**Michaelmas Term**

[2017] UKPC 45

**Privy Council Appeal No 0027 of 2016**

**JUDGMENT**

**O'Connor (Senior) and others ( Appellants ) v The Proprietors, Strata Plan No. 51 ( Respondent ) (Turks and Caicos Islands)**

**From the Court of Appeal of the Turks and Caicos Islands**

**before**

**Lord Kerr**

**Lord Wilson**

**Lord Sumption**

**Lord Carnwath**

**Lord Briggs**

**JUDGMENT GIVEN ON**

**21 December 2017**

**Heard on 13 November 2017**

| Appellants | Respondent |
| --- | --- |
| James Thom QC | Guy Fetherstonhaugh QC |
| Stephen Wilson QC | Conrad Griffiths QC |
| | Martin Dray |
| (Instructed by Bircham Dyson Bell LLP) | (Instructed by Sharpe Pritchard LLP) |

**LORD CARNWATH:**

**Introduction**

1.

"The Pinnacle" is a condominium development of 34 residential apartments and associated facilities at Providenciales, Turks and Caicos Islands. It was developed under an agreement between The Pinnacle on Grace Bay Ltd and the Government under the Encouragement of Development Ordinance 1972. It was registered in the Land Registry under the Strata Titles Ordinance (CAP 9.04) ("the Ordinance") on 12 September 2005. The respondent ("the Corporation") is a statutory body corporate created

under section 4(1) of the Ordinance, which provides: “The proprietors of all the strata lots contained in any strata plan shall, upon registration of the strata plan become a body corporate.”

2.
Section 20(1) of the Ordinance provides that “… the control, management, administration, use and enjoyment of the strata lots … shall be regulated by by-laws”. The section authorises the making and variation of by-laws, including standard by-laws set out in Schedules 1 and 2 to the Ordinance. Section 20(4) provides:

“No by-law shall operate to prohibit or restrict the devolution of strata lots or any transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement implied or created by this Ordinance.”

3.
The material by-laws for The Pinnacle, which are the subject of this appeal, were created at the time of initial registration. All purchasers therefore acquired their strata lots subject to the by-laws and with knowledge of their terms. They included the following:

“7.1 Each Proprietor shall:

…

9. 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)

16. Not use or permit to be used the Strata Lot or any part thereof for any illegal or immoral purpose, nor for the carrying on of any trade or business other than periodic renting or leasing of the Strata Lot in accordance with these by-laws unless such trade or business activity has been approved in advance by the Executive Committee in writing, which approval may be revoked for cause.”

For this purpose “Residential Strata Lot” is defined as “a Strata Lot which is intended for use as a residence”. The central issue turns on the construction of the words in italics.

4.
The appellants (“the O’Connors”) are the registered owners of Unit 102. From 2007 onwards they allowed Unit 102 to be occupied by paying holidaymakers for periods of less than one month at a time. The present proceedings were brought by the Corporation for orders restraining their use as contrary to by-laws 7.1.9 and 7.1.16. The trial judge (Ramsay-Hale J) dismissed the claim, but her decision was reversed by the Court of Appeal. The O’Connors appeal to the Privy Council with permission granted by the Board.

5.
The main issues in the appeal turn on the interpretation of those by-laws, and their validity having regard to section 20(4).

**Strata Title**

6.

Strata title has no direct parallel in the United Kingdom but it is a familiar concept in Australia, and other parts of the Commonwealth. As the judge observed (para 2), the Turks and Caicos Ordinance was modelled on the New South Wales Conveyancing (Strata Titles) Act 1961.

7.

Prohibitions of restrictions on disposal are common in such statutory regimes. In a study of the Australian law and practice (Cathy Sherry, Strata Title Property Rights: Private Governance of Multi-Owned Properties (Routledge, 2016)) the author notes (pp 32-33):

"Most states [in Australia] ban by-laws that restrict transfer, leasing or mortgaging of lots, to prevent the problems that existed in relation to company title, namely banks not wanting to lend on the security of an apartment if they cannot exercise a power of sale quickly and easily."

