Strata Collective Sale: August 2019 Update

DENTONS

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Summary

August 2019 marks the issue of the first ever judgment by the NSW Land and Environment Court approving a collective sale under Part 10 of the *Strata Schemes Development Act 2015* (the Act).

Since the Act commenced in November 2016, owners of strata schemes in NSW have had the ability to instigate a sale or redevelopment of their strata scheme (known as a 'strata renewal plan') subject to the approval of 75% or more of lot owners as well as the NSW Land and Environment Court to ensure the strata renewal plan is just and equitable in all circumstances.

In the almost three years since the introduction of the legislation, the existence of the legislation has helped a number of groups achieve collective sales by mutual agreement, however until now no group of owners have successfully navigated the entire court process and received a court order.

The decision in *Application by the Owners – Strata Plan No 61299 [2019] NSWLEC 111* is a fantastic outcome for the owner group (who were represented by Dentons), as well as current and future strata owners in NSW as it shows that it is possible to achieve strata renewal through the court process.

The judgment should further provide confidence to market participants including purchasers and financiers to explore opportunities in unlocking sites for urban renewal.

Background

First, we begin with an important clarification. A strata collective sale can refer to:

- The sale of lots in a strata scheme through the collaborate efforts of a group of owners who market their building for sale as a collective and each exercise their separate property right to sell their lot, but as part of a group sale under a single deal negotiated with a single purchaser; or
- A collective sale, as set out in the Strata Schemes Development Act 2015, whereby the Owners Corporation elects to progress a sale of all of the lots in the strata scheme by taking a number of steps, including the election of a committee, the development of a 'strata renewal plan' and ultimately seeking approval by the Land and Environment Court to this plan.

The above distinction is very important as there is a lot of confusion and misinformation in the market between the two. There are owner groups who are told they have to use the process in the legislation to do a collective sale (this is wrong, just like you don't need approval from the owners corporation to sell your individual strata lot, any group of

owners can at any time decide to sell as group by mutual agreement, exercising their ordinary rights as property owners).

There have also been several media reports over the last three years about groups ‘using the legislation’ to achieve a collective sale – which is misleading given the first judgment has only now issued. But it is true that the existence of the legislation and the framework set out in the process has helped a number of groups achieve 100% agreement on a sale – which is a very good thing.

As a final background point, an obvious question for any group of owners or a potential purchaser is which type of collective sale is preferable. In most circumstances the answer will be easy – if you can reach agreement with 100% of owners, a simple sale outside the legislation is considerably quicker, cheaper and better for all parties.

However the legislation exists for a reason (and we trust will at some stage be replicated in similar form in each Australian state and territory), and that is that in many cases it is simply not possible to achieve 100% agreement.

Judgment

Application by the Owners – Strata Plan No 61299 [2019] NSWLEC 111

This brings us to the landmark judgment delivered on 8 August 2019.

The property in question, 252 Sussex Street, Sydney is a 159 lot strata scheme currently operating as 119 serviced apartments over 19 floors as well as café, reception, gymnasium and four levels of basement car parking.

Having regards to the age of the building, the requirement for significant and expensive capital works and the opportunity for the property to be enhanced (but continue in use as a hotel) the sale of the building was something supported by the great majority of the owners.

With 159 lots in the scheme, almost all owned by separate owners, it was not considered feasible to achieve a sale without recourse to the legislative process. Instead, the Owners Corporation, led by a dedicated executive committee who had keenly followed the introduction of the amendments to the Act, set out about electing a strata renewal committee as well as the appointment of lawyers to represent the Owners Corporation and a selling agent to market the property for sale using an International Expression of Interest campaign. Dentons and Colliers International were appointed respectively.

The deal structure entered into involved an agreement with a purchaser secured following the marketing campaign which provided for settlement of the purchase of the whole building subject to the approval of the sale by the Land and Environment Court. There are other deal structures available, however we anticipate the approach taken by this group is one which will be readily replicated.

The court process involved a number of difficult hurdles including dissenting owners, although none of these owners ultimately appeared in Court as respondents. The lack of a respondent meant the Court scrutinised compliance with each and every limb of the legislation to ensure compliance.

In no way would we suggest that achieving the decision was easy or something which should be embarked on lightly.

This is a huge positive for strata owners as well as potential purchasers and financiers that the first decision by the Court is one which approves a strata renewal plan.

This case is important for a number of other reasons that may not be readily apparently to a casual reader of the judgment.

1. It relates to a large mixed use commercial building, and not a small scale residential apartment block, which is what the legislation appears to have been written for.
2. The judgment details at length the many procedural steps in the process. It was necessary to take the Court through all of these steps, in agonising detail, because section 182(1)(b) of the Act requires the Court to be satisfied that the steps taken in preparing the plan and obtaining the required level of support were carried out in accordance with this Act. This is a very onerous process.
3. It revealed the sheer difficulty involved in initiating the Court process and serving the lot owners with notice of the Court application. The Act provides that "notice of the application must be served, in accordance with rules of court" but there actually are no rules of court that explain how notice of such a court application should be served. Prior to this case, the Court had previously adopted the view that a full copy of the Court application had to be personally served on every lot owner (and other people listed in section 179(2)). In this case, with a number of lot owners residing overseas, this raised very complex legal and logistical issues. Ultimately, Moore J, in an interlocutory decision (with no judgment), agreed that personal service was not required. However, even without personal service, with over 100 parties to be served, a lot of time and money was spent simply ensuring that all of the relevant parties were served.
4. It resolves the conflict between the two different compensation requirements – section 171(1) which requires division of the sale price amongst the lot owners in the same proportion as their unit entitlements, and section 182(1)(d) which requires that each lot owner must receive not less than the compensation value for their unit, and confirms the width of the Court's power to make an ancillary order under section 186 wherever this is considered by the Court to be "appropriate or necessary" in the circumstances.

The successful outcome in this case is a testament to the hard work and dedication of the Strata Renewal Committee of the Owners Corporation, and the Court's willingness to take a practical approach in order to give effect to the objects and purpose of the legislation.

This should give a lot of confidence that strata renewal is possible. This is particularly the case given the scheme in question was not a small scheme and there were complex, property specific issues the Court had to deal with. The approach of the Court in this matter can be described as sensible and pragmatic.

The success of this specific matter does not guarantee the same result in other matters, although it is very helpful to finally have a precedent.

The next phase, involving enforcement of the Court orders and the mechanics of actually giving effect to the Strata Renewal Plan is again untested ground. This will be the first experience that the Registrar-General and Land Registry Services will have of a Court ordered strata renewal, and we expect that it will be an interesting journey! However, once the collective sale is finalised, the path should be easier for others in the future.

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