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THE LAKEWOOD ESTATE — A UNIQUE STRATA SCHEME THAT HAD A UNIQUE PROBLEM

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The Lakewood Estate is one of the first and only rural strata schemes in NSW. The unique nature of the Lakewood Estate created a unique problem that had confronted the owners corporation for many years which was recently resolved by NCAT.

Introduction

The Lakewood Estate was created in 1985 by the registration of Strata Plan No. 30123. The Estate is situated in Jindabyne, NSW and contains 100 lots and common property. The lots in the Estate contain free standing houses and outbuildings that are situated on acreages. The common property includes a free standing community hall, roads and paddocks. The Estate is large and occupies 806 acres of rural land.

The Unique Problem

For many years, the owners in the Lakewood Estate had insured their own houses and outbuildings. However, in 2011, it emerged that the owners corporation was responsible for insuring the houses and outbuildings situated on the lots. This is because the strata legislation requires the owners corporation to insure all of the buildings in the Estate, even buildings that do not contain any common property such as the houses and outbuildings on the lots. The owners did not want the owners corporation to insure their houses and outbuildings. Instead, they wanted to continue to do so by securing their own building insurance policies with their own preferred insurers.

What did the Owners Corporation do about the Problem?

Initially, the owners corporation obtained advice from Land & Property Information NSW (now NSW Land Registry Services) that the individual owners were responsible for insuring their houses and outbuildings. The owners corporation also obtained legal advice to the same effect. However, the owners corporation then obtained from the Commissioner for Fair Trading which indicated that the owners corporation was responsible for insuring the houses and outbuildings under the strata legislation. We agreed with that advice.

The Insurance Exemption

The strata legislation gives NCAT power to make an order exempting an owners corporation from the requirements to insure a building or structure if it is unnecessary or impracticable for the owners corporation to do so. This means that NCAT could, at the request of the owners corporation, make an order exempting the owners corporation from the requirement to insure the houses and outbuildings situated on the lots through the Lakewood Estate. However, that type of order was certainly novel and had probably never been made by NCAT, certainly not under the *Strata Schemes Management Act 2015* (Act).



The NCAT Application for the Insurance Exemption

Unperturbed by the prospect of making new law, in January 2018, the owners corporation applied to NCAT for an order to obtain an exemption from the requirement to insure the houses and outbuildings on the lots through the Lakewood Estate. The application was made under section 172 of the Act. The owners corporation argued that NCAT should make an order exempting it from the requirement to insure the houses and buildings on the lots because:

- the owners corporation had passed a unanimous resolution at a general meeting to apply to NCAT for that order;
- it was unnecessary for the owners corporation to insure the houses and outbuildings on the lots because:
 - the owners corporation did not own, and was not responsible for maintaining, the houses and outbuildings on the lots and therefore derived no benefit from any insurance cover over those building;
 - individual owners are able to, and would prefer to, insure their buildings, rather than have the owners corporation do so under a blanket insurance policy, and the owners already did so;
 - none of the individual owners would be prejudiced if the owners corporation was no longer required to insure the houses and outbuildings on the lots;
- it was impracticable for the owners corporation to insure the houses and outbuildings on the lots because:
 - the owners corporation would need to provide its insurer with a full insurance claims history for all of the 100 lots in the Estate to comply with its duties of utmost good faith and disclosure that it would owe the insurer and it could not do so;
 - the owners corporation would need to have all of the buildings on the lots valued for insurance purposes periodically to ensure it obtained adequate insurance cover each year, which would be prohibitively expensive;
 - the excess payable under the insurance policy taken out by the owners corporation would need to be high to keep the insurance premium low which meant that typical claims for broken windows and storm damage would not be worthwhile pursuing;
 - all of the owners would bear the cost of the insurance premium payable by the owners corporation in shares proportional to the unit entitlements of their lots which would not be fair because the premium would be calculated based on the replacement value of the houses and outbuildings on the lots, not the unit entitlements of the lots.



NCAT's Decision

NCAT agreed with the arguments of the owners corporation. NCAT concluded that it was unnecessary and impracticable for the owners corporation to be required to insure the houses and outbuildings on the lots for the reasons given by the owners corporation. Consequently, NCAT made an order under section 172 of the Act exempting the owners corporation from the requirement to insure the houses and outbuildings on the lots. In doing so, NCAT remarked that the strata legislation had not taken into consideration the wide variety of strata schemes that now exist, including schemes in which the buildings situated on the lots do not contain any common property (such as small schemes or rural schemes like the Lakewood Estate) where it is not appropriate for the owners corporation to insure those buildings.

Conclusion

The order made by NCAT brought to an end the longstanding uncertainty concerning the responsibility of the owners corporation to insure the buildings on the lots in the Lakewood Estate. The NCAT order makes it clear that the owners corporation is not responsible for insuring those buildings and that the individual owners need to do so. NCAT's decision is a victory for commonsense and demonstrates that, in appropriate circumstances, NCAT is able to make orders to relieve an owners corporation from having to comply with its insurance obligations under the strata legislation.

JS Mueller & Co Lawyers acted for the owners corporation in the NCAT case.

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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 almost 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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