8.

Thus, as Mr Thom QC submits for the O'Connors, the purpose of section 20(4) of the Ordinance is to ensure that a strata title unit is freely marketable. This, as he says, is not only in the interests of the proprietor for the time being, but others who may become or wish to become successors in title, including purchasers, chargees, receivers and creditors. It thus serves an important public purpose and should not be approached in a restrictive manner.

9.

The function of by-laws was described by Campbell JA in White v Betalli [2007] NSWCA 243 (cited by Mottley JA in the present case):

"204. It is that ancient notion of a by-law that the New South Wales legislature chose to adopt, without definition or explanation, when first enacting legislation concerning strata titles in 1961: section 13 Conveyancing (Strata Titles) Act 1961. It has appeared in legislation governing strata titles ever since. Such legislation creates a statutory framework within which a type of local community can be created and administered. It is a type of community where co-ownership, and the physical proximity of the spaces that the owners are entitled to occupy, create the opportunity for both cooperation and conflict. It is a type of community that was new in 1961, though it had some analogies with the communities that had previously existed through the creation of home unit companies under the Companies Act, or allowing for individual occupation of apartments in a building through a tenancy in common scheme.

205. There is nothing in the notion of a by-law that, of itself, imposes any kind of limitation on the kind of regulation that might be adopted, beyond that it is for the regulation of the particular community to which it applies. Any limitation on the type of restriction or regulation that can be a by-law must arise from the statute that enables the by-laws to be created, or from the general framework of statute law, common law and equity within which that local community is created and administered."

10.

The Board has been referred to a number of Australian decisions, including decisions of tribunals and adjudicators under specialised statutory systems. It is not proposed to refer to these in any detail, since, apart from the level at which they have been decided, there are material differences in the various statutes. It is clear however that statutes prohibiting restrictions on dealing in strata lots do not prevent reasonable restrictions on the uses of the property, even though such restrictions may have the inevitable effect of restricting the potential market for the property.

11.

It is apparent also that the problem of distinguishing between short and long term residential uses is a familiar one. A useful example is a judgment of the Court of Appeal of Western Australia: Byrne v The Owners of Ceresa River Apartments Strata Plan 55597 [2017] WASCA 104. It concerned lot 14 in a development which lay within an area where the permitted use in 2011 was "human habitation on a permanent basis", and where "short stay accommodation" (as defined) was not permitted without planning approval. On 23 May 2013, planning approval was granted for change of use to "serviced apartment" which was defined as "an independent living residential unit providing for short stay accommodation." By-law 16.1, applicable to lot 14, was in the following terms:

"16. Use of Premises

16.1 … a proprietor of a residential lot may only use his lot as a residence.

16.2 Notwithstanding bylaw 16.1 a proprietor of a residential lot may:

16.2.1 grant occupancy rights in respect of his lot to residential tenants …"

12.
The Court held that, on their proper construction, by-laws 16.1 and 16.2 provided that lot 14 could only be occupied by persons who used it "as their settled or usual abode" (paras 150 to 155). This was derived from the words "residence" in by-law 16.1 and "residential" in 16.2.1. Mr Byrne, who had been letting lot 14 for short periods, relied on a provision in the Western Australian Strata Titles Act 1985 (in similar terms to section 20(4) in the present case). His argument was not that section 42(3) of the 1985 Act made by-law 16 invalid, but that the by-law should be construed as permitting short-term letting in order to make it consistent with the Strata Titles Act. The court held that the by-law operated as a restriction on use rather than on alienation, and was therefore unobjectionable.

**The Present Case**

13.
Turning to the present case, the judge held that section 20(4) would not apply to a by-law which precluded the grant of a licence, but that the O'Connors' arrangements properly assessed were leases. That part of her judgment is not now in issue. But she went on to hold that, regardless of that specific finding, the by-law was contrary to section 20(4) and to that extent invalid, because it was expressed in terms which would restrict the grant of leases of less than a month. The Court of Appeal disagreed, holding that the by-law was in effect a restriction on use rather than on leasing as such.

