McMahon Clarke Legal

17 January 2008

Conrad Beal
Archers Body Corporate Management

Email: conradb@abcm.com.au

Dear Conrad

CATHEDRAL PLACE COMMUNITY BODY CORPORATE
MCP 106982 (CPCBC)

I refer to your email of 16 January 2008 and note your further queries regarding this matter.

Taking each of your queries in turn, I advise as follows:

1. **Are the motions submitted by Peter Zunker as representative of the Notre Dame body corporate for consideration at the next meeting of the CPCBC lawful.**

   I am of the opinion the motions submitted by Peter Zunker (Zunker) to the CPCBC are lawful.

   I note that on 17 October 2007, Zunker purportedly in his capacity as the duly appointed representative of the Notre Dame body corporate, submitted two motions (the first pertaining to the variation of caretaking agreement and letting agreement and the second pertaining to the amendment of the by-laws) requesting they be tabled at the next CPCBC meeting.

   The motions mirror the substance of motion 15 and 13 respectively passed by the Notre Dame body corporate at its annual general meeting on 11 January 2007.

   It would appear Zunker is now not submitting the motions to the CPCBC as a consequence of the motions passed by the Notre Dame body corporate.

   Strictly speaking, the Notre Dame body corporate, resolved to submit the motions in the same terms as Zunker has now submitted to the CPCBC and to sign a requisition for an extraordinary general meeting of the CPCBC to be convened to consider the motions.

   I understand the requisitioned EGM of the CPCBC was aborted and therefore the subject motions not voted on by the CPCBC.

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The CPCBC meeting to consider the Zunker motions will not be a requisitioned extraordinary general meeting, but the annual general meeting of the CPCBC.

You instruct that historically, the CPCBC has accepted motions for its consideration from the duly appointed representative of each of the subsidiary bodies corporate and it is on this basis that you have accepted the Zunker motions set out in his correspondence to you of 17 October 2007.

Mr Zunker has made it clear in his 17 October 2007 correspondence that he is submitting the motions in his capacity as representative of the Notre Dame body corporate and not in his personal capacity.

Consequently, in order for the motions to be considered out of order the CPCBC, a subsidiary body corporate or perhaps an aggrieved owner, would need to establish the Zunker motions were submitted by Zunker in his personal capacity and in furtherance of his own personal interests.

It would be difficult to establish the motions were submitted by Zunker in his personal capacity given that, in effect, the motions do no more then put into effect the wishes of the Notre Dame body corporate as evidenced by the passing of motions 13 and 15 at its AGM of 11 January 2007.

Also, I have been provided with no evidence to date that the passing of the motions will benefit, directly or indirectly, Zunker's personal interests.

I understand the main argument of some is that Zunker will personally benefit from the passing of the motions and that therefore he has a conflict of interest. This argument seems based largely on the fact Zunker is the son of the current caretaker and letting agent.

I have been provided with no evidence that Zunker will personally financially benefit in circumstances where the CPCBC votes in favour of extending his parents' caretaking and letting agreement. If any such evidence exists then this may well lend weight to an argument that a conflict exists.

Zunker, as chairperson of the Notre Dame body corporate, certainly owes a fiduciary duty to that body corporate. His personal interests and his duty as chairperson cannot be brought into conflict.

It is also arguable that as Notre Dame's representative to the CPCBC, Zunker owes a like fiduciary duty to the CPCBC, although this is less clear.

In discharging the duties of his position as chairperson of the Notre Dame body corporate and as its representative to the CPCBC, Zunker must act honestly and with the upmost good faith for the benefit of both bodies corporate.

No evidence has to date been provided to me to suggest Zunker has not done so.

I do not necessarily subscribe to the argument that Zunker necessarily has a conflict of interest, or is in breach of his fiduciary obligations simply by virtue of the fact he is the son of the current caretaker and letting agent.

To avoid any argument of impropriety, it would be prudent of Zunker not to vote on the subject motions at the CPCBC meeting. However, that is entirely a matter for Zunker.

It must also be said that the motions will of course be considered by all six members of the CPCBC. As such, it may ultimately transpire that Zunker's vote on the motions at the CPCBC is not the definitive vote.

Without further evidence, I am of the opinion the motions submitted by Zunker on 17 October 2007 for consideration by the CPCBC at its next general meeting are lawful.

2. **What resolutions are required for the "Zunker" motions to be validly passed by the CPCBC.**

Regarding the motion to vary the caretaking agreement and letting agreement, an ordinary resolution is required for it to be validly passed.

I note your instructions the CPCBC resolved to enter into the caretaking and letting agreement by ordinary resolution. It generally follows that an ordinary resolution is then only required to vary the caretaking agreement and letting agreement.

I note it is argued by some that a comprehensive resolution is required.

This argument appears to be based on the application of section 190 of the Mixed Use Development Act (MUD Act)

Section 190(1) of the MUD Act relevantly provides "the executive committee of a body corporate may undertake expenditure only if authorised by comprehensive resolution of the body corporate".

However, section 190(3)(c) of the MUD Act provides that subsection (1) does not apply to expenditure "in discharge of a liability incurred in relation to an obligation of the body corporate authorised by the body corporate in general meeting".

The liability incurred by the CPCBC under the caretaking and letting agreement will be a liability authorised by the body corporate in general meeting.

Regarding the motion pertaining to the amendment of the by-laws, for that motion to be lawfully passed, a comprehensive resolution is required.

Again, it is argued by some that the motion is required to be passed by a resolution without dissent.

This argument is based on the application of section 206A of the MUD Act.

Section 206A relates to restricted community property by-laws. Pursuant to section 206A (2) such a by-law may only be made by resolution without dissent.

It is arguable the proposed amendment to the by-laws to include by-law 22A falls within the ambit of section 206A. However, I submit there is a stronger argument it does not. Whilst the proposed new by-law 22A certainly seeks to restrict the use of part of the community property, it does not seek to do so in favour of one of the entities noted in section 206A(a)to(h) inclusive. Consequently, I am of the opinion section 206A does not apply in the circumstances.

As you are aware, Friday 18 December 2008 is my last day at McMahon Clarke. I have fully briefed Nathan Shaw on this matter. Nathan can be contacted on (07) 3239 2925.

Kind regards

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