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DON'T COME KNOCKING ON MY FRONT DOOR: OWNERS CORPORATION TOLD TO TRY ITS LUCK IN COURT

Adrian Mueller
Partner | Senior Lawyer
B.Com LLB FACCAL
[Email](#) | [LinkedIn](#)

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Does NCAT have power to make an order for the payment of money? In a recent case, NCAT decided that it did not. The outcome of this case has created doubt about NCAT's power to make money orders in strata matters.

The Case

The case of *Owners Corporation Strata Plan No. 14172 v Cai* [2019] NSWCATCD 56 involved a mixed use strata building in Macquarie Street in Sydney's CBD. A coffee shop and sandwich bar operated from lot 10. An orthodontic surgery was situated below lot 10.

The owners corporation of the building alleged that water was leaking from an air-conditioner and the overflow of a fridge that belonged to lot 10 which penetrated through the floor of lot 10 and into the orthodontic surgery below. The owner and tenant of lot 10 refused to fix the water leakage problem.

Therefore, in late 2017 the owners corporation gained access to the coffee shop and sandwich bar and carried out repairs to lot 10 which fixed the water leakage problem. Those repairs and related investigative work cost the owners corporation \$76,108.25. The owners corporation applied to NCAT for orders to require the owner and tenant of lot 10 to reimburse that amount.

The Basis of the Claim

Section 153 of the *Strata Schemes Management Act 2015 (Act)* imposes a duty on an owner and tenant of a lot not to use or enjoy the lot in a manner that causes a nuisance or hazard to the occupier of any other lot. The owners corporation alleged that the owner and tenant of lot 10 breached that duty by failing to do anything to fix the problem that resulted in water leaking from lot 10 into the orthodontic surgery below.

Section 120 of the Act says that if an owner or tenant fails to carry out work in order to remedy a breach of a duty imposed on them (such as the duty under section 153), the owners corporation may carry out the work and recover the cost of the work from that person as a debt. The owners corporation said that NCAT had power to order the owner and tenant of lot 10 to reimburse the owners corporation for the cost of the work it carried out to fix the water leakage problem in lot 10. The owners corporation said that the source of that power was the general order making power held by NCAT under section 232 of the Act.

Section 232 entitles NCAT to make an order to settle a complaint or dispute about, relevantly, the



operation, administration or management of a strata scheme or the exercise of, or failure to exercise, a duty conferred or imposed by or under the Act or the by-laws. The owner and tenant of lot 10 said that NCAT did not have jurisdiction to order them to reimburse the owners corporation for the costs it incurred repairing the water leakage problem.

The Decision

NCAT accepted that the owners corporation was entitled to recover the costs of carrying out work which the owner or tenant of lot 10 should have carried out to remedy a breach of their duty under section 153 of the Act. However, NCAT did not consider that entitlement could be converted into a money order under section 232. NCAT interpreted its power to make orders under section 232 narrowly by reading down the broad language used in the section.

NCAT considered that the purpose of section 232 is to permit orders to be made to resolve or settle a dispute or complaint by ensuring that matters concerning the administration and management of a strata scheme are addressed, or by ensuring that some duty imposed on those who are stakeholders in the strata scheme is addressed. In other words, NCAT concluded that the purpose of section 232 was to allow orders to be made that would produce an outcome to ensure that those within a strata scheme act, or refrain from acting, in some way that will achieve the workable operation, management and administration of the scheme.

NCAT also considered that it was important that the language of section 232 did not make any reference to an order for payment of money or debt recovery. NCAT also considered that it was telling that other sections in the Act specifically gave it power to make orders for the payment of money when section 232 did not. For example, section 132 of the Act specifically empowers NCAT to order an owner or occupier to pay the owners corporation a specified amount for the cost of repairing damage to the common property caused by work done by that owner or occupier and section 86 specifically empowers NCAT to order an owner to pay a sum of money for unpaid levies.

NCAT considered that if section 232 gave it power to make money orders then there would have been no need for provisions such as sections 86 and 132 to specifically confer on NCAT power to make money orders. For those reasons, NCAT concluded that the general order making power in section 232 does not include power to make a money order for the recovery of a debt.

The Debate

NCAT acknowledged that its decision was at odds with the earlier decision of the Appeal Panel of NCAT in the case of *The Owners-Strata Plan No. 30621 v Shum* [2018] NSWCATAP 15. In *Shum's* case, the Appeal Panel had concluded that NCAT's power to make orders under section 232 is not



confined to requiring a person to do or refrain from doing an act and that consistent with the purpose of the Act it includes a power to make a money order for the payment of damages.

In the *Cai* case, NCAT sought to distinguish the decision in *Shum* on the basis that that case was only concerned with a claim by an owner for a money order for the payment of damages as a result of a breach by an owners corporation of its duty to maintain and repair common property under section 106 of the Act. Ultimately, NCAT concluded that it was not a forum that could be used for debt recovery.

Conclusion

The outcome of the *Cai* case was that NCAT transferred the proceedings to the Local Court to permit the owners corporation to pursue its claim against the owner and tenant of lot 10 in that forum.

The *Cai* case touches on a broader controversy that is currently playing out in NCAT. That controversy relates to the fundamental question as to whether or not NCAT has power in strata matters to make money orders at all whether for payment of damages or the recovery of a debt. The decision in the *Shum* case was thought to have resolved that controversy but that is not the way matters have played out in NCAT. It almost seems inevitable that the controversy will be resolved by a higher authority such as the Supreme Court in the near future. For the time being, there remains doubt about NCAT's power to make any money orders in strata matters.

Adrian Mueller

Partner | B.Com LLB FACCAL
adrianmueller@muellers.com.au

About JS Mueller & Co Lawyers

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

02 9562 1266
enquiries@muellers.com.au
www.muellers.com.au



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