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NCAT CHANGES THE RULES FOR EXPERT EVIDENCE IN STRATA DISPUTES

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NCAT has recently changed the rules that apply to expert evidence in most strata cases. These changes relax the rules relating to expert evidence and make it easier for opinions to be given by experts in a quicker and cheaper way.

Introduction

A Court or NCAT may rely on evidence from experts to reach a conclusion about a technical matter. A person who wants to give expert evidence in a Court or NCAT, such as a building consultant, engineer or valuer, normally has to comply with certain rules before their evidence will be accepted. These include rules that require the person to follow an Expert Witness Code of Conduct to ensure that they act as independent expert and not as the “hired gun” of one of the parties. This is intended to ensure that opinions given by experts are soundly based, complete and reliable. Often, an expert’s report is rejected by the Court or NCAT if those rules are not followed. However, complying with those rules can prove expensive because experts need to explain in detail how they have formed their opinions in order to comply with the Expert Witness Code of Conduct. This can make it difficult to obtain expensive expert evidence in strata disputes in which parties cannot justify spending tens of thousands of dollars obtaining expert reports.

Rules for Giving Expert Evidence in NCAT

NCAT has rules that apply to experts who give evidence. Those rules used to require any expert to follow the Expert Witness Code of Conduct in every case, no matter how minor the issue in dispute. This meant that every expert report needed to be detailed in order to comply with those rules which, in many cases, increased considerably the costs of the experts. For example, those rules would require an expert to provide detailed reasons for each opinion expressed in his or her report rather than simply state opinions or conclusions without any supportive reasoning.

Changes to Rules for Giving Expert Evidence in NCAT

On 28 February 2018, NCAT changed the rules that apply to expert evidence. Those changes are intended to relax those rules in certain circumstances. Now, the rules relating to expert evidence will not apply to most cases in NCAT involving strata disputes. This is because the rules of evidence do not apply to most strata disputes in NCAT. For example, in an NCAT case concerning a breach of a by-law or unauthorised renovations the rules concerning expert evidence no longer apply. Importantly, the rules relating to expert evidence no longer apply to applications in NCAT to reallocate unit entitlements (where expert evidence from a valuer is essential).

When do the Rules for Expert Evidence in NCAT Still Apply?

The rules relating to expert evidence will still apply in some NCAT cases involving strata disputes. These include:

- (a) applications by owners corporations for the imposition of a monetary penalty for a breach of a notice to comply (where the rules of evidence do apply);
- (b) building defects claims by owners corporations for more than \$30,000;
- (c) disputes between owners corporations and builders about unpaid costs with a value greater than \$30,000;
- (d) any other proceedings in which NCAT directs that the rules for expert evidence will apply.

See NCAT Procedural Direction 3 – Expert Evidence.

What does this all Mean?

The changes made by NCAT mean that where the rules relating to expert evidence do not apply, NCAT will not be able to reject an expert's report on the grounds that the expert did not follow the Expert Witness Code of Conduct. However, that does not mean that NCAT will have to accept the opinions expressed by an expert. The task of NCAT when assessing the acceptability of an expert's report will be to decide how much weight to attach to that report. NCAT will still need to be satisfied that the expert's report provides a satisfactory basis upon which it can make its findings: see *J Evers Pty Ltd t/as Plumbing and Electrical Doctor -v- Rolt* [2018] NSWCATAP 150 at [28].

Conclusion

The changes to the rules relating to expert evidence made by NCAT are to be commended. Those changes are intended to differentiate between cases where it is appropriate to take a stricter approach to expert evidence and those where the importance and cost of the issues in dispute require a less strict approach to that issue. The changes to the rules regarding expert evidence will enable owners corporations involved in many disputes in NCAT to rely on expert evidence more often and in a far more cost effective way.

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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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