

SUPREME COURT OF QUEENSLAND

CITATION: *The Body Corporate for Cairns Village Resort Community Titles Scheme 18161 v F N Managements Pty Ltd Warren John Altman & Ors v F N Management Pty Ltd* [2004] QSC 426

PARTIES: **THE BODY CORPORATE FOR CAIRNS VILLAGE RESORT COMMUNITY TITLES SCHEME 18161**
(Applicant)
v
F N MANAGEMENT PTY LTD (ACN 094 226 829)
(Respondent)

WARREN JOHN ALTMANN, GREGORY KENNEITH BROWN, CLIFFORD ALEXANDER BURANDT, VIVIAN GREGORY HILL, JOY LOUISE HILL, GREGORY THOMAS McNAMARA, JENNIFER RUTH McNAMARA, MALCOLM ALLAN ORR, ELIZABETH ANNE ORR, SANDRA OZOLS, PAUL THOMAS SMITH, ELIZABETH MAREGRET SMITH, JOHN THEODOSIS and VILLAGE PROPERTY GROUP PTY LTD (ACN 095 330 153)
(Applicants)
v
F N MANAGEMENT PTY LTD (ACN 094 226 829)
(Respondent)

FILE NO/S: 388 of 2004
389 of 2004

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court in Cairns

DELIVERED ON: 1 December 2004

DELIVERED AT: Cairns

HEARING DATE: 18 October 2004

JUDGE: Jones J

ORDER: **1. I declare that the respondent has, since May 2001 to the present, been operating an unregistered managed investment scheme contrary to law**

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENT SCHEME – Whether the scheme was required to be registered pursuant to s 601ED(5) *Corporations Act 2001* – Whether the scheme was unlawful because it was unregistered - Where the scheme

at commencement had a total of 45 members - Where membership numbers then decreased to ten

PROCEDURE – JURISDICTION – POWERS OF SINGLE JUDGE - JUDGEMENTS AND ORDERS – OTHER MATTER – DECLARATIONS – Whether Supreme Court has jurisdiction to order declaratory relief under s 601ED(5) of the *Corporations Act* 2001.

COUNSEL: Mr A Philp SC for the applicants
Mr A Cooper for the respondent

SOLICITORS: Sykes Pearson & Miller for the applicants
Hillhouse Burrough McKeown for the respondent

- [1] Before me are two applications, each seeking, in a summary way, a declaration in identical terms, namely – that F N Management Pty Ltd has been, and is, unlawfully operating an unregistered management investment scheme. The remaining relief sought in the two applications will be dealt with upon trial.
- [2] The applicants in proceeding 389 of 2004 are each an owner of one or more lots in the Cairns Village Resort Community Title Scheme 18161. They collectively own 190 of the 202 lots of the Scheme. The applicant in proceeding 388 of 2004 is the Body Corporate for the Scheme. The lots are designed for use in the business of a holiday resort. The improvements and the general facilities are designed for short term holiday accommodation and do not have local authority approval for long term residences.
- [3] The respondent holds the management rights pursuant to a letting agreement and a caretaking agreement entered into with the Body Corporate and each dated 15 January 2000. The directors of the respondent are William Nason and Janine Nason. They, or a family trust under their control, own six lots in the Scheme including lot 99 on which is located the administration and commercial facilities for the resort. The remaining six lots are owned by persons who have not become involved in these proceedings.
- [4] In early 2001 the respondent invited the other lot owners to participate in what, the respondent concedes, was a managed investment scheme as defined in s 9 of the then *Corporations Law* and now continued in the *Corporations Act* 2001 (“the Act”). As the relevant provisions of the Act came into force on 11 March 2002 and are in any event identical with the predecessor provisions it will be sufficient to refer only to the requirements of the Act.
- [5] The scheme was prompted in January 2001 when the respondent, who had acquired management and letting rights on a lease back arrangement with lot holders, decided to convert the arrangement to a managed rights scheme. To this end the respondent prepared and distributed a disclosure statement and entered into a Letting Agreement with lot holders which complied in some respects with the requirements of ASIC Class Order (CO 00/570) the details of which are not relevant for present purposes. That this was a managed rights scheme is clearly established not only by concessions made on the hearing of the application¹ but particularly by the terms of

¹ Transcript 18/5

an application for exemption from compliance with the provisions of the *Corporations Act 2001* as to the registration of the scheme.²

