inbrief

GLAISTER ENNOR BODY CORPORATE UPDATE

Welcome back to the first issue of Body Corporate Business for 2020.

FEBRUARY 2020

ALLOCATION OF GARDENING COSTS

Landscaping around a building can make a significant difference to the on-site amenity and to the property's street appeal for prospective purchasers. Depending on the layout of a unit title development, gardens and lawns may be located on common property, or form part of an owner's principal or accessory unit, or a combination of both. Issues, however, can arise when the standard of gardening is not uniform across a development, or when the costs of gardening are not properly apportioned.

In *Ashayeva v Body Corporate 339562* [2019] NZTT Waitakere 9016244, Ms Ashayeva disputed that she should be contributing towards the costs of gardening work undertaken on the unit property. Ms Ashayeva owned a unit in an 80-unit development where most units have their own private garden. In 2010, a majority of owners decided some of the gardens in the development were poorly maintained, and decided the Body Corporate would engage a gardener (at the Body Corporate's cost) to carry out maintenance on the gardens.

Following that decision, some owners maintained their own gardens at their own cost. And, other owners had their gardens maintained by the Body Corporate's service contractor. All owners contributed towards the cost of the Body Corporate's service contractor in their levies on a utility interest basis; regardless, whether their gardens were maintained by the Body Corporate's service contractor or not.

The Tenancy Tribunal found the Body Corporate had no power to maintain unit property gardens or contract with a third party to maintain unit property gardens because:

- unit property gardens are not a building element or infrastructure to which section 138(1)(d) of the Unit Titles Act 2010 (**UTA**) would apply
- the definitions of "*building elements*" in section 5 of the UTA refers to the "*exterior aesthetics of the **building***" [emphasis added] and not the aesthetics of the development as a whole; that is, gardens are not part of the building; and

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- the Body Corporate provided no evidence that the maintenance was required to safeguard the building (say for example, trimming ivy or trees that could damage the building).

The Tenancy Tribunal also found the Body Corporate could not rely on section 126 of the UTA because the cost recovery power in section 126 only applies to work that the Body Corporate is required or authorised to do under the UTA or any other legislation.

The Tenancy Tribunal held that the Body Corporate could not levy Ms Ashayeva for costs associated with maintaining the unit property gardens. However, the Adjudicator did allow that the Body Corporate could arrange for gardening work to be carried out on a unit at that unit owner's request and cost.

Orders were made requiring the Body Corporate to reimburse Ms Ashayeva's share of the unit property gardening costs to June 2013 and the filing fee paid by Ms Ashayeva in bringing the claim.

This decision reinforces the position that a majority decision cannot legitimise an unlawful or ultra vires course of action by a body corporate. It, also, provides some authority for the proposition that a body corporate may enter into arrangements with third party contractors on behalf of some, but not all unit owners, on an opt-in basis. And, a body corporate may recover those costs from the owners who have opted in.

15TH ANNUAL ACSL STRATA LAW CONFERENCE 2020

The 15th Annual ACSL Strata Law Conference 2020 was held in Noosa, Queensland, Australia on 19-21 February 2020. The conference focused on some of the most fundamental and topical areas of unit title and strata law. Given the scale and gravity of building defects across Australia and New Zealand, part of this year's conference was devoted to that theme.

Vicki Toan spoke on the topic of the enforcement of body corporate operational rules.

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