Company Title Building Redevelopment Obstacles Amongst Shareholders

The decision of *Dungowan Manly Pty Ltd v McLaughlin* [2012] NSWCA 180, which provides guidance on the variation of the rights of shareholders in a company title structure.

The appellant, Dungowan Manly Pty Ltd ("**Dungowan**"), is the owner of a residential unit building held in company title, known as 'Dungowan Flats'.

Dungowan undertook a major redevelopment of the building between 2006 to 2008 (which involved extensive changes to the existing floors of the building and the addition of three upper floors), despite the opposition of two shareholders, the McLaughlins.

First Instance Proceedings

The first instance proceedings were commenced by the McLaughlins in the Supreme Court of NSW in 2006, alleging a breach by Dungowan of the contract contained in the Articles by proceeding with the redevelopment without the McLaughlins' consent. The McLaughlins sought, among other things, damages for breach of contract.

It was found in the first instance proceedings that the introduction of new classes of shares and the doubling of the size of the building was an alteration to the McLaughlins' rights under the Articles, including the exclusive right to use and enjoy their home unit, and thus the decision to pursue the redevelopment required their consent.

The primary judge awarded $200,000 in damages to the McLaughlins for breach of contract.

The Appeal and Cross-Appeal

Dungowan appealed against both awards and the finding that it had breached the Articles.

The McLaughlins contended by a cross-appeal that the primary judge should have awarded damages on a broader basis and in a greater sum.

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The appeal was dismissed on the basis that Dungowan was required to obtain the McLaughlins' consent to the redevelopment and amendment of the Articles, as the redevelopment materially altered the characteristics of Dungowan Flats, thereby altering the character and amenity of the McLaughlins' home unit, and affecting the rights enjoyed by the McLaughlins associated with the shares they held.

The cross-appeal was allowed, and the Court of Appeal held that the damages for breach of contract should be increased to $513,129.45, as the discounts applied by the primary judge were incorrect.

Key Takeaways

- A company cannot use constitutional powers to circumvent the protections given to a class of shareholders.
- The Court may look at the substance and practical effect of a resolution passed in determining whether a breach of a company's constitution or articles of association has occurred.
- Where a proposed amendment to a company's constitution or articles of association affects the rights and protections attached to a class of shares, it may amount to a variation of class rights, potentially requiring the consent of affected shareholders.

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Prepared by Bannermans Lawyers

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