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NCAT CONFIRMS THAT IT CANNOT IMPOSE PENALTIES

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NCAT CONFIRMS THAT IT CANNOT IMPOSE PENALTIES

In a recent decision, NCAT has confirmed that it does not have power to impose monetary penalties on persons who breach orders made by NCAT. This decision highlights an important flaw in the new strata legislation which needs to be fixed by legislative amendment.

Introduction

On 31 October 2017, NCAT handed down its decision in *The Owners – Strata Plan No. 82306 -v- Anderson* [2017] NSWCATCD 85. The *Anderson* case involved an Application by an owners corporation to NCAT for a monetary penalty to be imposed on a lot owner, Ms Anderson, for breaching an order made by a Strata Schemes Adjudicator. In the course of deciding the case, NCAT confirmed that it does not have power to impose a monetary penalty on a person who breaches an order made by NCAT.

Background

Ms Anderson is the owner of lot 2 in a strata scheme. In January 2011, the owners corporation of Ms Anderson's building made a by-law dealing with floor coverings. The by-law required any owner who intended to change the floor coverings in his or her lot to first apply to the owners corporation for approval to do so, to ensure that any new floor coverings that were not carpet met certain acoustic standards and to provide the owners corporation with an acoustic report to demonstrate that the changed floor coverings complied with those acoustic standards. On 24 November 2015, Ms Anderson removed carpet and underlay in her lot and polished the concrete floor slab. This was done without the consent of the owners corporation.

Strata Adjudication

The owners corporation alleged that Ms Anderson breached the by-law by failing to obtain its consent to change the floor coverings in her lot and by failing to provide an acoustic report to confirm that the new floor coverings in her lot, namely the polished concrete slab, complied with the acoustic standards specified in the by-law. On 12 April 2016, the owners corporation applied to a Strata Schemes Adjudicator for orders to require Ms Anderson to comply with the by-law under the *Strata Schemes Management Act 1996*. On 30 June 2016, the Adjudicator ordered Ms Anderson to replace the floor finish in her lot with either a soft or a hard floor that complies with the acoustic standards specified in the by-law and to obtain an acoustic report in accordance with the by-law.

Penalty Application

Ms Anderson was given notice of the Adjudicator's order. However, she did not comply with it despite repeated requests by the owners corporation for her to do so. For that reason, on 18 May 2017, the owners corporation applied to NCAT for an order that Ms Anderson pay a pecuniary penalty for breaching the Adjudicator's order.

The Problem

The Adjudicator's order was made under the *Strata Schemes Management Act 1996* (**1996 Act**). The 1996 Act gave NCAT power to impose a pecuniary penalty on a person who breached an Adjudicator's

order in an amount of up to \$5,500. However, on 30 November 2016, the 1996 Act was repealed and replaced by the *Strata Schemes Management Act 2015* (**2015 Act**). The 2015 Act abolished strata adjudications and does not give NCAT power to impose a pecuniary penalty on a person who breaches an order made by NCAT. This created a problem for the owners corporation because it was unclear if

NCAT had power to impose a penalty on Ms Anderson for breaching the Adjudicator's order.

Discussion of the Problem

NCAT agreed that the 2015 Act does not give it power to make an order imposing a pecuniary penalty on a person who breaches an order made by NCAT. NCAT also considered that the *Civil and Administrative Tribunal Act 2013* (**NCAT Act**) did not give the owners corporation standing to apply for a pecuniary penalty to be imposed on Ms Anderson for breaching the Adjudicator's order.

Indeed, NCAT observed that whilst section 72(3) of the NCAT Act prohibited a person, without reasonable excuse, from contravening an order made by NCAT, sections 75 and 77 of the NCAT Act made clear that only the NSW Attorney-General or a person with the written consent of the Attorney-General or a person authorised by the Attorney-General for that purpose is entitled to apply to NCAT for an order that a person pay a monetary penalty for breaching an order made by NCAT.

As the owners corporation, understandably, did not have the written consent of the Attorney-General to apply to NCAT for a monetary penalty to be imposed on Ms Anderson, it did not have standing to apply to NCAT for the penalty to be imposed under the NCAT Act as a result of which the owners corporation's Application for the imposition of the penalty under the NCAT Act was dismissed: see [42]-[44].

The Saviour

However, ultimately NCAT concluded that it was entitled to impose a penalty on Ms Anderson, at the request of the owners corporation, under the 1996 Act even though that Act has been repealed. This is because section 30 of the *Interpretation Act 1987* operated to preserve the right of the owners corporation to apply for a penalty to be imposed on Ms Anderson under the 1996 Act as if that Act had not been repealed largely because the Adjudicator's order was made under that Act. In the end result, NCAT gave Ms Anderson until 12 January 2018 to comply with the by-law by changing her floor coverings and delivering an acoustic report to demonstrate compliance with the by-law and determined that if Ms Anderson does not comply with the by-law by that date she is to pay a pecuniary penalty of \$2,500 to the Director-General of the Department of Fair Trading.

Legislative Reform

The *Anderson* case highlights a flaw in the 2015 Act. The flaw is that NCAT does not have power, at the request of an owners corporation, to impose a monetary penalty on a person who breaches an order made by NCAT under the 2015 Act such as an order for the person to comply with a by-law. This is a significant flaw in the 2015 Act which should be corrected by legislative amendment.





A Glimmer of Hope

An owners corporation which wishes to enforce an order made by NCAT against a person who has breached the order is not without remedy. There is scope for an owners corporation to apply to NCAT for the person to be held in contempt of NCAT and appropriately punished under the NCAT Act. There is

also the possibility for the owners corporation to apply to NCAT to have the case re-listed for the purpose of further orders being made, for example, orders permitting the owners corporation to carry out any work the person is required to perform under the initial order made by NCAT and, for that purpose, to require the person to give the owners corporation access to his or her lot. And there remains scope for the owners corporation to apply to the Supreme Court to enforce an order made by NCAT.

About JS Mueller & Co

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for over 30 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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