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PROPERTY MATTERS

Daniel Priestley: Service on the executive committee is usually a thankless task and which, from time to time, will engender ill will from dissenting proprietors



Certain pitfalls of strata lot ownership

Daniel Priestley, Counsel with Ogier & Boxalls explores how Cayman's strata system operates.

The fundamental purpose of the Cayman Islands system of strata lot ownership is to facilitate the creation of multiple freehold interests over a single piece of land. Typically, this results in the creation of apartment complexes, which will be the focus of this article, although strata lots can be comprised differently.

The reason for adopting this system in Cayman, which is also employed in a number of other common law jurisdictions, was to address the problems associated with the English system of creating apartment complexes, which is generally by way of the grant of long leases.

The two principal problems associated with the English system are that a lease does not confer indefinite ownership rights – it has a term and, generally speaking, when the term comes to an end, so too does the right of ownership; and also management of the apartment complex remains in the hands of the owner of the freehold, whose interests often conflict with those of the lease owners. Notwithstanding, this system is not without its own inherent weaknesses, which have been thrown into sharp relief by the passing of Hurricane Ivan last year.

Many prospective home owners have no choice but to opt for strata lot ownership: for those who live in Cayman permanently, it is usually a question of cost; for those who maintain vacation homes, it is the convenience of the management role of the strata corporation, which can be geared up to manage the strata lot during the owner's absences in a manner generally consistent with the owner's best interests.

For those who are contemplating purchasing a strata lot and, perhaps, have never owned property before, the issues associated with strata lot ownership may not be readily apparent and this article seeks to explain some of the most important pitfalls you may face.

Control

One consequence of strata lot ownership is that there are rules formulated for the common good of all proprietors (bye-laws) which must be observed, whether you agree with them or not. Furthermore, there is an outside body, the executive committee of the strata corporation, which is generally responsible for the management of the complex, including enforcement of the

bye-laws, to which each proprietor must answer.

The executive committee is usually staffed by some of the proprietors of the strata lots and so greater control can be gained by standing for election to the executive committee.

Decision making within the committee is generally carried out on democratic principles and so being on the executive committee lends a voice but does not guarantee control. There is a price to be paid for greater control: membership on an executive committee is voluntary and unpaid and can be quite onerous in terms of the time that must be devoted to sorting out management issues.

The executive committee will be called upon to take a number of discretionary decisions which will affect all proprietors to a greater or lesser degree. As with any discretionary decision which must be taken, not everyone will be in favour of it. Service on the executive committee is therefore usually a thankless task and which, from time to time, will engender ill will from dissenting proprietors.

Where the issues at stake are significant, which has particularly been the case in the wake of Hurricane Ivan, this can lead to paralysis, whether because the decision requires the unanimous endorsement of the proprietors or because of a general unwillingness to take an unpopular decision. Furthermore, proprietors who serve on an executive committee expose themselves to potential personal liability should it be established that an action taken by the executive committee falls outside the scope of the powers conferred on it by the bye-laws or by law.

Some strata corporations protect those who serve on their executive committee by purchasing errors and omissions insurance policies, but many more do not.

In an effort to ensure probity and to lessen the responsibilities of executive committee members, certain duties of the executive committee are often delegated and there are a number of costs which must be incurred to enable the strata corporation to function independently. Accordingly, the costs of strata lot ownership can be quite high vis-à-vis the economics that can be derived from self management of an individual property.

Insurance

Each strata corporation is required by law to take out and maintain material damage insurance of the complex. Unless unanimously agreed otherwise by the proprietors, the insurance must be in an amount equal to the full rein-



Ocean club was devastated during Hurricane Ivan. Members of the strata are still waiting for the property to be restored

statement value of the complex (which includes provision for shoring up, demolition, professional fees and ancillary expenses). Not everyone manages their risks in the

same way – some prefer a high deductible in exchange for lower premiums but there is little flexibility built into the system. Many strata corporations are not fully aware of the

Strata relations

Appleby attorneys Paul Greven, a property Associate, and Ward Sykes, a commercial litigation Associate and local Strata Law specialist, address a number of current legal issues affecting strata proprietors and Executive Committees. Second in a two-part series.

What is an example of a current dilemma that is or will be faced by Executive Committees?

In the ensuing months after Hurricane Ivan wreaked its havoc, many strata corporations had to determine how best to repair the common property and strata lots (units) while balancing the obligations of the Law and by-laws with the need to repair effectively and promptly. Many individual proprietors wished to proceed with the reconstruction of their own units by using their own funds and contractors. The rationale for this was commonly to repair more quickly than if left to the strata to address with the delays and complexities possible in a larger overall project. This raised issues and concerns such as:

1. How and to what extent should the owner be reimbursed for his or her expenditures?
2. Did the proprietor use a reputable contractor?
3. Did the repairs by the proprietor's contractor satisfy the requirement to repair and reinstate?
4. How should proprietors with different expenditures be equitably compensated?

