

## CROSSDALE COURTS UPDATE

### **Retirement Views, Summer 2009/2010**

The Crossdale Courts' saga continues. A recent decision of the Supreme Court means that the protection offered by the Retirement Villages Act 2003 ("Act") to residents of an unregistered retirement village is still as yet undecided.

#### **Brief Background**

The owner of Crossdale Courts, Crossdale Properties Limited ("CPL"), entered into agreements with the residents of Crossdale Courts granting residents the right to occupy their respective units for life. Subsequently, Cashmere Capital Limited ("Cashmere") made advances to CPL totalling \$940,000. These advances were secured by a first registered mortgage over eight certificates of title owned by CPL.

CPL eventually defaulted on its loan obligations. Cashmere decided to exercise its power of sale over the property and required the residents to leave. However the residents resisted this and argued that their rights under the Act would take priority over Cashmere's mortgage and that Cashmere could not therefore exercise its power of sale.

In the High Court, it was found that Cashmere was the operator of Crossdale Courts as, in exercising its rights under the mortgage, it was effectively managing or controlling the village. Cashmere therefore had a duty to register the village and the residents' occupancy was accordingly protected by the Act.

The Court of Appeal came to the same conclusion as the High Court but by different reasoning. Prior to the High Court hearing, an Order in Council had been made under s103 of the Act declaring Crossdale

Courts to be a retirement village. The Court held that if such an Order in Council was made, a memorial must automatically be noted on the certificate of title to the land comprising the village, thereby conferring the protection of the Act onto the residents.

#### **Supreme Court Ruling**

Although the High Court and the Court of Appeal had ruled in favour of the residents, the Supreme Court ruled in favour Cashmere.

#### ***Effect of Order in Council***

The Supreme Court held that an Order in Council made under s103 of the Act does not automatically result in that village becoming a registered retirement village. Rather, the Order in Council merely clarifies whether a particular development is a retirement village. If an Order in Council is issued, the operator of the village will be required to register the village. Once the necessary documents are completed and the village registered, a memorial will be entered on the certificates of title comprising the village and the protections of the Act, in particular the prohibition against a mortgagee sale of the village except as a going concern, will apply to the residents.

#### ***Was Cashmere the operator of Crossdale Courts?***

The Supreme Court then had to determine whether Cashmere was the operator of Crossdale Courts and whether Cashmere was obliged to register the village pursuant to the Order in

Council. If Cashmere was not the operator, then it was not required to register the village and Cashmere would be able to exercise its mortgagee power of sale. However if Cashmere was the operator, it would be obliged to register the village and the residents would be protected by the Act.

The Supreme Court did not eventually decide on this point as they required more facts regarding Cashmere's acts as mortgagee. In particular it was noted that a mortgagee would only be the operator if it was exercising effective management or control of the village. In order to be viewed as having exercised effective management or control, Cashmere would need to have done more than take steps that were incidental to exercising its power of sale. The Supreme Court therefore referred the case back to the High Court to hear evidence on this point.

## **Conclusion**

There is still some way to go before the residents of Crossdale Courts know their fate. One thing is clear though, and that is that registration of a village under the Act can be a very important step in ensuring significant protection to residents.

**Kathleen Kuang**

## **Contact Us**

Please feel free to contact us for more specific advice or about any other matter relating to your retirement village.

Our contact details are:

Burke Melrose, Lawyers

PO Box 5142, Auckland 1141

Ph: +64 9 356 2630

Fax: +64 9 356 2631

Email [enquiries@burkemelrose.co.nz](mailto:enquiries@burkemelrose.co.nz)

Web [www.burkemelrose.co.nz](http://www.burkemelrose.co.nz)

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