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CONFUSION REIGNS: NCAT WEIGHS IN ON ITS POWER TO AWARD COMPENSATION

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In a recent decision that has produced a confusing outcome, the Appeal Panel of NCAT has decided that NCAT does not have power to award damages (but might be able to order payment of compensation) where there are defects in common property that an owners corporation does not repair. The outcome of this case has added further uncertainty to an already uncertain area of law concerning NCAT's power to order payment of money in strata disputes.

Introduction

Many strata buildings suffer from water leaks because of defects in the common property. Those leaks can have a number of consequences. Often, one of those consequences is damage that a leak causes to the interior of a lot. In some cases, the leak and consequential damage are so severe that the lot cannot be inhabited or rented. In those circumstances, the owner of the affected lot sometimes takes legal action against their owners corporation to recover their financial loss such as rental loss and the cost to repair damage to the lot caused by the leak.

Recent Cases

Since the *Strata Schemes Management Act 2015 (Act)* commenced on 30 November 2016, there have been a number of those types of claims made by owners against owners corporations in NCAT. In many of those cases, NCAT has awarded the owners damages for their losses. The damages awarded by NCAT typically include rental loss but can also include the cost to repair damage to lot property, legal costs and experts' fees.

A Change of Mind?

The very recent decision of the Appeal Panel of NCAT in *Shih -v- The Owners – Strata Plan No. 87879* [2019] NSWCATAP 263 has cast doubt on NCAT's power to award damages to owners in claims of that type. The decision of the Appeal Panel in *Shih* is directly inconsistent with an earlier decision of the Appeal Panel where it was held that NCAT could order an owners corporation to pay damages to an owner for the losses suffered by that owner due to defects in the common property which the owners corporation did not repair (see *The Owner Strata Plan No.30261 -v- Shum* [2018] NSWCATAP 15). The two inconsistent decisions of the Appeal Panel make this grey area of the law even more murky and are likely to result in damages claims by owners being brought in the Courts rather than NCAT until the position is clarified by a higher authority such as the Supreme Court.



The Shih Case

The Shihs own a lot in a relatively new residential apartment building in Carlingford, Sydney. The Shihs alleged that there were defects in the common property of the building that allowed water to leak into and damage their lot. The Shihs wanted to rent their lot but claimed that the water leakage and consequential damage made it impossible for them to do so. In 2018, the Shihs took legal action against their owners corporation in NCAT seeking orders to require the owners corporation to repair the defects in the common property that were allowing water to leak into their lot and to pay them damages to compensate them for their loss of rent and the cost of replacing carpet. The Shihs were not entirely successful. NCAT only awarded them the modest sum of \$542.86 in damages for rental loss and ordered them to pay the owners corporation's costs. Dissatisfied with that outcome, the Shihs appealed against NCAT's decision to the Appeal Panel of NCAT.

The Shih Appeal

In the appeal, the owners corporation argued that NCAT did not have power to order the owners corporation to pay damages to the Shihs for their losses. The Appeal Panel agreed with the owners corporation. It concluded that NCAT does not have power to award damages to a lot owner for the losses the owner suffers as a result of a breach by an owners corporation of its duty to repair the common property.

Framing the Argument

Section 106(5) of the Act gives an owner a right to sue an owners corporation for damages for any reasonably foreseeable losses the owner has suffered as a result of a breach by an owners corporation of its statutory duty to maintain and repair common property. However, section 106(5) does not state that NCAT has the power to award the owner damages in those circumstances. Indeed, the section does not contain any hint about what may be the appropriate jurisdiction in which an owner should pursue a claim for damages. The Shihs argued that section 232 of the Act gave NCAT power to award them damages. Relevantly, section 232 gives NCAT power to make an order to settle a complaint or dispute about an exercise of, or a failure to exercise, a function (including a duty) conferred or imposed on an owners corporation by or under the Act or the by-laws such as the duty to maintain and repair common property.

The Appeal Panel's Reasoning

No Specific Power to Award Damages

The Appeal Panel disagreed with the Shihs. The Appeal Panel undertook a thorough review of the sections in the Act which create a right for a person to recover damages or a debt. The Appeal Panel observed that there are a number of specific sections in the Act which give NCAT the power to make monetary orders. These include:

- Section 60(3) which entitles NCAT to order a strata manager to pay a commission to an owners corporation;
- Section 72 which gives NCAT the right to order a party to a strata managing agency agreement or building manager agreement to pay compensation to another party to the agreement;
- Section 89 which empowers NCAT to order a developer to pay compensation to an owners corporation for underestimating levies during the initial period;
- Section 132 which permits NCAT to order an owner to pay compensation to an owners corporation for the cost of repairing damage to the common property caused by the owner;
- Section 147 which permits NCAT to order an owner or occupier to pay a monetary penalty to an owners corporation for breaching a by-law;
- Section 148 which entitles NCAT to order an owners corporation to pay compensation to an owner when repealing a common property rights by-law.

The Appeal Panel contrasted those sections with a number of other sections in the Act which entitle a person to claim damages or a debt but do not expressly give NCAT power to award those damages or order the payment of that debt. This included:

- Section 26 which entitles an owners corporation to recover certain monies from a developer as a debt;
- Section 86 which only permits NCAT to order an owner to pay overdue levies to an owners corporation where there are other pending proceedings in NCAT between those parties;
- Section 120 which permits an owners corporation to recover from a person the cost of carrying out work which that person is required to (but does not) perform under a by-law or for some other reason.

