

SUPREME COURT OF QUEENSLAND

Registry: Brisbane
Number: BS13638/21

Applicant: **VOYAGER RESORT LTD ACN 010 547 618**

AND

Respondents: **ALAN SKELTON & ORS**

APPLICANT'S OUTLINE

I Background

- [1] The applicant (**VR**) is an unlisted public company.¹ Its capital is divided into 1,992 ordinary shares,² five of which were held by the original “subscribers”.³
- [2] It operates a timeshare scheme at a property known as Voyager Resort (the **resort**). The resort is a 62-lot community title scheme situated at Broadbeach and provides a prime development opportunity.⁴ VR leases 60 lots under a 99-year lease, commencing on 27 December 1984 (the **timeshare lots**). It owns the remaining two lots, one of which is used as an office and the other by a manager appointed by VR to run the resort.⁵
- [3] The timeshare scheme was created by dividing the title to each timeshare lot into 51 shares held as tenants in common (a **fractional interest**): 3060 fractional interests in total.⁶ The Articles of Association for VR contemplate that each holder of ordinary shares owns one or more fractional interests.⁷ Those Articles then confer an entitlement to use and occupy for one week per share a timeshare lot and the resort facilities.⁸ The effect of the Articles is to link each ordinary share to the enjoyment of one “vacation week” at the resort during each 12-month period. Costs for operating and maintaining the

¹ Sandford affidavit (CFI-14), ex BLS-2 at p. 55.

² Julian Armitage affidavit (CFI-3), ex AJA-1 at p. 20 (Res 8.1 & 8.2), Affidavit of service (to be filed) ex BLS-3(at p. 1.

³ Arts. 4 and 5 of the Articles of Association. Sandford affidavit (CFI-14), ex BLS-2 pp 19-54.

⁴ Heaton affidavit (CFI-4), [6].

⁵ Heaton affidavit (CFI-4), [9].

⁶ Heaton affidavit (CFI-4), [11].

⁷ Art. 6

⁸ Arts. 8-14.

resort are shared between members *pari passu*, with contributions being raised by levies.⁹

- [4] The timeshare scheme was never fully subscribed, leaving VR as an owner of one or more fractional interests in each timeshare lot. Increasingly since the late 1980s, interest in the timeshare scheme has waned, and member apathy has grown.¹⁰ Out of a potential 3060 members, currently, there are only 1061.¹¹ Of those members, some have become non-voting members (due to non-payment of levies), and some are uncontactable or have died.¹² The timeshare scheme is currently at risk of collapse.¹³ There are significant ongoing and future maintenance costs looming.¹⁴
- [5] In that context, on 13 November 2021, an overwhelming majority of VR's members resolved to implement a process to see the resort sold as one and for VR to be wound up.¹⁵ Specifically, the members resolved inter alia:
- (a) to sell the resort;¹⁶
 - (b) for VR to apply to this Court for the appointment of statutory trustees;¹⁷
 - (c) for VR to be wound up following distribution by the trustees of the net sale proceeds.¹⁸

II Statutory framework of statutory trustees for sale

- [6] An applicant for the appointment of a statutory trustee for sale under s 38 of the *Property Law Act 1974* (Qld) must:
- (a) identify the land.
 - (b) show the land is held in co-ownership (defined as “ownership whether at law or in equity in possession by 2 or more persons as joint tenants or as tenants in common”¹⁹).
 - (c) show the applicant is a co-owner of the land.

⁹ Arts. 15-24.

¹⁰ Heaton affidavit (CFI-4), [14].

¹¹ Heaton affidavit (CFI-4), [11-12].

¹² Heaton affidavit (CFI-4), [16-17].

¹³ Heaton affidavit (CFI-4), [26].

¹⁴ Heaton affidavit (CFI-4), [33-34].

¹⁵ Julian-Armitage affidavit (CFI-3).

¹⁶ Julian-Armitage affidavit (CFI-3), ex AJA-1 at pp. 24-5 (Res. 2).

¹⁷ Above (Res 3).

¹⁸ Julian-Armitage affidavit (CFI-3), ex AJA-1 at pp. 24-5 (Res. 6).

¹⁹ *Property Law Act 1974*, s 37.

