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CONSIDERING MEDIATION?

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CONSIDERING MEDIATION?

Mediation is an important part of the dispute resolution processes for strata schemes pursuant to the *Strata Schemes Management Act 2015*. How should your owners corporation deal with a request from a lot owner to attend at Mediation?

A recent decision of the Appeal Panel of NCAT has underlined the need for agreements reached at Mediation to be sufficiently certain if they are to be capable of being enforced under the strata legislation.

This in turn raises questions about how owners corporations should approach Mediation, particularly the most common form of Mediation for strata matters, under the auspices of Fair Trading NSW.

The Recent NCAT Decision – January 2021

In this decision (*Macey's Group Pty Ltd v Owners Strata Plan No 33591* [2021] NSWCATAP 7) the Appeal Panel of NCAT overturned the original NCAT decision to enforce an agreement reached at Mediation between the owners corporation and the lot owner.

The Appeal Panel said that not only was the agreement reached at Mediation insufficiently certain to enable it to be enforceable, but that NCAT did not have the power to “fill in the gaps” which may have existed in the Mediation Agreement.

Background

The owner of a lot (lot 40) in a waterside harbour strata scheme had the benefit of two special by-laws providing common property rights. Those rights gave the lot owner exclusive use in relation to the parking of cars and boat trailers on part of the common property. The owner also operated a marina business on adjoining land, owned by the Crown.

Over time, the owners corporation began to regard some aspects of the common property rights by-laws as being unsatisfactory (to the owners corporation), and sought to negotiate those matters with the owner of Lot 40. As part of that process of negotiation, the lot owner and the owners corporation participated in Mediation at which certain agreements were apparently reached, including an agreement that the common property rights by-law in favour of the lot owner would be repealed and in its place the lot owner would be granted a Commercial Lease.

The Commercial Lease envisaged by the agreement reached at Mediation gave the owner of lot 40 access to relevant common property and facilities, and also set out the basis upon which payments were to be made by the lot owner to the owners corporation.



However, a number of significant features of the proposed Commercial Lease were not fixed or determined as part of the Mediation Agreement.

After Mediation had concluded, the owner of lot 40 reconsidered the wisdom of this “deal”, and did not take any further steps to progress it with the owners corporation. The owners corporation then brought proceedings in NCAT seeking to enforce the Mediation Agreement.

At first instance, before a single Member of the Tribunal, NCAT found that the owners corporation was able to enforce the Mediation Agreement. However, on appeal the NCAT Appeal Panel held that NCAT would not enforce the Mediation Agreement in this instance because:

- there were “holes” in the terms and conditions of the proposed Commercial Lease, and NCAT did not have the power to rectify the Mediation Agreement and “fill” those holes; and
- since NCAT did not have that power, the Mediation Agreement was not sufficiently certain, and therefore as a matter of law, it was not capable of being enforced.

As a result, NCAT refused to require the lot owner to consent to the repeal of original the common property rights by-laws in the lot owner’s favour.

Requirements for Enforceability of Mediation Agreement

In this case, the “missing” elements which prevented there being an enforceable Commercial Lease were reasonably clear – the “missing” items included any proper specification of the term (that is, the length) for the Commercial Lease. Also missing were sufficient other terms setting out to the parties’ obligations and responsibilities.

Not for the first time, the Appeal Panel also raised the question as to whether a Mediation Agreement can ever be capable of enforcement in NCAT because of the “confidential” nature of what takes place in Mediation. For example, the Appeal Panel commented that it may not be possible for a party to be able to give evidence about what a Mediation Agreement actually consisted of because of the confidentiality provision in s223 within the legislation.

Despite this and earlier comments of the Appeal Panel on this issue of enforceability, the *Strata Schemes Management Act 2015* (Section 223) provides an explicit power to enforce Mediation Agreements. On balance we believe it must be possible to do so despite the provisions of s223 of the Act.



Implications for Strata Schemes

In light of this decision, how can owners corporations attend at Mediation confident that their dispute can be resolved “once and for all” if they reach agreement with the other party? To ensure that a dispute can be resolved and finalised at Mediation, an owners corporation probably needs to have some level of advice to ensure that any agreement reached is “sufficiently certain”.

It is not always possible or advisable to have a lawyer attending at a Mediation – indeed, the process utilised by Fair Trading NSW is designed for non-lawyers. For example, if the other party to a Mediation objects to the involvement of a lawyer from the owners corporation, then almost certainly the lawyers will not be allowed to be involved.

Therefore, an owners corporation should, wherever possible, take the following steps to bring the highest level of confidence that a Mediation Agreement will be capable of being enforced:

- the owners corporation should go into the Mediation properly advised in relation to the issues involved;
- if it becomes likely during the course of the Mediation that it may be possible to reach agreement, and if there is any doubt in relation to the terms and conditions of that Mediation Agreement, then the owners corporation should request time to “break out” of the Mediation proceedings, and should obtain advice from its lawyer; and
- if at all possible, the owners corporation should have its legal advisor consider any possible Mediation Agreement, prior to the owners corporation “signing off” on the terms and conditions of the agreement at the Mediation.

There is no doubt that Mediation can be a very powerful tool in resolving strata disputes, and owners corporations should ensure that they are properly advised when authorised in reaching a resolution.

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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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