Fast forward a few months and many Executive Committees are (or will soon be) facing the fact that they will be unable to provide any or sufficient funds to proprietors who previously undertook their own renovations for such reasons as: i) the strata

corporation still has insurance payments proceeds received; what was expected to cover the necessary physical structures of the Strata developer; an individual proprietor; iii) many proprietors whose costs (to shortage of labour fees) the alien proprietor would have to receive under the of the strata lot proprietor not enough funds to up the difference.

Suggested solutions situations between and Executive C

The unforeseen difficulties imposed by hurricane Ivan have to the stresses of including Executive members and strata proprietors and, on the other hand, many proprietors simply want their lives (the home front) to be as normal as possible. For many, this simply means to move back to their homes with their loved ones. On the other hand, trying to progress in an orderly manner is not always the best solution. Executive Committees that are usually faced with many other costs and professional fees. The following are some issues to keep in mind to help lives easier and maximize the benefits of strata ownership.

New proprietors

If you are getting a strata unit, it is very important to carefully review the terms and conditions of the laws pertaining to strata ownership. There may be rules pertaining to development which may affect your life enjoyable on number/size of units (about noise etc.) to purchase. It is not

implications of their duty in this regard and will insure each strata lot for an equal amount no matter differences in the costs of reinstatement from one strata lot to another, leading to unwitting underinsurance. In other cases, executive committees have deliberately underinsured the complex to save on insurance premium costs. Proprietors are generally stuck with the decisions made by the executive committee both in terms of the insurance taken out and the result of negotiations with the insurer, should a claim become necessary. In the wake of Hurricane Ivan, this has resulted in owners being forced to make large additional payments to make up shortfalls that no one had anticipated, which, to say the

least, has caused considerable consternation.

Special assessments

A special assessment is a levy, over and above the usual running costs of the complex, which the executive committee has power to impose where the strata corporation finds itself in need of an injection of cash. During the last year, many special assessments have been made necessary to make good shortfalls arising from underinsurance and uninsurable losses but, most commonly, special assessments are levied to carry out major capital renewals, which do become necessary as a result of the passage of time. Having said this, it is rare to see a strata corporation with a well defined plan to deal

with capital renewals and special assessments often come as a very unwelcome surprise to proprietors. It is becoming increasingly common to see proprietors being forced to borrow to raise the necessary funds to pay special assessments.

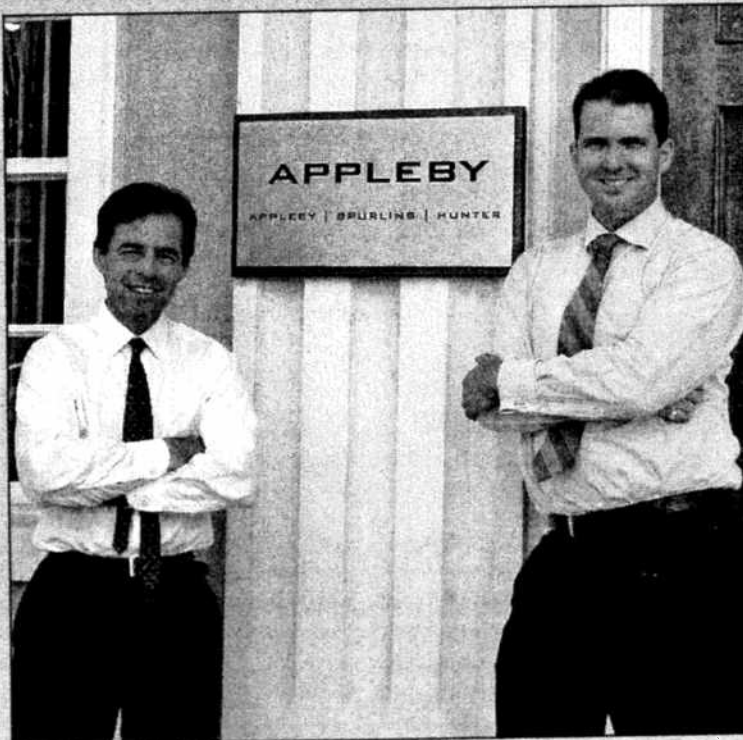
The decision to levy a special assessment is usually a discretionary one and not everyone will always agree that it is necessary, or even advisable, to do so. Prospective purchasers of strata lots are well advised to ascertain the position as to special assessments over the short to medium term at least through direct contact with the relevant strata corporation and negotiate their purchase price accordingly.

Caveat emptor! ("Let the buyer beware!")

: dilemmas and solutions

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Ward Sykes and Paul Greven

have your attorney review the terms and discuss these with you prior to entering into any purchase agreement. You should inquire not only of the assessment due as of completion but also whether there are any planned or anticipated costly projects (ex. hurricane Ivan repairs) which will require a special assessment.

Existing proprietors

to accommodate the stresses that were not as evident prior to Ivan. In addition, if certain members of your Executive Committee need to move on, there are usually mechanisms in place to appoint new members. Check your By-laws.

Executive committees

Ensure that you are quite familiar with your rights and obligations

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