Control of commercial use after the developers sell

DENTONS RODYK

December 1, 2013

Introduction

Not long ago, most developers of buildings approved wholly or partially for commercial use, be it in a mixed use development or otherwise, would lease, and not sell, the commercial strata lots (especially the retail strata lots) so as to be able to control the tenant mix and image of the development. In recent times, however, many such developers are selling the commercial strata lots while the development is still under construction. As these developments are often marketed as “prestigious” and “premier” buildings, a practical difficulty then arises - how can the developer help to ensure that the development will indeed remain “prestigious” and “premier”, even after all the strata lots in the development are sold and the developer steps out of the picture?

The position of a developer versus that of a landlord

A landlord who retains and leases out the commercial strata lots in its building may endeavour to safeguard the image and reputation of the building by retaining strict control over the tenant mix and shop fronts. Such control is effectively achieved by inserting provisions into each tenant’s lease agreement to regulate such issues.

A developer may similarly exercise strict control over to whom the commercial strata lots in the development may be sold. However, once a commercial strata lot is sold, the developer, in theory, relinquishes control over how the purchaser uses the lot: subject to obtaining the relevant authorities’ approvals, the purchaser may freely carry on any type of trade or business at the lot.

A developer who faces this practical difficulty should consider safeguarding the image and reputation of the development by way of (1) a restrictive covenant and/or (2) by-laws.

Use of a restrictive covenant

The developer may insert a clause into all the sale and purchase agreements for the commercial strata lots providing that, on completion, the purchaser undertakes to execute a restrictive covenant, in favour of every other strata lot in the development, governing the permitted type of trade or business which may be carried out at each commercial strata lot in the development (Restriction).

The original purchaser himself is hence proscribed from carrying on any trade or business at his lot which is not permitted by the Restriction; the Restriction, once notified on the land register, likewise binds his subsequent

purchasers, assignees or lessees (section 46 of the Land Titles Act (LTA)). The subsidiary proprietors of the other strata lots may sue on any breach of the provisions of the Restriction, although the courts have the discretion to award damages only (in lieu of injunctive relief) (see, for example, Jaggard v Sawyer [1995] 1 WLR 269).

Limitations of this method

The lifespan of the Restriction may not last till the end of the tenure of the development. While the Restriction continues to bind all purchasers of the commercial strata lots who have entered into it, as against other subsequent purchasers, section 141 of the LTA stipulates that the Restriction is only good for 20 years from the date of the entry of the notification on the land register; although the Restriction may be extended, each extension is only good for a further 10 years each time the extension is filed. Moreover, section 140 of the LTA provides that the Restriction may be varied or extinguished by the court if, for instance, it can be shown that such variation or extinguishment would not materially injure the person entitled to the benefit of the Restriction.

Furthermore, where enforcement of the Restriction is concerned, the individual subsidiary proprietors of the other strata lots may be reluctant to sue on any breach of the provisions of the Restriction due to the costs involved.

Use of by-laws

To complement the Restriction, a developer may facilitate tabling a motion at the first annual general meeting of the management corporation for by-laws to be passed by the management corporation to restrict the type of trade or business which may be carried out at each commercial strata lot in the development (Restrictive Use By-laws). The Restrictive Use By-laws should be consistent with the terms of any Restriction.

The Restrictive Use By-laws will bind all subsidiary proprietors, lessees and occupiers for the time being of the strata lots in the development (section 32(6) of the Building Maintenance and Strata Management Act (BMSMA)).

Section 32(10) of the BMSMA provides that the management corporation or any subsidiary proprietor, lessee or occupier for the time being of any of the strata lots may apply to court for an order to enforce the performance of or restrain the breach of the Restrictive Use By-laws, thus giving the management corporation enforcement rights (as opposed to the case of the Restriction, where only individual subsidiary proprietors have enforcement rights).

Would the Restrictive Use By-laws be valid?

The management corporation clearly has the general power to make by-laws regulating the use of individual strata lots. Section 32(3) of the BMSMA provides that the management corporation may make by-laws “for the purpose of controlling and managing the use or enjoyment of the parcel comprised in the strata title plan” and this purpose extends to “such other matters as are appropriate to the type of strata scheme concerned”. Section 2(1) of the BMSMA in turn defines “parcel” as “the whole of any land, building and common property comprised or to be comprised in a strata title plan”, which includes any strata lot in the strata title plan.