- [7] The power in section 38 confers a limited discretion to refuse to make an order. As Connolly J explained when sitting as a member of the Full Court in *Re Permanent Trustee Nominees (Canberra) Ltd*²⁰ "There are very few defences to partition proceedings based merely on the circumstances of the parties. To say therefore that the exercise of the jurisdiction is virtually mandatory is an adequate statement for most cases...."
- [8] A similar approach has been taken by the New South Wales Court of Appeal. Concerning its cognate legislation²¹ the Court of Appeal held that, once co-ownership is established, a co-owner of property can seek the appointment of statutory trustees for sale "almost as of right" unless it would be inequitable to allow the application.²² Whilst it would be wrong to limit or close the circumstances where it would be inequitable, the circumstances would generally be confined to where the appointment would be inconsistent with proprietary rights or a fiduciary obligation or where estoppel lay to defeat it.²³
- [9] A co-owner opposing the appointment of trustees for sale has the onus of dissuading the Court from ordering a trust for sale.²⁴

III Discussion

A The land

- [10] VR seeks the appointment of statutory trustees for sale over each timeshare lot. Each Lot would be a separate statutory trust if the application were allowed.
- [11] VR solely owns the other two lots in the resort.²⁵ Hence, there is no power, nor need given the proposed trustees and the resolutions of VR's members, to appoint a statutory trustee in respect of those two lots: the resort can be and will be sold as one with the concurrence of VR.

B Co-ownership by the applicant and its members

²⁰ [1989] 1 Qd R 314 at 321. See also *In Ranger v Ranger* [2009] QCA 226 at [14], where Holmes JA and Mullins J described the right to seek the appointment of a statutory trustee for sale as an incident of co-ownership. And *Wilson v Strzelcykowski* [2016] QCA 227; (2016) 78 MVR 106 where Philip McMurdo JA described this right as a "valuable ingredient of a co-owner's proprietary interest".

²¹ *Conveyancing Act 1919*, s 66G (NSW). It is materially identical to s 38.

²² *Ferella v Official Trustee in Bankruptcy* [2015] NSWCA 411 at [38].

²³ *Tory v Tory* [2007] NSWSC 1078 at [42] (White J). Cited with apparent approval in *Ferella v Official Trustee in Bankruptcy* [2015] NSWCA 411 at [38].

²⁴ *Woodson (Sales) Pty Limited v Woodson (Australia) Pty Limited* (1996) 7 BPR 14,685 at 14,701 (Santow J).

²⁵ Heaton affidavit (CFI-4), [42].

[12] Each timeshare lot is held in co-ownership by VR and other members.²⁶

C A time share scheme

[13] These submissions are filed in advance of any submissions being made in opposition to the relief.

[14] *Prima facie*, there are no grounds to refuse to make the order for the appointment of statutory trustees. The existence of a timeshare scheme is not *per se* a disqualifying factor.²⁷

Club Esplanade Ltd v Acott [2002] QSC 256

[15] A building at 116 The Esplanade, Surfers Paradise operated as a timeshare scheme. Like the resort, ownership of each lot was comprised of 51 undivided shares as tenants in common. Each lot was leased to Club Esplanade Limited, the applicant in the proceeding, under a long term (96 year) lease. The Club was not a co-owner of the lots. The building was then 28 years old and expensive to maintain. The appointment of statutory trustees for sale was sought.

[16] Justice Wilson refused the application. Her Honour's reasons for doing so are important and illustrate the stark difference between that case and here. By way of summary of Her Honour's reasons at [11]-[14]:

- (a) The proponent had not considered the practical steps necessary to bring the time share scheme to an end.
- (b) There was no proposal for the surrender of the lease by the applicant, for the winding up of the timeshare business, or the winding up of the applicant and the distribution of any surplus among the members.
- (c) Her Honour recognised a problem with distribution as "the lots are unlikely to be of equal value". That, too, had not been considered by the applicant.
- (d) "However, merely to sell the real estate interests would not effect a winding up of the business relationships between the parties, and the proposed method of distributing the net sale proceeds may not result

²⁶ Outline, paragraphs 2-4 above (or **O [2]-[4]**). Mr Heaton's affidavit (CFI-4) includes title searches for each week of each Lot. As the 3000 pages of title searches prove, each Lot is held in co-ownership. The summary particulars (title reference, lot number, BUP6459 and owner name) are contained in a helpful table at paragraph 42 of Mr Heaton's affidavit.

²⁷ See O[15]-[22].

in returns to the members that accord with the true value of their respective interests.”

[17] Those concerns do not arise here. VR’s members have overwhelmingly resolved (467 votes in favour, five votes against²⁸) to sell the resort and end the timeshare scheme through the following process:

(a) VR applies for the appointment of the three of its board members as statutory trustees for sale on conditions that:

The Trustees keep proper books of account in relation to amounts received or expended by them.

The Trustees shall take out and maintain appropriate insurance.

The Trustees shall not be entitled to any remuneration (for the avoidance of doubt, their indemnity for properly incurred expenses remains).

(b) Those appointments be made to facilitate the sale of the resort, expressly or implicitly incorporating the sale of Lots 1 and 2. There is thus no issue with the surrender of VR’s lease as part of the sale transaction.

