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YOU'VE BEEN WARNED. APPROACH THE SUPREME COURT AT YOUR PERIL!

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The Supreme Court has recently ordered a lot owner who succeeded in litigation against an owners corporation to pay the owners corporation's costs because the dispute between the parties could have been dealt with by NCAT. This is one of the first times a litigant has been punished by an adverse costs order for approaching the Supreme Court for relief which could have been given by NCAT.

The Case

We recently wrote about the decision of the Supreme Court in *EB 9 & 10 Pty Ltd -v- The Owners – SP 934* [2018] NSWSC 464. In that case, the Supreme Court decided that an owners corporation of an apartment building in inner Sydney could not upgrade or build on common property in a way that would prevent a lot owner gaining access to, and egress from, a car space lot with a regular sized car. After the Court handed down its judgment, the Court had to decide who should pay the costs of the litigation.

Costs of Litigation

Normally, the loser of a court case is ordered to pay the legal costs of the winner. This is the usual rule that applies to most litigation. However, in this case, the Supreme Court took a different approach. Even though the owners corporation lost the case, the Court ordered the lot owner to pay the owners corporation's costs. Why?

NCAT should resolve strata disputes

The strata legislation gives the NSW Civil and Administrative Tribunal (NCAT) broad power to resolve strata disputes. This means that NCAT is able to make orders to resolve most types of strata disputes including disputes between lot owners and owners corporations. This reflects the intention of the NSW Parliament that NCAT should sort out most strata disputes, not the Supreme Court.

Adverse Costs Consequences of Approaching the Supreme Court

Section 253 of the *Strata Schemes Management Act 2015* says that nothing in the strata legislation removes any rights or remedies that an owner or owners corporation may have in relation to any lot or common property outside of the legislation. This is intended to preserve the right of parties to a strata dispute to approach the Supreme Court to resolve their dispute instead of forcing the parties to sort out their dispute in NCAT. However, section 253 also says that if litigation is commenced in a Court, and the Court is of the opinion that NCAT could have resolved the dispute that is the subject of the litigation, the

Court must order the plaintiff to pay the defendant's costs regardless of the outcome of the case. In other words, if a party approaches the Supreme Court for orders to resolve a strata dispute, the Supreme Court can order that party to pay the costs of the litigation, even if that party is successful, if the Court considers that NCAT could have resolved the dispute.

The Decision

In this case, the Supreme Court considered that NCAT could have made orders to resolve the dispute between the lot owner and the owners corporation about the proposed upgrade of the common property which would have impeded the owner's ability to enter and exit the owner's car space with a regular sized car. The Court held that, whilst NCAT does not have the power to issue declarations to clarify the parties' rights, NCAT could have made an order binding the owners corporation not to alter the common property in a way that restricted or impeded the owner's access to, and use of, the owner's car space via the common property by developing or upgrading the area of common property adjacent to the car space. For that reason, the Court concluded that the owner could have approached NCAT to resolve the dispute between the owner and the owners corporation and, therefore, ordered the owner to pay the owners corporation's costs of the case, even though the owner was successful. The Court also remarked that it does not (but should) have power to transfer proceedings from the Court to NCAT in appropriate circumstances: see *EB 9&10 Pty Ltd -v- The Owners SP934 (No. 2)* [2018] NSWSC 546.

Conclusion

The outcome of this case serves as a timely reminder that Parliament intended that most strata disputes would be resolved by NCAT, not the Supreme Court. The decision in the case confirms that if a lot owner or owners corporation approaches the Supreme Court for orders to resolve a dispute that is capable of being resolved by NCAT, the party approaching the Court can expect to pay the other party's costs of the case irrespective of the outcome. The remarks of the Supreme Court also give rise to the distinct possibility that Parliament will amend legislation to give Courts, including the Supreme Court, power to transfer cases involving strata disputes to NCAT where NCAT has power to resolve those 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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