However, it appears that the specific question of whether the management corporation’s general power extends to making by-laws that *restrict the type of trade or business which may be carried out at a particular strata lot* has yet to be addressed locally. There does not appear to be any provision in the BMSMA or any reported local case law dealing with this specific point. For example, prescribed by-law 16 of the Second Schedule to the Building Maintenance (Strata Management) Regulations 2005 (BMSMA Regulations), which prohibits a subsidiary proprietor or occupier of a strata lot from using his lot for any purpose “which may be injurious to the reputation of the subdivided building”, likely applies only to trades or businesses which are clearly immoral, such as prostitution. Further, although the by-law in question in *Lark Lounge and Nite Club Pte Ltd v MCST Plan No 1420* [1997] 3 SLR(R) 945 allowed the management corporation to prevent the change of use of a particular strata lot, the Singapore High Court was never

asked to consider if that by-law was ultra vires the powers of the management corporation under the corresponding provisions to section 32 of the BMSMA (section 41 of the then Land Titles (Strata) Act) (at [27]).

In contrast, this specific question has been affirmatively answered in New South Wales in the context of the then NSW Strata Titles Act 1973, which is similar to the BMSMA. In *Sydney Diagnostic Services Pty Ltd v Hamlena Pty Ltd* (1991) NSW Titles Cases 80-009 (Sydney Diagnostic Services), the New South Wales Court of Appeal upheld a by-law prohibiting (1) the conduct of any enterprise or undertaking, other than the practice of medicine, at all strata lots of the medical centre and (2) the conduct of certain medical practices, such as radiology and pathology, at all strata lots of the medical centre except for certain designated lots. The New South Wales Court of Appeal, agreeing with Young J's decision in the New South Wales Supreme Court below, reasoned that the power conferred on the body corporate under section 58(2) of the then NSW Strata Titles Act 1973 (which corresponds to section 32(3) of the BMSMA) *extended to making by-laws regulating what trades, avocations and activities could and could not be conducted at each lot in a subdivided building* (at 60,101).

The local courts may be persuaded to adopt similar reasoning because bylaws which *restrict the type of trade or business which may be carried out at a particular strata lot* are arguably consistent with the legislative scheme of the BMSMA.

A number of prescribed by-laws in the Second Schedule of the BMSMA Regulations already regulate the type of activities that may or may not be carried out at *all strata lots generally* (e.g. by-laws 11 (Cleaning windows), 14 (Keeping of animals), 15 (Duty to maintain lot) and 18 (Prevention of fire and other hazards)). Young J at first instance in Sydney Diagnostic Services observed that the existence of such prescribed by-laws indicates that certain types of conduct which occur at individual strata lots may nonetheless impact the subsidiary proprietors as a whole; he further observed that it was not unexpected that the types of trades or businesses occurring in buildings such as medical centres and shopping malls would affect the subsidiary proprietors' use and enjoyment of the lots as a whole as those taking strata space in such buildings commonly do so on the basis that only certain types of trades or businesses will be permitted (at 60,063 to 60,064).

It may also be argued that a by-law that only permits a type of trade or business to be carried out at *certain strata lots (to the exclusion of others)* may still operate for the benefit of the subsidiary proprietors as a whole. As recognised by Young J at first instance in Sydney Diagnostic Services, in the case of a medical centre, it may well be for the commercial benefit of the subsidiary proprietors as a whole that only one of each specialty be carried on in the medical centre (at 60,064).

Other limitations of this method

The Restrictive Use By-laws can only be made pursuant to a special resolution passed by the management corporation in general meeting (i.e. passed by subsidiary proprietors present at the meeting holding at least 75% of the aggregate share value). If the developer has sold a large number of strata lots in the development by the time of the first annual general meeting of the management corporation, it is unlikely that the developer will be able to pass the requisite special resolution on the weight of its own votes. The developer will hence have to rely on the subsidiary proprietors of the other strata lots for this purpose.

In addition, as with the Restriction, the lifespan of the Restrictive Use By-laws may not last till the end of the tenure of the development because section 32(3) of the BMSMA allows for the Restrictive Use By-laws to be amended or repealed pursuant to a special resolution passed by the management corporation in general meeting (i.e. passed by subsidiary proprietors present at the meeting holding at least 75% of the aggregate share value).

Conclusion

Developers who are preparing to sell commercial strata lots may wish to consider the feasibility of both methods. Despite the individual limitations outlined above, employing both methods in tandem may at least permit a developer to give potential purchasers of the strata lots, especially in mixed use developments, some assurance as to the sustainability of the image and reputation of the development in question.

Your Key Contacts

Melanie Lim
Senior Partner, Singapore
D +65 6885 3651
melanie.lim@dentons.com

Lynette Khoo
Partner, Singapore
D +65 6885 7931
lynette.khoo@dentons.com