Section 34A of the Local Court Act 2007. In that context, one could expect a commonsense approach to interpretation and orders for damages are available.

If you need any assistance with your company affairs or disputes please reach out to contract one of our group title specialists on 02 9929 0226 or enquiries@bannermans.com.au.

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