14.
As already noted, the O'Connors appeal with leave of the Privy Council. There was a possible question whether the appeal lay as of right. This was on the basis of section 3 of the Turks and Caicos Islands (Appeal to Privy Council) Order 1965, which allows such an appeal in relation to "some claim or question to or respecting" property of the value of £300 or more. The O'Connors submit that this is a claim or question "respecting" their strata lot, the value of which clearly exceeds that figure. In the circumstances, it is unnecessary for the Board to express a view on this issue.

**Discussion**

15.
Without disrespect to the detailed submissions of counsel on both sides, the Board regards this appeal as turning on a short question of construction of the relevant by-laws. They are to be construed benevolently, having regard to their purpose in assisting the good management of the development for

the benefit of its residents as a whole, and with a view if possible to avoiding inconsistency with the governing statute.

16.
Two features of the by-law attract immediate attention. First, it applies to a “Residential Strata Lot”, that is a lot “intended for use as a residence”. It is common ground that a by-law designed to secure restriction to residential use is in principle unobjectionable. By the same token there can be no objection in principle to the inclusion of words designed to define what is meant by use as a residence.

17.
Secondly, the latter part of the by-law (the part beginning “notwithstanding”) is not a restriction, but a relaxation of what precedes. The first sentence is very tightly drawn since it restricts use not simply to residential use, but residential use by the proprietor of the strata lot. Taken literally, that would make it impossible for anyone other than the proprietor, even a long-term lessee, to occupy the lot as his home. The second part of the by-law is therefore essential to relax that restriction, by allowing reasonable residential use by others, including reasonable exploitation of the property for rental by others (whether lessees or licensees). That element of business use, within the residential category, is recognised by by-law 7.1.16, which prevents business use without consent “other than periodic renting or leasing … in accordance with these by-laws”. That must be a reference to residential renting under by-law 7.1.9, since there appears to be no other by-law which allows any form of business use without consent.

18.
In the Board’s view, the limitation to one month can be seen as designed to provide some definition of what is meant by “use as a residence” for this purpose. The character of the use is clearly affected by the length of occupation. Short-term use by holiday-makers is different in kind from longer-term residential use, even if it may be difficult to draw a clear dividing line.

19.
As already noted, this is a familiar problem in the law. For example, in an English case, Caradon District Council v Paton (2001) 33 HLR 34, the Court of Appeal had to decide whether a covenant requiring a house not to be used other than as a private dwelling-house was breached by use for occupation by holidaymakers under tenancies for short periods. Latham LJ said:

“Both in the ordinary use of the word and in its context it seems to me that a person who is in a holiday property for a week or two would not describe that as his or her home. It seems to me that what is required in order to amount to use of a property as a home is a degree of permanence, together with the intention that that should be a home, albeit for a relatively short period, but not for the purposes of a holiday.” (para 36)

The Board respectfully agrees with this analysis, and would apply the same thinking to the concept of use as a residence.

20.
Seen in this light, in the Board’s view, the emphasis of the second part of the by-law is not so much on the word “rental” (which in this context can be read as an ambiguous term apt to cover a letting or a licence), as on the period of occupation. By requiring rentals, and therefore occupation periods, to extend for at least one month, the by-law is seeking to ensure the degree of stability which is necessary to maintain the character of the residential use. In the Board’s view this is properly regarded as part of a legitimate restriction on the use of the strata lot, to ensure that the residential

purpose of the development is protected. It does not involve an impermissible restriction on leasing contrary to section 20(4).

21.
For these reasons, the Board will humbly advise Her Majesty that the appeal should be dismissed. It is understood that in these circumstances issue (4) relating to costs does not arise. Accordingly, subject to any submissions received within 28 days of this judgment, costs before the Board will follow the event.