(c) The net sale proceeds be distributed as follows:

First, by the Trustees appointing a professional valuer to determine the proportion of each Scheme Lot to the net sale proceeds, based on the proportionate share that the value that each respective Scheme Lot represents to the value of all Scheme Lots (once determined, the Share), where such determination will, except in the case of manifest error, be final and binding on Members.

Second, by the Share for Lots 1 and 2 being disbursed to the Club.

Third, by the Trustees retaining the net sale proceeds and dividing each remaining Share into fifty-one shares (the Co-Owner Shares).

Fourth:

Where the Fractional Interest held by the Co-Owner was not subject to a registered mortgage when the resort was sold, by paying the Co-Owner Share to the Co-Owner.

Where the Fractional Interest held by the Co-Owner was subject to a registered mortgage when the resort was sold, by giving notice in writing to

²⁸ Julian-Armitage affidavit (CFI-3), ex AJA-1 at p 25.

each such Co-Owner and each such mortgagee of the amount of the Co-Owner's Share and, thereafter, by paying that Co-Owner's Share as directed in writing by the Co-Owner and the mortgagee or as ordered by any court.

- (d) Next, the net income would be paid out.
- (e) Finally, the final and conditional resolution of the members would then take effect so that VR and the timeshare scheme would be wound up under the supervision of two registered liquidators.

Vacation Club Ltd v AGG Properties Pty Ltd [2019] NSWSC 1357

[18] *Vacation Club Ltd v AGG Properties Pty Ltd* [2019] NSWSC 1357 concerned a time share scheme at Settlement Point Road, Port Macquarie. The applicant was the time share scheme manager, viz., VR's equivalent. Unlike VR, it was not, however, a co-owner of lots.

[19] The building in *Vacation Club* was built in about 1979 and started as a time share scheme in 1980. There was a lease over the whole of the site to the applicant. By the time of the proceeding, the club was finding it increasingly difficult to cover its overheads and maintenance costs.

[20] Like VR did here, the applicant took a plan to members at an extraordinary general meeting before commencing the proceedings. Resolutions "were passed by an overwhelming majority of members" to the effect that orders would be sought from the Court to appoint trustees to sell the Property and that the Club would be appointed as the agent of the Club members to lead this process.

[21] Having regard to the plan that members approved, Justice Darke concluded at [36]:

I can discern no other possible arguments against the appointment of trustees for sale in this case. In circumstances where the vast majority of co-owners are members of the Club, and the members have voted overwhelmingly in favour of a sale of the Property I do not think that any co-owner who is not a Club member (presumably having chosen not to seek membership) would be in a position to resist the application.

IV Service

[22] A supplementary short outline of argument on service will be filed once the service evidence is available.

V The Trustees

[23] VR seeks the appointment of three board members as the statutory trustees. Those board members are:

- (a) Ms Julian Armitage, a highly credentialed and experienced legal professional, tribunal member and company director;²⁹
- (b) Mr Heaton, the resort manager and licensed residential letting agent who has been involved with the resort since 1993;³⁰
- (c) Mr Walters, a former chartered accountant and business owner.³¹

[24] The conditions on which VR proposes that they be appointed are the same conditions on which the members overwhelmingly supported their appointment.³²

[25] It is necessary and desirable to appoint the proposed trustees. Aside from their skill and experience:

- (a) they are board members of VR. Moreover, that board has been actively considering and preparing for a sale of the resort since about 2019 and have been working with professional consultants (lawyers, town planners and the like).³³ In that regard, Ms Julian-Armitage deposes:

The board would adopt a similar process when it comes to appointing a real estate agent and other consultants (for example, chartered accountants dealing with the sale proceeds). The board is also aware of the ability to apply to the Court for judicial advice, and will not hesitate to do so should the need arise.

- (b) The appointment will only concern Lots 3 to 62 (because Lots 1 and 2 are owned solely by VR). The plan is to sell the resort as a single parcel. The lease requires surrender too. It thus makes practical sense that three board members of VR be appointed statutory trustees because only VR can sell Lots 1 and 2 and surrender the lease).

VI Orders sought

[26] A draft order will be provided in advance of the hearing.

G Handran QC and M Downes

²⁹ Julian-Armitage affidavit (CFI-3), ex AJA-1 at p 27.

³⁰ Julian-Armitage affidavit (CFI-3), ex AJA-1 at p 30.

³¹ Julian-Armitage affidavit (CFI-3), ex AJA-1 at p 32.

³² See O [17(a)].

³³ Julian-Armitage affidavit (CFI-3), [11]-[12]; Heaton affidavit (CFI-4), [43]-[46].

Counsel for the applicant
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