

UPDATE

## Court of Appeal restores developers' power to amend strata by-laws

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The Cayman Islands Court of Appeal has recently confirmed that matters relating to the governance, control and management of a strata corporation registered under the Strata Titles Registration Law (the STRL), are within the powers of the proprietors of the strata corporation through by-laws adopted in accordance with the STRL. As such, where a developer controls all the voting rights of the strata corporation, there is no limit to the power of the developer to adopt by-laws which confer enhanced voting rights at general meetings, and control of the executive committee, provided that such by-laws are adopted by a resolution passed with the requisite majority in accordance with the STRL and the amended by-laws do not otherwise infringe the STRL.

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On 4 November 2016, the Court of Appeal handed down its judgment on the appeal in *Thompson Resorts Limited and Castaways' Timeshare Limited v Carl Clappison & Ors*. The Court set aside the declaration of the trial judge that by-law 2 of Proprietors, Strata Plan No. 381 (**Castaways' Cove**), which granted to the developer enhanced voting rights and control of the executive committee for a period of 50 years, was *ultra vires* the STRL.

In determining whether by-law 2 was contrary to the STRL, the Court considered section 15 of the STRL, 1973, which was in effect at the time the impugned by-law was adopted (now section 21 of the 2013 Revision). This judgment makes it clear that:

1. the STRL expressly allows strata corporations to amend the default by-laws set out in Schedule 1 of the Law;
2. there are no limitations on a strata corporation adopting, amending or varying the by-laws set forth in Schedule 1 of the STRL, so long as the amendment is made in accordance with section 15 of the STRL, 1973 (section 21 of the 2013 Revision);
3. the requirement for unanimity (now a super-majority) on the resolution amending the Schedule 1 by-laws is a legal imperative, rather than a procedural requirement; and
4. it is for the legislature, not the judiciary, to amend a law which is governed by statute.

### The Grand Court proceedings

The First and Second Respondents, owners of unit entitlements in Castaways' Cove, brought proceedings in the Grand Court, seeking certain relief, including a declaration that by-law 2 is *ultra vires* the powers and duties of Castaways' Cove, as being inconsistent with the STRL, and for an order that by-law 2 be removed from the Castaways' Cove by-laws.

By-law 2 was adopted in October 2003 by a unanimous resolution amending the default by-laws in Schedule 1 of the STRL. At the time, the developer, Thompson Resorts Limited (TRL), owned 100 per cent of the unit entitlement within Castaways' Cove and, under a Strata Management Agreement, was also appointed as the exclusive manager of the property for the period ending June 2050 with rights of renewal for subsequent five year periods. The amended by-laws and the Strata Management Agreement created a governance and management structure under which Castaways' Cove would be managed together with,

and as part of, the Reef Resort (now the Wyndham Reef Resort), for a period of 50 years ending in June 2050.

By-law 2 conferred on TRL: the power to call extraordinary general meetings at its sole discretion; the entitlement on a poll taken at a general meeting to such number of votes equal to all the votes cast at the meeting, plus two additional votes; and the power to appoint at least two out of five members of the executive committee. The trial judge, Mangatal, J., held that by-law 2 was *ultra vires* the STRL, and ordered that the executive committee of Castaways' Cove amend by-law 2 and file the re-amended by-laws with the Registrar of Lands.

Agreeing with Henderson, J. in *Keim v Proprietors, Strata Plan No. 275* (Ocean Pointe Club), the trial judge held that the intent of the STRL was that a strata corporation be run on democratic lines; and that the voting structure embodied in the model Schedule 1 by-laws was designed to be a democratic, inclusive process, enabling majority rule and allowing the proprietors to make collective decisions. The judge concluded that by-law 2 was repugnant to the structure and scheme of the legislation.

### **The Court of Appeal's judgment**

The Court of Appeal overturned the decision. The Court held that notwithstanding what the trial judge described as its apparently undemocratic characteristics, by-law 2 would be valid so long as the amending resolution was passed unanimously (as was the requirement at the time), and the amended by-laws did not breach any provision of the STRL, such as, for example: section 15(4) of the STRL, 1973 (now section 21(4)), which provides that no by-law shall operate to restrict the devolution of strata lots or any dealing therewith, or any easement implied or created by the STRL; and section 15(5) (now section 21(5)), which provides that no amendment or variation of the by-laws shall be effective until they have been filed with the Registrar of Lands.

Sir George Newman, who delivered the judgment of the Court, stated that 'it is impossible to see how the clear meaning of section 15(2) can be cut down by an implied reservation or limitation upon the validity of a duly passed unanimous resolution.' He noted that the STRL created no sub-class of resolutions which, if duly passed, lose validity, as the trial judge held, when proprietors other than the developer subsequently purchase units within the strata development. He further held that resolutions duly passed take effect after due notification, and bind the corporation and every member.

### **Conclusion**

The Court of Appeal's decision should come as welcome relief to a vast number of developers of strata developments in the Cayman Islands. It is common practice for developers, upon registration of a strata plan, to adopt and register amended by-laws replacing the default Schedule 1 by-laws. Typically, a developer will adopt some variation of by-law 2, at least, for example, to secure control over the development during the construction stage, or until all units in the development have been sold.

Developer control takes on added importance where the development is operated as a resort, or as part of a resort. In such cases, consistency in appearance and management standards is critical, more so where the resort is managed under a management agreement with an established international brand. Had the Court of Appeal not set aside the Grand Court's judgment, all by-laws adopted since 1973, which contain provisions similar to the Castaways' Cove by-law 2, would also be *ultra vires* the STRL. This would have given proprietors of those strata corporations the right to have such by-laws set aside. The difficulties which would have been caused by such an eventuality are not difficult to imagine.

The STRL has been the subject of review and consideration for reform for a number of years. The issue of a developer's ability to amend the default Schedule 1 by-laws has been recognised and discussed in a report of the Law Reform Commission but, to date, there has been no proposal to limit or restrict that power, as has been done in other jurisdictions which have adopted legislation similar to the STRL.

There is no reason to believe that the current state of the law does not reflect the desired policy. In any event, whether or not that policy changes is, as the Court of Appeal has pointed out, a matter for the legislators, not the judiciary.

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