Doc-Ref 500T1

MATHEWS HUNT LEGAL

Mathews Hunt Legal ABN 32 701 279 452
Lvl 7 Tower One | Southport Central
56 Scarborough Street | Southport Qld 4215
PO Box 3371 | Australia Fair | Qld 4215
e: admin@mathewshuntlegal.com.au
w: www.mathewshuntlegal.com.au
ph: +617 5555 8000

Our Ref: PH:MH:106118
Your Ref: CTS 33891

13 May 2021

Emerald Lakes – The Quays CTS 33891
C/- Peak Body Corporate Management
PO Box 1509
RUNAWAY BAY QLD 4216

By email: nick@peakbcm.com.au

Dear Sirs/Madams

Emerald Lakes - The Quays CTS 33891 - Deed of Variation

Thank you for your instructions to review the proposed Deed of Variation to the Caretaking and Letting Agreement dated 22 April 2005 ('the Agreement') between the Body Corporate for Emerald Lakes - The Quays CTS 33891 ('the Body Corporate') and Emerald Lakes Residential Pty Ltd ACN 629 282 319 As Trustee For The Emerald Lakes Unit Trust ('the Manager').

Legislation

We understand that the Body Corporate is governed by the:

- *Body Corporate and Community Management Act 1997* ('the Act'); and
- *Body Corporate and Community Management (Accommodation Module) Regulation 2020* ('Regulation').

Assumptions

This advice is provided on the following assumptions:

1. that the Agreement was properly authorised;
2. that there have been no variations to the Agreement; and
3. that any applicable option to extend the term of the Agreement has been validly exercised.

Please urgently advise if our assumptions are incorrect as it will affect the validity of our advice.

Documents

We have reviewed the following documents in preparing this advice:

Individual liability limited by a scheme under professional standards legislation.

1. Caretaking and Letting Agreement dated 22 April 2005;

2. Deed of Assignment dated 31 March 2017;

3. Transfer Deed dated 31 May 2019;

4. the proposed Deed of Variation ('Proposed Deed');

5. the proposed motion ('Proposed Motion'); and

6. BCCM Form 20 ('Form 20').

Variation of the Agreement

Any variation to the Agreement must be considered by the Body Corporate at a general meeting.

We have been instructed to advise on the proposed 5 year option, commencing on 6 May 2030 and ending on 5 May 2035. We comment on the proposed variation material as follows.

Proposed Deed

Background

This clause is standard and does not require our further comment.

Clause 1 – Definitions

We understand that there have been no extensions, renewals or variations of the Agreement. Please advise if our understanding is incorrect.

Based on our above understanding, **we recommend** that we are instructed to request the removal of the reference to '*extensions, renewals……and variations*' to the Agreement in clause 1.1(b).

Clause 2.1 – Variation

Clause 2.1(a) proposes to insert a new clause 24 into the Agreement inserting a five (5) year option to extend the term of the Agreement.

The current term of 10 years commenced on 6 May 2020 and expires on 5 May 2030 ('the Current Term'). The proposed option term will commence on 6 May 2030 and end on 5 May 2035.

An option to extend the term of the Agreement adds certainty to the Manager and its financier. As a general rule, most financiers prefer terms to be extended to the maximum possible length of time so as to afford them maximum security over the management rights loan, but that is no reason for the Body Corporate to consent to the extension. Additionally, an option to extend the management rights term is more attractive to any potential purchaser and may also be the Manager's motive for requesting the variation.

While it is not a legal issue, we query the benefit to the Body Corporate of granting a 5 year option, as once the variation is approved the Body Corporate is left with very little leverage if there is a subsequent issue with the Manager (whether the current one or a future one).

The proposed 5 year option is:

1. conditional upon the Manager providing written notice to the Body Corporate;

2. there being '*no outstanding breach of this Agreement by the Manager which the Manager has failed to remedy within a reasonable period of time (no less than 14 days) from having received notice from the Body Corporate*'; and

3. on the same conditions as contained in the Agreement including calculation of the Manager's remuneration to be varied each year in accordance with the calculation provided in clause 3 of the Agreement.

We recommend that we are instructed to request that:

1. the reference to '*nor*' in the first line of the proposed option clause is changed to '*or*'; and

2. the reference to '*no outstanding breach …………(no less than 14 days)*' is replaced with a requirement for there not to be any '*unremedied breaches*';

3. the written notice being provided no sooner than 6 months and no later than 3 months prior to end of the previous option, rather than '*at any time*'.

Subject to the above amendments being effected, this clause is otherwise satisfactory.

Clause 2.1(b)

This clause proposes the deletion of clause 23(d) of the Agreement. Clause 23(d) states the Agreement ends after the expiry of the Further Term ending on 5 May 2030.

As the proposed option extends that time period to 2035, this variation is necessary to allow for the further option period.

This clause is satisfactory.

Clause 2.2 – Ratification

This clause states that the Body Corporate:

1. ratifies and confirms all of the terms and conditions of the Agreement; and

2. agrees to be bound by the terms and conditions of the Agreement.

There is no benefit, nor obligation, on the Body Corporate to provide the requested ratification in point 1 above. **We will request** the deletion of this section of the clause.

The Body Corporate is already bound by the terms and conditions of the Agreement. Therefore, point 2 above is satisfactory.

Clause 2.3 – Acknowledgement

This clause requires the Body Corporate to acknowledge and agree that:

1. the current term of the Agreement is 10 years beginning on 6 May 2020 and ending on 5 May 2030.

   Clause 23(a) allows for the automatic extension of the Further Term where the Manager has not given written notice to the Body Corporate, that it does not want the Term extended, at least 3 months before the Term expiring on 5 May 2020. **Please immediately advise us if the Further Term has not been validly exercised.**

   Assuming the Further Term (period commencing 6 May 2020) has been validly exercised, this is correct.

