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Is the deed of mutual covenants still relevant?

Law & Realty
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BEFORE the Strata Management Act, 2013 (SMA) came into force in June 2015, purchasers of strata properties commonly signed what is called a deed of mutual covenants (DMC).

What is the DMC?

The DMC is a deed that provides the rules, commonly called house rules, that regulate the use and enjoyment of common property in a strata development (for example, a condominium).

In short, all owners and residents of a strata development share the use of common property as governed by those rules.

When the SMA came into force, a set of such rules, known as by-laws, were prescribed in the Third Schedule of the Strata Management (Maintenance and Management) Regulations, 2015.

These regulations were enacted pursuant to the SMA.

The question therefore arises as to whether the DMC is still relevant after the statutory by-laws came into force.

The by-laws

It is pertinent to look at section 148 of the SMA. It reads:

On the coming into operation of this Act, in a local authority area or part of a local authority area or in any other area, the provisions of any written law, contracts and deeds relating to the maintenance and management of buildings and common property in as far as they are contrary to the provisions of this Act shall cease to have effect within the local authority area or that other area.

At first reading, it may appear that any DMC signed before the SMA came into force no longer has any effect. For maintenance and management of a strata development, the rules that apply are the statutory by-laws.

But that, of course, is not the full picture. The statutory by-laws could not be excluded but, they could be added to.

When maintenance and management are carried out by the developer, it could make additional by-laws under section 32(2) of the SMA, with the approval of the Commissioner of Buildings.

The joint management body and the management corporation may also do so, by a special resolution, under section 32(3) and section 70(2), respectively, of the SMA.

It must be emphasised that additional by-laws made must not contradict or be inconsistent with the statutorily prescribed by-laws.

Is the DMC invalid?

Nevertheless, in the writer's view, that again may not be the full picture. Reading section 148 of the SMA carefully, it is not the DMC that ceases to have effect but only the provisions in it that are contrary to the provisions of the SMA which can be rendered invalid.

Therefore, any provisions in the DMC which are not contrary to the provisions of the SMA remain valid.

It remains entirely possible for the DMC to have other rules for the maintenance and management of stratified developments in addition to those in the statutory by-laws. Such rules agreed in the DMC apply as a contract as between the purchasers and the developer.

However, strictly speaking, these other rules in the DMC are not by-laws, unless they are made into additional by-laws in the manner discussed above.

For a developer intending to improve on the statutory by-laws, setting out additional rules by way of a DMC would pave the way to the developer making them into additional by-laws under section 32(2) of the SMA.

The making of these additional by-laws may be seen as merely formalising what is already agreed by purchasers in the DMC.

Other uses of the DMC

It is not unusual that the DMC may also contain provisions other than house rules.

In the recent case of Prestaharta Sdn Bhd vs Ahmad Kamal Md Alif & Ors, 2016, a provision in the DMC set out certain facilities in the development as being not common property but, instead, belonged to the developer. The DMC was upheld as a contract entered into freely by the purchasers and the developer.

In that case, the purchasers of a development claimed 13 facilities to be common property. These included the restaurant, hotel arcade, coffee house, reception, lobby lounge and health centre. The developer argued that they were additional facilities and not common property.

The developer produced a DMC which stated that these 13 facilities were additional facilities that can be enjoyed by the parcel owners but that the developer remained the proprietor. The Court of Appeal agreed.

Of course, under present law, common property will be designated before the developer is permitted to sell any parcel. If the DMC in the Prestaharta case was made after the SMA came into force, the outcome is likely to be different. However, the case demonstrates that the DMC may still be useful in setting contractual terms.

Another case that demonstrates the usefulness of a DMC is that of the Federal Court in Bandar Eco Setia Sdn Bhd vs Angelane Eng, 2015. The case did not deal with a strata development but a gated community of bungalow lots.

The DMC in that case imposed certain rules as to the design and construction of houses on the lots. The purchaser in that case built a house that exceeded approved height restrictions. The court agreed that the restriction agreed in the DMC applied and was enforceable against the purchaser.

Conclusion

The fact that section 148 of the SMA does not categorically invalidate all provisions of a DMC means that the window is still open to developers to craft provisions that capture the vision of communal living as designed by them for a particular project. When signed by all purchasers, it forms a contract that may be enforced by the courts.

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