The Appeal Panel concluded that the drafters of the Act were very careful to confer jurisdiction on NCAT

to make certain orders or decisions in specific circumstances. The Appeal Panel considered that it was telling that section 106(5) of the Act does not specifically confer on NCAT jurisdiction to make damages awards under that section.

The Appeal Panel also held that given that section 106(5) does not specifically say that NCAT has power to award an owner damages (when many other sections of the Act do confer specific power on NCAT to make money orders) “it is impermissible to import into the general power in section 232 a specific power” to award damages in a claim made under section 106 (5).

No Power to Award Common Law Damages

The Appeal Panel also considered that it would be unusual for NCAT to be given power to determine whether and to what extent damages could be ordered in the absence of a specific section giving NCAT that power. The Appeal Panel considered that it would be unusual for NCAT to have power to determine a common law claim for damages when those types of claims are normally determined by a court under different rules of procedure and evidence and that it was unlikely the drafter of the Act intended to remove the right of a Court to determine a common law claim for damages. The Appeal Panel also held that the language used in section 106 of the Act refers to an owner bringing an “action” for damages which is language more consistent with an intention by the drafter of the Act that a claim for damages under section 106(5) should be brought in a Court.

No Power to Split Actions

The Appeal Panel also held that it would be unlikely that NCAT could entertain damages claim made by an owner based on a breach of an owners corporation’s duty to repair common property when an owner could bring a claim arising under the same set of circumstances against the owners corporation for damages based on nuisance or breach of a common law duty of care arising out of the same factual circumstances. The Appeal Panel said it was unlikely the drafter of the Act would have intended to create the ability for an owner to pursue damages claims before different decision makers based on different causes of action.

For those reasons, the Appeal Panel concluded that an action under section 106(5) for damages for breach of statutory duty must be maintained in a court of competent jurisdiction.

A Twist in the Tale

The Appeal Panel then turned its attention to the scope of NCAT’s power to make orders under the

general power in section 232 of the Act. The Appeal Panel tentatively indicated that its preliminary view is that NCAT's order making power in section 232 is sufficiently wide to enable a money order to be made to compensate an owner for reasonably foreseeable losses the owner suffers in order to settle a dispute or rectify a complaint about an owners corporation's breach of its duty to repair common property.

The Appeal Panel said that section 232 is intended to give NCAT power to make orders to settle disputes about certain matters relating to the operation and management of a strata scheme and it is arguable that the drafter of the Act intended to invest in NCAT a broad dispute resolution power to deal with disputes and complaints of the kind referred to in section 232 such as disputes about a failure of an owners corporation to comply with its duty to repair common property. The Appeal Panel considered that it was possible that an order to settle such a dispute could require an owners corporation to pay an owner a sum of money to, for example, enable the owner to rectify defects in the common property, to cover the cost of removal and storage of furniture while defects in the common property are being repaired, to cover the cost to repair or replace any property of an owner that is damaged by a failure to repair common property or the payment of monetary compensation for reasonable and reasonably foreseeable losses suffered by an owner as a result of a failure by an owners corporation to repair common property.

The Appeal Panel noted that the previous Act contained in section 138(3)(d) an express prohibition on an Adjudicator awarding damages but that this prohibition was not included in section 232 which was a strong indication that NCAT's order making powers under section 232 are very broad.

An Inconsistency?

The Appeal Panel did not consider that its preliminary conclusion that NCAT could make an order to compensate an owner for the owner's losses under section 232 was inconsistent with its conclusion that NCAT could not award damages to the owner for the same losses. The Appeal Panel considered that the creation of a right to bring an action for damages under section 106(5) is separate to and distinguishable from a broad power NCAT has to settle a dispute or a complaint under section 232. In other words, the Appeal Panel considered that a right to order payment of compensation under section 232 is independent of and concurrent with an entitlement of an owner to seek damages in a court under section 106(5) for the same loss.

An Interesting Point

The Appeal Panel did not indicate the legal basis or cause of action on which any compensation could be ordered under section 232. This makes the metes and bounds of such a claim for compensation



difficult to measure. For example, when and on what basis would compensation be awarded to an owner and how is the amount of compensation meant to be measured?

What will the Shihs do?

The Appeal Panel has given the Shihs an opportunity to pursue (or convince Appeal Panel that they should be entitled to pursue) a claim for compensation under section 232 instead of their damages claim under section 106(5). It remains to be seen if they do so and what success they have doing so.

Conclusion

The position as to whether or not NCAT has power to make money orders to compensate an owner for losses he or she suffers as a result of a breach by an owners corporation of its duty to repair common property is unclear. There are now conflicting decisions of the Appeal Panel of NCAT on that very issue and the decision in *Shih* leaves open the possibility that compensation claims can be made under section 232 but the principles that will apply in determining on what basis compensation will be awarded and the amount of compensation that can be awarded under that section remain unclear. What is clear is that the uncertainty surrounding NCAT's power to compensate owners for losses they suffer as result of defects in the common property that are not fixed by an owners corporation will now need to be clarified by the Supreme Court or legislative intervention by way of an amendment of the Act.

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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 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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