NOVEMBER 2010
Issue 13

ManagementONE

MANAGEMENT Rights SOLUTIONS

A newsletter from Mahoney Lawyers

Exercising Your Option
by Matthew Manz, Partner

We have in previous issues of ManagmentOne referred to instances of Managers failing to exercise options in their Caretaking and Letting Agreements. Unfortunately we are still seeing many instances of this occurring. The consequences of not doing so can be dire.

If an option is not exercised in accordance with the terms of the Agreements the Agreements will expire at the end of the term, in which case the Manager no longer has the right to conduct the caretaking and letting business for the scheme. In such a situation the only solution generally is for the Manager to request the Body Corporate to enter into new Agreements. However, depending on timing, it may be possible to adopt a simpler process at a general meeting. We did this recently for a Manager who was selling (and using another law firm which claimed to be an expert in management rights). We were approached to see if there was a simpler way to solve the problem, rather than having to get whole new Agreements. We successfully devised a simpler procedure which was followed at the general meeting resulting in a lot less expense for the Manager.

Problems can arise if, after the Manager forgets to exercise an option, the Body Corporate exploits the opportunity and seeks to impose changes to the Agreements against the Manager's interests. Even worse, if there has been real conflict in the complex, the Body Corporate might seek to tender for and engage another contractor to conduct the business or do away with management rights altogether.

To avoid this from happening Managers should ensure that they diarise all of the option extension dates in their Agreements to ensure that they do not lose the opportunity to renew the Agreements. At the time of exercising an option, Managers should ensure that the extension of the Agreements is properly recorded in a document executed by the Manager and the Body Corporate, as the documenting of the option being properly exercised and the Body Corporate's acknowledgment of that is something a subsequent buyer will want to see. We can of course assist you with that at the time.

Buying Management Rights Off the Plan
By Matthew Manz, Partner

There are a number of reasons why people want to buy management rights off the plan. One of the major reasons is that, properly structured, there is no stamp duty on the initial grant of the management rights. There is still however duty payable in respect of the unit. Other reasons include expectations that –

- the multiplier will be lower when acquiring the rights from the developer; and
- the profit could ultimately be a lot higher than that projected by the developer (especially for short term accommodation).

Although there is GST on an off the plan Management Rights purchase, that is remitted back to the buyer as an input tax credit at the time the first BAS is lodged so the only expense is the interest incurred on the GST payment for the brief period between payment and receipt of the input tax credit. Whilst the legal fees, and general delays can be much greater than a normal purchase, the duty saving more than makes up for that.

As with any business there are a number of risks in purchasing management rights off the plan. Some of those risks include –

- the management rights being listed at a price based on a high multiple of the projected net profit;
- the projected net profit being based on a high estimate of rentals;
- the price being based upon an assumption that most if not all units will be sold to investors and come into the letting pool;
- cash flow issues which can result from delays in construction of the complex;
- slow lettings; and
- developers sometimes not paying Body Corporate levies on unsold units.

There are steps a buyer of management rights can take to increase the prospects of a successful purchase of management rights off-the-plan. At least the following issues should be addressed:-

1. Seek experienced legal and financial advice. Carefully review any projections of profit prepared by a developer. Have these checked by an experienced management rights accountant.
2. Establish the track record of the developer they are buying from. Do they usually sell all or most of their units to investors? How are the units marketed, and by whom? Have the marketers made any promises to the investors about the rental achievable for the units, or the expenses to be incurred (including letting charges)? Are the rentals and expenses realistic? Will the expenses represented to investors curtail the Resident Managers' ability to charge normal fees and commissions?
3. Assess the need for a rebate or claw-back provision – Does the price take into account the risk that the units might be sold to owner occupiers, ie a relatively low multiplier? Or is the purchase price calculated at a higher multiplier, on the basis that the units will all be sold to investors? If so, seek to negotiate a rebate for any units which are not in the letting pool, ie actually managed by the Resident Manager. There are several different ways this can be treated. The methods used can be very complex and are often the subject of intense negotiations with developers. Some developers are reluctant to agree to this type of rebate. It is really a question of who bears the risk if owners do not use the Resident Manager.
4. Do you require a certain number of sales to investors before settlement in order for you to proceed at all? Does the developer intend to retain units to sell later? Try and get these into the letting pool.

• CPI increases

Most Caretaking Agreements provide for CPI increases. We often see that managers have not claimed these increases for several years! The following is a table of the Brisbane All Groups CPI figures.

