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AFTER 4 YEARS, MR NICHOLLS GETS TO KEEP HIS SPA

After four sets of legal proceedings, the Supreme Court has finally given the green light for a lot owner to keep his outdoor spa. This case highlights the restrictions that apply to appeals to the Supreme Court against decisions made by NCAT in strata disputes and the difficulty winning those appeals.

Introduction

The case of *The Owners Strata Plan No. 68976 -v- Nicholls* [2018] NSWSC 270 brings to an end almost four years of litigation concerning a spa and decking installed on an external area in a lot in a residential strata scheme on Sydney's northern beaches. In the end, the Supreme Court dismissed an appeal by the owners corporation of the strata scheme against a decision of NCAT which permitted the owner to retain the outdoor spa. This means the owner will get to keep his spa despite the objections of the owners corporation. So, how does a spa give rise to four separate sets of legal proceedings and almost four years of litigation?

The Facts

In about 2013, Mr Nicholls and Ms Molendorff, installed a spa and deck on an external area of their lot. The owners corporation, and certain lot owners, objected to the spa and deck. They asserted that the spa and deck encroached on common property, were visible from outside lot 1 and did not have an appearance in keeping with the building in breach of the by-laws. They wanted Mr Nicholls and Ms Molendorff to remove the spa and deck.

Land & Environment Court Case

In about 2014, a lot owner commenced proceedings in the Land and Environment Court against Mr Nicholls and Ms Molendorff to restrain them from carrying out any further works. In about mid-2014, Mr Nicholls and Ms Molendorff gave a temporary undertaking to the Court not to undertake any further work. However, in the meantime, Waringah Council confirmed that the work undertaken by Mr Nicholls and Ms Molendorff was exempt development that did not require Council approval. For that reason, the owner discontinued the proceedings in the Land and Environment Court and agreed to pay Mr Nicholls and Ms Molendorff's costs of those proceedings.

The Strata Adjudication

Unperturbed by the discontinuance of the lot owner's proceedings in the Land and Environment Court, on

12 May 2015, the owners corporation applied to a Strata Schemes Adjudicator for orders to require Mr Nicholls and Ms Molendorff to remove the spa, deck and ancillary works installed on their lot. The owners corporation complained that the spa and accompanying deck had been built on common property, utilised common property services and were not in keeping with the building in breach of the by-laws. On 29 September 2015, the Adjudicator dismissed the application on the basis that he was not satisfied that Mr Nicholls and Ms Molendorff had committed any significant breach of the by-laws. Importantly, the Adjudicator concluded that the spa was in keeping with the appearance of the building even though the owners corporation presented evidence from an architect which suggested otherwise.

NCAT Appeal

On 22 October 2015, the owners corporation appealed to NCAT against the decision of the Adjudicator. NCAT dismissed the appeal. Relevantly, NCAT agreed with the conclusion reached by the Adjudicator that the spa was in keeping with the building. This is because the spa was small, its colour seemed to be a close match to that of the building and it had an unobtrusive cover when not in use. NCAT considered that the Adjudicator was entitled to disagree with the opinion of the architect who had said the spa was “totally out of character with the minimalist design of the building” because the photographs of the spa showed that it was a small item which did not detract from the building at all.

Supreme Court Appeal

The owners corporation was dissatisfied with NCAT’s decision. Therefore, on 9 August 2016, the owners corporation appealed to the Supreme Court against the decision of NCAT. Briefly, the owners corporation claimed that NCAT did not provide adequate reasons for its decision, made a mistake when it agreed with the Adjudicator that the spa was in keeping with the rest of the building, did not give the owners corporation a fair hearing, relied on misleading evidence and made a decision that was not fair and equitable. The Supreme Court did not consider that there was any merit in the grounds of appeal of the owners corporation and dismissed the appeal and, in doing so, ordered the owners corporation to pay the costs of Mr Nicholls and Ms Molendorff. In summary, the Supreme Court was not satisfied that NCAT had got it wrong.

Lessons to be Learned

The decision in the *Nicholls* case highlights the restrictions that apply to appeals against decisions of NCAT and the difficulty winning those appeals. The NCAT legislation says that a party dissatisfied with the decision of NCAT may appeal against the decision to the Supreme Court. However, the legislation also says that the appeal requires the leave or permission of the Supreme Court and can only relate to a question of law: see section 83 of the *Civil and Administrative Tribunal Act 2013*.



This means that a person who wants to appeal to the Supreme Court against a decision of NCAT in a strata dispute must convince the Court that the appeal involves an issue of principle or a matter of public importance, or show that there has been an injustice and that the decision of NCAT is more than just arguably wrong in order to get the Court's permission to run the appeal: see *Mailoi -v- Chirelli* [2017] NSWSC 982.

Then, even if the person is able to convince the Court that at least one of those matters apply, the appeal is limited to questions of law. This means that the person appealing generally cannot challenge factual errors made by NCAT, only legal errors. In the *Nicholls* case, this made it difficult for the owners corporation to challenge in the Supreme Court the findings of fact made by the Adjudicator and NCAT that the spa had an appearance that was in keeping with the building or did not detract from the appearance of the building.

Conclusion

The takeaway from the *Nicholls* case is that the scope to appeal to the Supreme Court against decisions of NCAT in strata matters is extremely limited and those appeals can be difficult to win. In practice, this means that NCAT is likely to be the final decision maker in the overwhelming majority of strata disputes.

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About JS Mueller & Co

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for over 30 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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