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FINALLY A CONCLUSIVE
ANSWER:
NCAT DOES NOT HAVE
POWER TO AWARD
COMPENSATION TO
LOT OWNERS

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FINALLY A CONCLUSIVE ANSWER:

NCAT DOES NOT HAVE POWER TO AWARD COMPENSATION TO LOT OWNERS

The President and Deputy President of NCAT have recently handed down a decision in which they have concluded that NCAT does not have power to award a lot owner compensation as a result of a failure by an owners corporation to repair defects in the common property. This decision is likely to be followed by NCAT in the future and resolves a longstanding controversy about this issue.

Introduction

In 2018, the Appeal Panel of NCAT determined that NCAT had power to award a lot owner compensation for losses arising out of a breach by an owners corporation of its duty to repair the common property: see *The Owners – Strata Plan No. 30621 v Shum* [2018] NSWCATAP 15. In 2019, another Appeal Panel of NCAT reached a different conclusion and held that NCAT did not have power to order an owners corporation to pay a lot owner damages for losses suffered due to defects in the common property: *Shih v The Owners – Strata Plan No. 87879* [2019] NSWCATAP 263. On 15 January 2020, an appeal panel comprised of the President, Deputy President and a Principal Member of NCAT handed down a decision confirming that NCAT does not have power to award a lot owner compensation for losses suffered as a result of an owners corporation's failure to repair common property: *The Owners – Strata Plan No. 74835 v Pullicin; The Owners – Strata Plan No. 80421 v Vickery* [2020] NSWCATAP 5. The decision in *Pullicin and Vickery* is likely to be followed by NCAT in the future. This means that claims by lot owners for compensation against owners corporations owing to a failure to repair common property will need to be made in a Civil Court.

Facts

The *Pullicin and Vickery* cases involved similar facts. Mr and Mrs Pullicin own an apartment in Sydney. Mr Vickery owns an apartment in Newcastle. Water penetrated into the apartments owned by the Pullicins and Mr Vickery through defects in the common property outside their apartments. Those defects were not promptly fixed by the owners corporations. The Pullicins and Mr Vickery could not rent their apartments due to the water penetration as a result of which they sued their owners corporations in NCAT for compensation to cover their loss of rent as a result of a breach by the owners corporations of their statutory duty to properly maintain and keep in good repair the common property. The Pullicins and Mr Vickery were initially successful and NCAT awarded them close to \$100,000.00 each in compensation. Each owners corporation appealed against NCAT's compensation orders to the Appeal Panel. The owners corporations argued that NCAT did not have power to award compensation to a lot owner as a result of a breach by an owners corporation of its duty to maintain and repair the common property.

The Decision

The Appeal Panel was constituted by three persons – the President and Deputy President of NCAT and a Principal Member. The Panel concluded that NCAT did not have power to order an owners corporation to pay damages to a lot owner to compensate the owner for his or her losses as a result of a breach of an owners corporation's duty to maintain and repair the common property. In reaching that conclusion, the Appeal Panel held that the *Shum* and *Shih* cases were incorrectly decided and that, in the future, it is to be expected that NCAT will follow its decision and not the earlier decisions in *Shum* and *Shih*.

The Reasoning

The Appeal Panel concluded that NCAT does not have power to award compensation to an owner owing to a breach by an owners corporation of its duty to repair common property for several reasons.

First, the Appeal Panel held that section 106 of the *Strata Schemes Management Act 2015 (Act)* only creates the right for a lot owner to sue an owners corporation for damages for breach of the duty to repair common property but does not confer on NCAT jurisdiction to award those damages.

Second, whilst section 232 of the Act gives NCAT a general jurisdiction to entertain complaints or disputes between a lot owner and an owners corporation about the operation of a strata scheme or the failure to comply with the duty to repair common property, that does not confer power on NCAT to make an order for damages or compensation in favour of a lot owner in those types of disputes.

Third, there is no section in the Act which expressly or impliedly confers power on NCAT to make orders requiring an owners corporation to pay compensation for a failure to comply with its duty to maintain and repair common property.

Fourth, there is nothing in the Act including the legislative history leading up to the commencement of the Act or the purpose of the Act which would indicate that Parliament intended to give NCAT power to award compensation in circumstances such as these.

The outcome of the case was that the compensation awards made by NCAT in favour of the Pullicins and Mr Vickery were overturned.

Conclusion

This recent decision of the Appeal Panel is expected to be followed by NCAT in the future. This means that lot owners who want to claim compensation from their owners corporations owing to a failure to repair common property will need to bring those claims in a Civil Court.



NCAT still retains jurisdiction to make orders, at the request of lot owners, to require owners corporations to repair common property. However, there is a twist in the tale.

A lot owner who wants to both claim compensation and seek an order to force an owners corporation to repair common property will not be able to do so at the same time. This is because section 232(3) of the Act prevents a person bringing proceedings in both NCAT and a Civil Court at the same time.

This means that a lot owner will need to choose whether they first sue an owners corporation for compensation in a Civil Court or initially apply to NCAT for orders to require an owners corporation to repair common property and later sue for compensation in court.

The decision in the *Pullicin and Vickery* cases clarifies a longstanding uncertainty about NCAT's power to award compensation. It is now clear that NCAT will not award a lot owner compensation for losses caused by an owners corporation's failure to repair common property.

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