



JS MUELLER & CO
LAWYERS



NCAT DISHES OUT PUNISHMENT.

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

NCAT DISHES OUT THE PUNISHMENT

In a seminal case, NCAT has imposed a penalty on an owners corporation for failing to comply with an order to repair common property. This decision confirms that NCAT does have power to penalise parties who breach orders and dovetails nicely with new strata laws that are due to commence later this year that will make it easier for NCAT to impose penalties for contraventions of orders.

Background

When the strata laws were rewritten in 2015, the provisions which entitled NCAT to impose monetary penalties on parties who breach its orders was inadvertently omitted. This omission means that the only person who is able to apply to NCAT for a penalty to be imposed on a party who has contravened an order is the NSW Attorney General or a person with his consent or consent of a person authorised by him. In practice, this has made it extremely difficult for an application to be made to NCAT for a penalty to be imposed following a breach of an order due to the difficulty associated with obtaining the Attorney General's consent to bring a penalty application. A recent NCAT case has, however, shown that it is possible to bring a penalty application in NCAT in certain circumstances.

The Case

Mr & Mrs Westbury own an apartment on the ground floor of a strata building in Wollongong. The Westbury's apartment has a patio which leaks. There has been a long running dispute between the Westburys and the owners corporation about the repair of the leaking patio. In January 2019, NCAT ordered the owners corporation to repair the patio to stop it leaking. In October 2019 NCAT made amended orders for the owners corporation to repair the patio by 20 December 2019.

The Problem

NCAT's orders required the owners corporation to repair the patio in accordance with a certain scope of works. However, that scope of works was inadequate and further work needed to be done to stop the patio leaking. The further work involved installing further drainage points in the patio floor. However, this further work required the owners corporation to gain access to a private car space in the basement car park beneath the patio to core drill the new drainage points and run a drainage pipe along the ceiling of that car space. The owners of the car space did not consent to the owners corporation entering their car space and attaching the drainage pipe to the ceiling of the car space. This meant that the owners corporation could not complete the works it had been ordered to perform by NCAT or the further works that were necessary to stop the patio leaking.



The Penalty Application

In 2020, the Westburys obtained the consent of the NSW Solicitor General to apply to NCAT for the owners corporation to be penalised for failing to comply with the rectification order concerning the patio. This meant that the Westburys could (and did) apply to NCAT for the owners corporation to be penalised for breaching that order. The Westbury's were successful. NCAT imposed a \$6,600.00 penalty on the owners corporation for breaching the rectification order and ordered the owners corporation to pay the Westbury's costs.

Key Points

A three member NCAT panel made the following key findings in the penalty application:

- (a) NCAT had the power to impose a penalty for a breach of its orders but the exercise of that power is discretionary meaning NCAT does not have to impose a penalty if it is not appropriate to do so;
- (b) the purpose of imposing a penalty is primarily to deter the party in breach of the order from repeating the breach and to deter others who might be tempted to contravene orders made by NCAT;
- (c) all of the circumstances of the case must be considered when determining the amount of penalty to be imposed and the maximum penalty should be reserved for the worst possible case and provides a form of yardstick to measure the amount of the penalty that should be imposed in any particular case;
- (d) other factors such as punishment and rehabilitation have a role to play in helping determine the appropriate amount of the penalty;
- (e) NCAT will not impose a penalty just because the parties agree that it is appropriate to do so – NCAT must be satisfied that it is appropriate for a penalty to be imposed;
- (f) even though the owners corporation could not comply with the rectification order (because the car space owners would not agree to give it access to their car space to carry out essential work), that did not provide the owners corporation with a reasonable excuse for the breaching the order;





- (g) once the owners corporation realised that it would not be able to comply with the rectification order on time or at all, it should have applied to NCAT to stay or extend the time for compliance with the rectification order (but it did not do so);
- (h) the maximum penalty that can imposed on an owners corporation for breaching an NCAT order is \$22,000.00;
- (i) a penalty equal to 30% of the maximum should be imposed on the owners corporation largely because the owners corporation had made little attempt to comply with the rectification order, the owners corporation had taken no formal steps to secure a right to carry out work in the car space (eg. by obtaining a court imposed easement to permit the drainage pipe to be installed along the ceiling of the car space), and the Westburys had been unable to use the patio;
- (j) NCAT can make payment of a penalty conditional by, for example, only requiring the owners corporation to pay a penalty if the necessary rectification work had not been completed by a certain date (but declined to do so in this case because it was not clear by when the owners corporation would be able to comply with the order);
- (k) the appointment of a compulsory strata manager to manage the Westbury's building did not relieve the owners corporation from responsibility for failing to comply with the rectification order or mean that NCAT could not impose a penalty on the owners corporation itself;
- (l) a penalty application is out of the ordinary, there are few remedies available to a party confronted with a breach of an order by another party and a party pursuing a penalty application can also be seen as acting in the public interest in prosecuting the application as a result of which it is more likely that the party pursuing a penalty will be entitled to an award of costs in its favour.

Conclusion

The *Westbury* case makes clear that it is possible for NCAT to penalise a party who has breached an order where the NSW Solicitor General consents to the penalty application proceedings. The case also sets out factors that NCAT will take into consideration when determining whether it should impose a penalty and, if so, the amount of the penalty. The *Westbury* case dovetails nicely with provisions in the *Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2021* which are expected to become law later this year which will give NCAT the power to require a person to pay a penalty of up to \$5,500.00 (without the consent of the NSW Attorney General) for breaching an order made by NCAT.



Westbury v The Owners – Strata Plan No. 64061 [2021] NSWCATEN 3

Adrian Mueller

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

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JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of all strata law inclusive of by-laws, building defects and levy collections.

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



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