2. the Proposed Deed inserts a further 5 year option.

   This is correct; and

3. the unexpired term, if the Proposed Deed is approved, is not greater than 25 years from the date that the AGM occurs.

   This is correct as the potential end date of the unexpired term will be 5 May 2035.

Although the information contained within this clause appears correct, there is no benefit, nor any obligation, on the Body Corporate to provide the requested acknowledgment.

We recommend that we are instructed to request the deletion of this clause.

Clause 2.4 – Entry into Proposed Deed

This clause states that the Body Corporate warrants that it has at general meeting, by secret ballot, without the use of proxies and in compliance in all respects with the requirements of the Act and the applicable Regulation Module, resolved to vary the Agreement in accordance with this Deed and to enter into this Deed.

This clause is satisfactory, assuming that the BCCM Form 20 is sent out with the AGM agenda and the motion is considered by the resolution stated within the motion.

Please contact us if you have any queries.

Clause 3 – Costs

Pursuant to this clause, the Body Corporate is responsible for its own legal and administrative costs associated with the proposed variations.

In our opinion, as the variations are for the sole benefit of the Manager, the Manager should pay the reasonable legal and administration costs associated with the Body Corporate's review of and entry into the Proposed Deed.

The Committee's leverage on this point is that it may not support the Proposed Motion unless the Manager pays the Body Corporate's costs.

We have requested an undertaking from the Manager. We are awaiting the Manager's response and will provide you with an update upon receipt of the Manager's response.

We will request this clause is amended accordingly.

Subject to our above recommended amendment, this clause is satisfactory.

Clause 4 – Further assurance

This clause is standard and does not require our comment.

Clause 5 - Severance

This clause is standard and does not require our comment.

Proposed Motion

The Proposed Motion is valid and merely reflects the changes in the Proposed Deed. However, to better protect the Body Corporate's interests, **we will request**:

1. the motion is amended to reflect any costs undertaking provided by the Manager with respect to payment of the Body Corporate's legal and administrative costs;

2. removing the reference to a deed being entered into '*on substantially the same terms and conditions as those in the deed of variation circulated with this motion*'.

   Removing these words and referring simply to the deed '*circulated with this motion'* ensures the terms and conditions as agreed between the parties is the same as those contained in the deed considered by the Body Corporate and entered into if the motion is passed.

Subject to the above amendments being effected, the Proposed Motion is otherwise satisfactory.

Form 20

A Form 20 is required to be distributed to owners when considering the extension or renewal of the Agreement so as to ensure that the key points of the extension are noted for owners.

We have perused the contents of this document and note that it states:

1. the current expiry date of the Agreement is 5 May 2030;

2. the annual remuneration is listed as '$154,575.83 plus GST plus CPI increase on 6 May 2021'. **Please immediately advise us** if this figure is incorrect; and

3. the Manager has been granted occupation authority for the purpose of signage.

   We note that clause 21 of the Agreement relates to occupation authority and the plan included in the Agreement appears to have one area marked by hand and labelled as Occupation Authority Area. Please ensure the Committee check the areas marked on the plan in the Agreement and those marked on the Form 20 are identical and correctly labelled and marked.

> **Please immediately advise us** if the Manager does not have an occupation authority in respect to the area as indicated on the plan annexed to the Form 20 or the Committee has any queries or concerns about the areas marked on the plan in this form.

Having an incomplete or incorrect Form 20 is usually to the Body Corporate's advantage, as the Manager risks the motion being ruled out of order at the AGM, or the resolution being invalidated. However, it may mean that the owners are not properly informed when voting on the variation.

We have noted that the Form 20 does not include the Manager's ACN details where the Manager's name is required. **We recommend** that you instruct us to request that the Manager is correctly identified in sections 2 of 3 of the Form 20 with the insertion of the Manager's ACN.

We also recommend the Committee peruse the contents of the BCCM Form 20 to ensure it is satisfied with the information as stated and prior to the inclusion of the Form 20 in the general meeting agenda.

Please ensure the Form 20 is included on the AGM agenda as required by the Regulation.

Please contact us if you have any queries concerning the Form 20 or its contents.

Varying the Agreement further

The Manager's consent is required to make any changes to the Agreement.

Accordingly, when a caretaker/letting agent/manager is proposing a variation, the Body Corporate can usually negotiate further variations that are beneficial to the Body Corporate.

However, s.113(1)(c) of the Act prohibits the Body Corporate from seeking or accepting the payment of an amount, or the conferral of a benefit for, extending the term. Additionally, s.113(3) of the Act relevantly states:

> *"If an amount is paid to, or a benefit is accepted by, the body corporate in contravention of subsection (1), the person who paid the amount or conferred the benefit may recover the amount, or the value of the benefit, as a debt."*

Therefore, the Body Corporate cannot validly negotiate variations to its benefit as part of this variation.

AGM

Please advise when a date has been set for the general meeting.

Following the general meeting, please advise us if the motion was passed.

Communications

To protect the Body Corporate's position in this matter, we request that you:

- ask the Committee not to provide this advice to the Manager; and

- not respond to any communications from other solicitors on this matter - they should not be contacting you anyway.

Instructions sought

Please advise us whether:

1. the Body Corporate accepts the documents in their present form; or

2. the Body Corporate requires us to request amendments to the proposed variation, as recommended above.

We look forward to receiving the Committee's instructions in due course.

Please contact **Karen Palmer** with any queries.

Yours sincerely,

Per:

Peter Hunt
Director
MATHEWS HUNT LEGAL