- [6] The requirement for certain schemes to be registered arises pursuant to s 601ED(1) of the Act which provides that an investment scheme must be registered if it has more than 20 members. At a time after the commencement of the scheme the total membership was 45 members. At no time was the scheme registered as required by that subsection. By s 601ED(5) a person is prohibited from operating a managed investment scheme required to be registered unless the scheme is so registered.
- [7] Since the commencement of the scheme the number of members associated with it has varied. Now there are only 10 members.
- [8] The basis upon which the respondent opposes the making of the declaration is that in the present state of membership there is no requirement for registration. Mr Cooper of counsel for the respondent argues that requirements for registration must accommodate the changing status of the scheme over time. If, for example, the scheme started with less than 20 members but increased beyond that level this could provoke an application for registration or, the operator might continue outside the legislation with an exemption from the Australian Securities Investment Commission (ASIC). Whether such an exemption would be granted depends upon an operator's compliance with the requirements of a Class Order. The relevant Class Order at the time the scheme was set up (CO 00/570) has since been replaced by CO 02/305.
- [9] The issue of whether the respondent was likely to gain such exemption is gauged by the fact that when it made its belated application on 31 May 2004 the application was rejected by ASIC on the grounds –
1. “FN Management Pty Ltd has been operating an unregistered management investment scheme in contravention of the Act for a significant period of time (since 2001); and
 2. Even if ASIC class order (CO 02/305) *Management Rights Schemes* had been applicable to FN Management Pty Ltd, FN Management Pty Ltd would not have been able to rely on the relief contained in the class order, as copies of the letting appointments that have been provided to ASIC do not appear to us to meet the requirements of para 1(g) of Schedule B to contain the provisions set out in Schedule E.”³

An application for a “no action letter” in respect of the respondent's past non-compliance was refused also.

- [10] The respondent argues that such a determination is not final and it merely expresses the ASIC opinion. In my view, the finding by ASIC was well based on the evidence before me and unlikely to be overturned on any review. The rationale for granting an exemption is to relieve the parties of the burden of registering when the scheme is small and when members are not significantly relying on the skill of a particular letting agent. Seeking an exemption in such circumstances, permits the objects of the legislation to be fulfilled because the operator of the scheme will come under the supervision of ASIC and it's status would be reviewable by ASIC.⁴ The suggestion

² Affidavit Ian Hillhouse sworn 6 September 2004

³ See ex 1

⁴ ASIC Policy Statement 140 at PS 140.48-50

that a managed investment scheme could operate legally under a system where it could be registered or deregistered according to the level of its membership not only fails to have regard to the extensive procedural requirements accompanying registration but it overlooks the very objects of such registration. One critical requirement of CO 02/305 that cannot be met is that each unit can be lawfully used as a residence.

- [11] I find that the respondent operated a managed rights scheme commencing in 2001. The scheme at that time was required to be registered under the provisions of s 601ED of the Act but it was not, and nor was any exemption from registration granted. The ex post facto change in membership and the reduction in the number of members does not obviate the necessity for registration whilst the scheme continues in its original form and in circumstances where the membership could be increased without undertaking the onerous pre-registration procedures referred to in the Act.
- [12] Prima facie then the applicants have established the basis for making the declaration sought.
- [13] The respondent argues that the relief should be refused on discretionary grounds. It contends that the making of a declaration in the terms sought serves no purpose. Mr Cooper cites the remarks of Vaisey J in *Lever Brothers & Unilever Ltd v Manchester Ship Canal Company*⁵ to the effect that it is not the practice of the courts to give an expository gloss upon an Act which is determining a real issue.
- [14] As I have mentioned in my previous judgment between these parties the jurisdiction to grant purely declaratory relief is “almost unlimited and indeed limited only by its own discretion”.⁶ Here the making of the declaration is not an empty gesture. Its making permits the parties to consider their respective rights under the existing arrangements and will allow the other matters in dispute to proceed against the background of this determination relating to part of the respondent’s conduct. In my view it is beneficial that the declaration be made.

Order

- [15] I declare that, the respondent has, since May 2001 to the present, been operating an unregistered managed investment scheme contrary to law.

⁵ (1945) 78 Lloyds Law Reports 507

⁶ Per Gibbs J in *Forster & Iododex Aust Ltd* (1972) 127 CLR 421 at 435