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Restrictions on short-term letting and Strata by-laws

A look at Strata by-laws in the Cayman Islands which expressly seek to limit strata owners from short-term letting of their units and the implications of a recent Privy Council decision.

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1. Background

For some time there has existed a potential conflict between Strata by-laws which expressly seek to limit strata owners from short-term letting of their units, usually for less than a month or requiring the use of a particular rental manager, and Para 21(4) of the Strata Titles Registration Law (Revised) (the Strata Law) which reads:

"No [strata] by-law shall operate to prohibit or restrict the devolution of strata lots or any dealing therewith or to destroy or modify any easement implied or created by this Law" [emphasis added]"

The position was considered in the 2015 case of *Foith and Others* which related to an action brought by condominium owners of the Residences at the Ritz Carlton, Grand Cayman, regarding the apparent conflict between Para 21(4) of the Strata Law, as set out above, and the Strata by-laws at the Ritz which sought to restrict owners to rent their units through a "Manager...on such terms as determined by the Manager or the Executive Committee...[with the Manager]...entitled to a management fee up to 30% of the gross rent [received]".

It was determined that the word "dealing" in Para 21(4) of the Strata Law was intended to include "leasing". Accordingly it was concluded that a Strata "**by-law may not prohibit or restrict a strata lot owner's right to rent or lease his unit**".

In the case of *Foith and Others*, in addition to the restrictive Strata by-laws, there were also a number of restrictive provisions provided for in the relevant Sale and Purchase Agreements which mirrored the those provided for the Strata by-laws.

Judge Henderson noted that there is nothing in the Strata Law itself which attempts to prohibit a party from contracting out of the restriction in Para 21(4) (set out above) and that "purchasers have complete freedom to agree to restrictions on leasing or to look elsewhere for a strata lot".

In his judgement Judge Henderson found:

1. the restrictive leasing provisions of the Ritz's **Strata by-laws** were found to be **invalid** as they were inconsistent with the statutory provisions relating to restrictions on leasing; but
2. subject to sufficient drafting and due registration of the restriction against the relevant land register at Lands & Survey, the **contractual restrictions** against short term letting contained in the Sale and Purchase Agreements were found to be **legally effective**.

2. What's new?

O'Connor (Senior) and Others

At the end of 2017 there was a decision by the Judicial Committee of the Privy Council in London concerning the validity of a by-law in relation to a strata-titled condominium in the Turks and Caicos Islands that restricted short-term leasing of individual condominiums. In this case a restriction against short-term letting, contained within the Strata by-laws was found to be valid as a legitimate restriction on the use of residential strata lots and not a contravention of the relevant strata legislation relating to restrictions on "dealings".

The decision has been heralded as fundamentally altering the landscape as previous case law concerning similar by-laws have typically held them to be invalid.

To summarise the facts:

- The Pinnacle was a luxury condominium development comprising 34 residential apartments and associated facilities at Providenciales, Turks and Caicos Islands. It was registered under the Strata Titles Ordinance (the **Ordinance**) in 2005.
- The relevant strata by-laws, which were effectively positive and negative freehold covenants, were created at the time of the initial registration of the Pinnacle. By-law 7.1.9 provided:

"Each proprietor shall not use or permit his residential strata lot to be used other than as a private residence of the Proprietor or for accommodation of the Proprietor's guests and visitors. Notwithstanding the foregoing, the Proprietor may rent out his Residential Strata Lot from time to time provided that in no event shall any individual rental be for a period of less than one (1) month." [Emphasis added by author]

- An injunction was being sought by the "strata corporation" to restrain the owners of the Pinnacle from allowing their units to be used by paying holidaymakers – typically on week-long lets – i.e. for periods of less than one month at a time, contending a contravention of by-law 7.1.9. as set out above.
- The owners argued that the by-law was of no effect, alleging that it fell foul of section 20(4) of the Ordinance which, similar to Cayman's own strata legislation, stipulates:

"No by-law shall operate to prohibit or restrict the devolution of strata lots ...or other dealing therewith ..."

- The Privy Council found:
 - a. that by-law 7.1.9 was valid as a legitimate restriction on the use of residential strata lots and it did not involve an impermissible restriction on leasing contrary to section 20(4) of the Ordinance;
 - b. Strata statutes prohibiting restrictions on "dealing" in strata lots, as we have in Cayman, do not prevent restrictions on the uses of the lots, even though such restrictions may inevitably restrict the potential market for the lots;
 - c. by-law 7.1.9 applied, and was expressed to apply, to a "residential strata lot", namely a unit "intended for use as a residence";
 - d. A by-law designed to restrict use to residential use is in principle unobjectionable;
 - e. The first sentence of by-law 7.1.9 was a very tightly drawn and highly limiting restriction on the use of any lot; essentially, it prohibited commercial exploitation of the residential units:

"Each proprietor shall not use or permit his residential strata lot to be used other than as a private residence of the Proprietor..."

- f. Properly construed, the second sentence of by-law 7.1.9 was not a restriction but, rather, a relaxation of what had gone before; it provided a measure of relief by allowing residential use by others, including exploitation for rental by third parties, provided always that any letting was for at least one month:-

"...Notwithstanding the foregoing, the Proprietor may rent out his Residential Strata Lot from time to time provided that in no event shall any individual rental be for a period of less than one (1) month."

- g. Following the approach in *Caradon District Council v Paton (2001) 33 HLR 34*, short-term use by transient holiday-makers is considered different in character from long-term residential use. There is a qualitative difference. A person in a holiday property for a week or two is not using the same as his home or residence; such use lacks a degree of permanence.
- h. The temporal requirement in by-law 7.1.9 was justifiable because it was part and parcel of an attempt to limit the use of the lot to that of a residence; it sought to ensure the degree of stability in occupation required to preserve residential use.
- a. All in all, **the by-law did not prohibit letting; it prohibited use other than as a residence.**

3. Where does this leave us?

The Privy Council's decision in *O'Connor (Senior) and Others* decision is binding on the Courts in Cayman. We may therefore consider that similarly drafted Strata by-laws restricting the use of residential condos via limits on letting terms, would be found to be valid and binding here in Cayman. We would therefore recommend that when drafting Strata by-laws, where the desired result is to restrict short term lettings of units, that consideration is given to mirror the drafting as set out in *O'Connor (Senior) and Others*.

As emphasised in *Foith and Others*, we would advise, as a matter of good practice, that any desired bespoke restrictions on lettings or use are also, in addition to the Strata by-laws, expressly set out in restrictive agreements which are properly registered against the "Incumbrances" section of the relevant land register title to the particular condo units.

Whilst we appreciate the additional administrative demands, we would recommend that developers selling their residential development condos for the first time take responsibility for the due registration of the relevant "restrictive agreement" (perhaps in a Schedule to the Transfer Deed) at Lands and Survey post-closing on behalf of the purchasers and subsequently deliver certified copies of the land register along with a pack of original transaction documents to the purchasers once completed.

The information and expressions of opinion contained in this guide are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

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