For example, if your remuneration started at $100,000 in October 2005, the correct calculation for the October 2010 increase based on Brisbane All Groups CPI would be $100,000 x 179.1 (i.e. the last index figure before the review date) / 150.9 (i.e. the last index figure before the commencement date) = $118,687.87.

That would be increased by 10% GST if there is a GST escalation clause in your Caretaking Agreement. Managers should check that there is.

In the last 10 years, the CPI has increased by about 40%.

Mahoney Lawyers have assisted many managers in having their remuneration increased to market level.

Up to date figures can be found at http://www.oesr.qld.gov.au.

Year	Quarter	CPI
2000	March	125.5
	June	126.4
	Sept	131.3
	Dec	131.6
2001	March	132.7
	June	134.0
	Sept	134.2
	Dec	135.8
2002	March	137.1
	June	138.1
	Sept	139.2
	Dec	139.9
2003	March	141.8
	June	141.8
	Sept	143.3
	Dec	144.2
2004	March	145.4
	June	146.3
	Sept	146.8
	Dec	148.0
2005	March	149.2
	June	150.0
	Sept	150.9
	Dec	152.1
2006	March	153.5
	June	156.2
	Sept	157.5
	Dec	157.3*
2007	March	158.0
	June	160.2
	Sept	161.7
	Dec	163.4
2008	March	165.6
	June	168.4
	Sept	170.8
	Dec	170.4*
2009	March	170.8
	June	171.8
	Sept	174.1
	Dec	174.7
2010	March	176.0
	June	177.3
	Sept	179.1

* negative quarterly CPI

5. Make sure the management rights purchase contract is subject to legal due diligence enquiries. The good news is that it is much easier to have changes made to by-laws and agreements at this stage than it is in the case of an existing business purchaser. We can generally persuade developers to put provisions in the agreements and by-laws that maximise the benefits to the manager.
6. The developer should agree to provide names and addresses of investors who are in the course of buying a unit, to enable the Resident Manager to make contact at the earliest opportunity.
7. Try and obtain early possession of the unit and commence operating the business, once construction is finished. This could be a month or more before other settlements in the complex.
8. Seek a contractual undertaking by the developer in the management rights purchase contract that they will not undertake any letting in the complex, either themselves or through any of their sales agents.
9. Managers are usually expected to liaise with the developer and builder in relation to construction and defect issues – often for a considerable time. This can take up a lot of time in larger complexes.
10. Are there enough storage areas for use by management and have these been properly allocated?
11. Is the developer required to fitout the office and to what extent? Is the developer required to supply, or ensure that the body corporate supplies, before you take over specified equipment?

Estate Planning – If there's a will... there's a way

By Bill Tomlinson, Solicitor, Mahoney Lawyers

Estate planning and the making of wills are not the most pleasant topics. None of us take joy in planning what will happen on our death. However we owe it to the family members who will survive us to ensure that the event is, at least from a financial and asset management perspective, as smooth as possible, with as little tax as possible being paid.

In an era of asset protection, tax planning, higher divorce rates and superannuation we encourage our clients to take a proactive approach and turn their minds to how they want to pass and protect their hard-earned wealth.. There is an array of estate planning tools that can be used to protect a family and an estate in the event of death or disablement.

The most important tool is a will that contains testamentary trust provisions. These have two main advantages. The first is tax effectiveness. The proper use of such trusts allows the distribution of assets over time and in the most advantageous way to your loved ones having regard to tax and their individual circumstances. Potentially this will reduce income tax, capital gains tax, stamp duty and other transfer costs.

The second advantage is asset protection. Because the assets are held in the trust and not by the beneficiary personally, they are not generally able to be accessed by bankruptcy proceedings, creditors or via commercial or family litigation. With some attention to the structure and control of the trust, it is also possible to protect against spendthrift beneficiaries and put in place minimum ages for younger beneficiaries to control the estate assets.

Other possible estate planning measures include:-

- Enduring Powers of Attorney to allow for decisions to be made and actioned on your behalf should you become incapacitated for any reason.
- Advance Health Directives to give comprehensive instructions as to preferred and unwanted medical treatments should you be incapacitated.
- Review of existing commercial structures, including self managed super funds, to determine how control and assets are passed after the death of one of the stakeholders.

Many people do not realise that assets held in these structures are not directly governed by their Will and do not normally form part of their estate.

Bill Tomlinson at our office has been helping many of our clients in this sensitive but important area. He would be happy to speak to any clients about putting in place or reviewing their estate plan.

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