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DOES YOUR OWNERS CORPORATION HAVE A MISBEHAVING BUILDING MANAGER? NCAT GIVES SOME HOPE WITH FIRST- TIME ORDERS TO TERMINATE CARETAKER AGREEMENT!

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NCAT GIVES SOME HOPE WITH FIRST-TIME ORDERS TO TERMINATE CARTAKER AGREEMENT!

A recent decision of the NSW Civil and Administrative Tribunal has broken new ground in making orders for the termination of a Building Manager Agreement pursuant to s72 of the *Strata Schemes Management Act 2015* (the **Act**). In particular, the finding in this case was that the caretaker (building manager) had failed to perform the relevant agreement satisfactorily, and that the building manager agreement, in the circumstances of the case, was harsh, oppressive, unreasonable or unconscionable.

Owners Corporations which are burdened with 'misbehaving' building managers and/or historic, long-term caretaker agreements may wish to consider whether their particular circumstances might provide a basis for freeing themselves from those agreements. In this article, we explore some of the issues set out in s72 of the Act that were considered by NCAT for the first time.

Background

The strata plan in this case was registered in January 2001 and covers two buildings in Ultimo, Sydney that were originally developed by Meriton. In October 2000, Meriton sold the caretaker management rights to a building management company which has had control of those rights since that time.

In 2020, the Owners Corporation received for the first time a full copy of the Caretaker Agreement and were surprised to discover that the Caretaker Agreement only provided for annual increases in management fees in accordance with the CPI – but their building manager had in fact been charging annual increases of 5% since October 2000.

Unsurprisingly, the Owners Corporation was shocked at this discovery and investigated other aspects of the Caretaker Agreement and the behaviour of the building manager under that Agreement. The Owners Corporation was dissatisfied with the performance of the building manager and ultimately commenced proceedings in the NSW Civil and Administrative Tribunal seeking an order that the Caretaker Agreement be terminated pursuant to s72 of the Act. Specifically, the Owners Corporation sought an order on the basis of several parts of s72(3) including:

- that the building manager had performed the agreement unsatisfactorily;
- that charges payable by the Owners Corporation under the agreement were unfair;



- that the Caretaker Agreement was, in the circumstances of the case, harsh, oppressive, unconscionable, or unreasonable.

What did the Building Manager do?

The Owners Corporation claimed that the building manager's conduct and performance of the Caretaker Agreement was unsatisfactory. NCAT agreed. NCAT found, for example, that:

- the building manager had refused to perform the Caretaker Agreement because it had not provided access to CCTV footage, had failed to provide keys when requested by the secretary of the Owners Corporation, and most fundamentally had failed to provide the Owners Corporation with a proper copy of the Caretaker Agreement until 2020;
- the building manager had unsatisfactorily performed the Caretaker Agreement by charging based on 5% annual increases instead of the CPI increases specified in the Caretaker Agreement;
- the building manager had unsatisfactorily performed the Caretaker Agreement by the principal of the building manager being a member of the strata committee;
- the building manager had unsatisfactorily performed the Caretaker Agreement by the conduct of its employee improperly commencing and pursuing Supreme Court proceedings in the name of the Owners Corporation attempting to prevent the 2020 AGM from going ahead, without proper authority or instructions; and
- the building manager had unsatisfactorily performed the Caretaker Agreement through the conduct of the principal and employees of the building manager prior to the 2020 AGM where they falsely represented that the AGM had been cancelled which conduct was borne out of a desire to control the Owners Corporation rather than to serve the Owners Corporation, as required by the Caretaker Agreement.

"Gross Misconduct"?

The Caretaker Agreement included a provision which entitled the Owners Corporation to terminate the Agreement where the building manager engaged in "gross misconduct". The Owners Corporation by commencing the proceedings, and seeking an order pursuant to s72 of the Act, had not sought to rely upon the conduct of the building manager amounting to "gross misconduct", and instead left the decision as to whether the Caretaker Agreement should be terminated in the hands of NCAT pursuant to s72 of the Act.

However, in this case, NCAT found that the conduct referred to above constituted "gross misconduct" in terms of that expression used in the Caretaker Agreement.



Therefore, if for some reason it was found that NCAT did not have power under section 72 of the Act to terminate the Agreement, the Owners Corporation would nonetheless have been justified in terminating the Agreement based upon the building manager's "gross misconduct".

Additional Conduct by the Building Manager

Apart from the conduct of the building manager being found to constitute a failure to satisfactorily perform the Caretaker Agreement, NCAT also found that there was a basis for terminating the Caretaker Agreement because it found that the charges payable by the Owners Corporation were unfair, pursuant to s72(3)(b) of the Act.

In particular, the Tribunal found:

- that by charging 5% annual increases, not being an agreed variation to the Caretaker Agreement, those charges were unfair; and
- additional fees which had been charged to the Owners Corporation but not authorised by the Owners Corporation or by the Caretaker Agreement were also unfair.

Can the Provisions of s72 of the Act be Used by an Owners Corporation?

Arguments were raised in the case as to the application of the Act in circumstances where the Caretaker Agreement predated the current strata legislation – in particular, this Caretaker Agreement was entered into in October 2000.

The good news for Owners Corporations is that even where Caretaker Agreements are entered into prior to 2016, there are circumstances where section 72 of the Act will still apply and enable Owners Corporations to terminate a Caretaker Agreement pursuant to that section.

Obviously, each Caretaker Agreement and its particular circumstances will need to be looked at on a case-by-case basis.

Termination Under the Caretaker Agreement or pursuant to s72 of the Act? A Lesson on Strategy

The Caretaker Agreement which was considered by NCAT in this case had, as referred to above, a clause which entitled the Owners Corporation to terminate the Agreement where the building manager had engaged in "gross misconduct or gross negligence". The difficulty for an Owners Corporation is that if it terminates a Caretaker Agreement in reliance on that clause, and a Court or Tribunal later determines that the conduct of the caretaker/building manager did not amount to "gross misconduct or



gross negligence”, then the Owners Corporation could be liable to pay damages to the caretaker/building manager for the wrongful termination of the Caretaker Agreement.

Exactly such an outcome has occurred in New South Wales in recent years.

However, by utilising s72 of the Act, the decision of whether to terminate the Caretaker Agreement is placed into the hands of NCAT. Although the decision will not come about as quickly or simply as a decision being made to terminate by the Owners Corporation itself under the Caretaker Agreement, the utilisation of this section of the *Strata Schemes Management Act 2015* provides an Owners Corporation with some protection from the possibility of having to pay damages to a building manager/caretaker for wrongful termination of the Caretaker Agreement.

Other Lessons for Owners Corporations

An Owner Corporation can sometimes be burdened with a Caretaker Agreement entered into long ago at a time when the developer controls the Owners Corporation’s affairs.

Owners corporations can also be burdened with oppressive building managers who operate apparently without regard to the best interests of the Owners Corporation.

This decision of NCAT provides a comprehensive analysis of the operation of s72 of the *Strata Schemes Management Act 2015* and provides a solid framework for an Owners Corporation to consider whether there are grounds to seek the assistance of NCAT to bring an unfair or unsatisfactory Caretaker Agreement to an end.

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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.

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