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SUPREME COURT RULES EXECUTIVE COMMITTEE HAS POWER TO SETTLE COURT CASE

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Is an executive committee able to settle litigation involving an owners corporation? If so, can the executive committee decide to settle a court case at an informal meeting?

INTRODUCTION:

Imagine that an owners corporation is involved in a court case that will be decided by a Judge after a 5 day hearing. The hearing commences. On day 2 of the hearing, an offer of settlement is made to the owners corporation. The settlement offer needs to be accepted before the end of the hearing. So the owners corporation needs to act quickly. But there is a problem.

The executive committee wants to accept the settlement offer. However the committee needs to give at least 72 hours notice of its intention to hold a meeting to accept the offer. And that notice needs to be given to all owners. If the committee does so, it will not be able to hold its meeting until after the end of the hearing which is too late. So what does the committee do?

The recent decision of the Supreme Court in *The Owners Strata Plan No 57164 v Yau [2016] NSWSC 1056* provides a solution to the problem. In that case, the Court held that in certain circumstances, an executive committee can make decisions which bind the owners corporation without needing to give 72 hours notice of a meeting.

FACTS:

The *Yau* case involved a dispute between an owners corporation and two lot owners, Mr and Mrs Yau. The dispute started when the Yaus wanted access to a grease arrestor and kitchen exhaust system which formed part of the common property in order to operate their restaurant. The owners corporation had passed a special resolution under section 62(3) of the Strata Schemes Management Act 1996 not to repair the grease arrestor and kitchen exhaust system which had fallen into disrepair. The Yaus started legal action seeking, among other things, a declaration that the special resolution was invalid and orders to force the owners corporation to fix the grease arrestor and kitchen exhaust system and pay compensation to them.

The case was listed for a five day hearing. The parties made numerous attempts to settle the dispute. After day 2 of the hearing, a settlement offer was made by the Yaus to the owners corporation. Later that day (at 5:25pm) an email was sent by a member of the executive committee to the other committee members advising that a meeting would be held at 6:30 pm that evening to consider the settlement offer. The majority of the executive committee met that evening with the owners corporation's lawyers and after receiving legal advice, made the decision at 9:30pm to settle the case.

THE DISPUTE ERUPTS:

After the case had settled, several owners expressed dissatisfaction with the terms of the settlement. Those owners claimed that the settlement was not in the interests of the owners corporation and should not have been accepted by the executive committee. The owners also claimed that the decision made by the executive committee to settle the case was not a valid one.

THE NEXT COURT CASE STARTS:

Those owners convinced the owners corporation to start legal action against the Yaus in an attempt to overturn the settlement that had been accepted by the executive committee. That legal action was started more than 12 months after the settlement agreement had been made. The owners corporation argued that there were two main reasons why the settlement agreement was not validly entered into:

1. Adequate notice was not given of the meeting of the executive committee at which the settlement offer made by the Yaus had been accepted in breach of clause 6 of Schedule 3 to the Strata Schemes Management Act 1996; and
2. The executive committee did not have authority to instruct the lawyer of the owners corporation to settle the case because the settlement agreement involved matters that needed to be determined by the owners corporation at a general meeting pursuant to section 21 of the Act.

ADEQUATE NOTICE:

Clause 6 of Schedule 3 of the Strata Schemes Management Act 1996 says that in the case of a large strata scheme, at least 72 hours notice must be given to all members of the executive committee and to all owners before a meeting of the committee can be held. In the *Yau* case, the Supreme Court held that non-compliance with the requirements to give 72 hours notice of the executive committee meeting and to ensure that notice is given to all executive committee members and owners did not invalidate a decision made by the executive committee. In other words, the Court said that a failure to comply with the requirements for giving notice of a meeting of the executive committee set out in clause 6 in Schedule 3 did not make the meeting, or the decisions made at the meeting, invalid.

However the Court did note that a decision made at an executive committee meeting for which proper notice had not been given could be overturned by NCAT under section 153 of the Act in appropriate circumstances.

AUTHORITY OF THE EXECUTIVE COMMITTEE:

The Supreme Court also held that the executive committee possessed the power and authority to instruct the lawyer of the owners corporation to settle the case with the Yaus. In making this decision the Judge



considered that there were no restrictions placed on the executive committee concerning the type of instructions it could give the lawyer including instructions to settle the case. The Judge said that there was a distinction between an executive committee authorising its lawyer to settle a court case and an owners corporation acting in accordance with a settlement agreement which required it to make decisions at a general meeting. In the Judge's opinion, the executive committee could authorise its lawyer to accept a settlement agreement even though that agreement might require the owners corporation to make decisions at a general meeting.

RATIFICATION:

The Judge also said that the subsequent conduct of the owners corporation ratified the settlement approved by the executive committee. The Court considered that the lack of any prompt objection by any of the owners to the settlement agreement, the payment by the owners corporation of compensation to the Yaus and the performance by the owners corporation of works required under the settlement agreement all indicated that the owners corporation had, by its conduct, ratified the settlement agreement. In the words of the Judge the making of a settlement agreement even if done without authority "can be ratified by the owners corporation in other ways other than by the passing of a resolution in a general meeting."

THE COURT RULING:

The court ultimately held that the settlement agreement approved of by the executive committee on behalf of the owners corporation was valid and binding on the owners corporation.

LESSONS TO BE LEARNT:

There are a number of important lessons to be learnt from the *Yau* case. Firstly, the case indicates that an executive committee is generally able to make urgent decisions on behalf of an owners corporation without having to give 72 hours notice of a meeting to all owners. Secondly, the case confirms that even if an executive committee makes a decision without proper authority, the owners corporation is able to ratify the decision by acting in accordance with the decision and without passing a resolution at a general meeting. Thirdly, the case confirms that an executive committee is able to approve an agreement on behalf of an owners corporation even though the agreement will require the owners corporation to make decisions at a general meeting such as a decision that must be made by special resolution. The case should provide welcome relief to owners corporations and executive committees which are forced to make urgent decisions that cannot wait for proper notice of a meeting to be given.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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