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# A LOAD OF RUBBISH

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## A LOAD OF RUBBISH

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In a surprising decision, the Supreme Court has recently held that lot owners are able to start legal action in NCAT to force an owners corporation to grant them a licence to use common property before the owners corporation has rejected their proposal for a licence. This decision will alter the strategy of some owners who want to obtain special rights over areas of common property and may result in the commencement of litigation to gain leverage over an owners corporation.

### THE FACTS

Mr & Mrs Turek own and operate a convenience store from a lot in a mixed use strata building in the inner Sydney suburb of Chippendale. They wanted to be allowed to store commercial waste in a bin area on the common property. They needed the permission of the owners corporation to do so.

In April 2019, Mr & Mrs Turek started legal action against the owners corporation in NCAT. In the NCAT case, they sought an order granting them a licence to store the commercial waste from their convenience store in the common property bin area. That order was sought under section 131 of the *Strata Schemes Management Act 2015* (**Strata Act**).

Section 131 allows NCAT to order that an owner may use common property in a certain way. But section 131 says that NCAT cannot make that order unless (among other things) it is satisfied that the owners corporation has refused to grant the owner a licence to use the common property in that way.

### THE HEARING

The hearing of the NCAT case took place in November 2019. By that stage, Mr & Mrs Turek had not submitted a licence to the owners corporation to permit them to store commercial waste in the common property bin room. For that reason, the owners corporation had not refused to grant them a licence to use the bin room and the owners corporation asked for their claim to be dismissed on the basis that NCAT did not have jurisdiction to make an order under section 131.

NCAT did not dismiss Mr & Mrs Turek's application. Instead, NCAT adjourned the case, ordered Mr & Mrs Turek to give the owners corporation a proposed licence agreement for the use of the bin room by them and ordered the owners corporation to hold a general meeting by January 2020 to consider the bin room licence. Mr & Mrs Turek submitted their proposed licence agreement and it was considered at a general meeting held in January 2020, but the owners corporation did not make any decision in relation to the licence. The owners corporation did not reject it or approve it.



## **THE NCAT APPEAL**

In November 2019, the owners corporation appealed to the Appeal Panel of NCAT against the decision by NCAT to adjourn the hearing rather than dismiss Mr & Mrs Turek's claim. The appeal was unsuccessful. The Appeal Panel held that NCAT was entitled to adjourn the hearing to facilitate the determination of the dispute between the owners corporation and Mr & Mrs Turek "in a just, efficient and cost effective manner" because if Mr & Mrs Turek's claim was dismissed there was a likelihood that they would simply submit a licence agreement to the owners corporation and then file another NCAT application.

## **THE SUPREME COURT APPEAL**

The owners corporation appealed against the decision of the Appeal Panel to the Supreme Court. The appeal was unsuccessful.

The Supreme Court concluded that by the time of the hearing, NCAT was not able to make an order granting Mr & Mrs Turek a licence to use the bin room under section 131 because, by that stage, the owners corporation had not yet refused to grant a licence. However, the Supreme Court held that NCAT did have the power to adjourn the case until there had been a refusal by the owners corporation to grant the licence, even though Mr & Mrs Turek had filed their application with NCAT before the owners corporation had refused to grant them that licence. The Supreme Court found that, in those circumstances, NCAT did not have to dismiss Mr & Mrs Turek's claim (even though it could have done so) and was entitled to adjourn the hearing to give the parties more time to sort out their dispute.

The owners corporation also challenged NCAT's power to order Mr & Mrs Turek to provide a draft bin room licence and the order compelling the owners corporation to hold a general meeting to consider that licence. The Supreme Court considered that there was some doubt as to whether NCAT had the power to make those orders but ultimately did not have to decide the issue because the owners corporation did convene the general meeting to consider the draft licence within the time provided for by the order. For that reason, the owners corporation's challenge was a moot one.

## **CONCLUSION**

The *Turek* case produced a surprising outcome. The conclusion the Supreme Court reached is that an owner who wants to be granted a licence to use part of the common property in a particular way can start legal action against the owners corporation in NCAT to seek an order for that licence to be granted before the owners corporation has rejected the licence. The Court also concluded that NCAT is entitled to adjourn the hearing of a case to give the parties more time to resolve their dispute (even if NCAT does not have power to make an order to resolve the dispute at the time of the hearing) if that will allow



the parties to sort out their dispute in a just, quick and cheap manner.

The outcome of the *Turek* case may change the strategy that is adopted by owners who want their owners corporation to grant them rights over the common property, encourage owners to start legal action in NCAT earlier than they previously would have and potentially result in owners using an NCAT case as leverage to obtain the outcome they desire from the owners corporation.

Ultimately the case gives NCAT a mandate to attempt to resolve strata disputes in a more flexible way. It remains to be seen if the approach adopted in the *Turek* case is followed in subsequent cases: see *The Owners – Strata Plan No. 70871 v Turek* [2020] NSWSC 1027.

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**About JS Mueller & Co Lawyers**

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