

NCAT's Dispute Resolution Power – How far does it go?

Section 232 of the Strata Schemes Management Act 2015 (“SSMA”)

Section 232 provides the NSW Civil & Administrative Tribunal (“NCAT”) with a general dispute resolution power. On its face, this is extremely broad. However, recent NCAT decisions indicate that:

- Parties involved in NCAT proceedings have experienced unexpected and inconsistent decisions in relation to the extent of NCAT's powers to make certain kinds of order, although a recent Court of Appeal decision has largely resolved this.
- Parties contemplating NCAT proceedings in relation to strata disputes need to carefully consider:
 - The nature of the dispute and the orders needed to resolve it. That may include orders which are not your preferred option, but which may prove necessary as part of a negotiated settlement.
 - Whether NCAT has power to make those orders or whether it may be necessary to commence proceedings in a court. That in turn raises the question of which court, which necessitates consideration of the jurisdictional limits and order making powers of the various courts.

Scope of Section 232

- Section 232 of the SSMA gives NCAT power to “make an order to settle a complaint or dispute” about any of a wide range of issues. It is much broader than the corresponding provision of the previous strata management legislation, which significantly limited the circumstances in which the power was available.
- Recent NCAT decisions indicate that:
 - An application for specific orders under another section of the SSMA does not preclude an application for orders to the same effect under Section 232.
 - An application may be made for an order that a function be exercised, notwithstanding that the function requires a unanimous or special resolution.
 - NCAT is not prevented from making an order for the payment of damages or subject to a cap on the quantum of such an order.
 - An application to NCAT in relation to a dispute may prevent another party applying for orders in relation to the same subject matter. This may also prevent a party from seeking orders under Section 232 if not sought in the original application, but NCAT appears to have a discretion under Section 240 to make such orders anyway.

Limits on Section 232

Recent NCAT cases have struggled with the proposition that, for NCAT to be able to make an order, power to make the order must be conferred by the SSMA or the Civil and Administrative Tribunal Act 2013 ("NCAT Act"), compounded by the less than ideal drafting of these acts on this point.

Most of these cases concern NCAT's power to award damages against an owners corporation for failure to comply with the owners corporation's statutory duty to repair and maintain common property under Section 106(5) of the SSMA. A recent Court of Appeal decision has largely resolved that issue. *Vickery v The Owners – Strata Plan No 80412 [2020] NSWCA 284*. Key points:

- Sections 106(5) and 232 of the SSMA give the Tribunal power to award damages for loss arising from failure to comply with the owners corporation's statutory duty to repair and maintain common property under Section 106 of the SSMA.
- Whilst the words “settle” and “resolve” used in Section 232 may not confer a specific order making power, they should not be read down to preclude an appropriate remedy within the Tribunal's power in the absence of an express prohibition.

The issue has come up in other contexts and this may continue. For example, the decision of the Tribunal in *The Owners – Strata Plan No 76830 v Byron Moon Pty Limited [2020] NSWCATAP 186*, suggests that the Tribunal doubts that Section 232 gives the Tribunal jurisdiction to order adjustment of levy contributions as between owners in response to incorrectly raised levy contributions. However, the reasoning in that decision on that point is dubious and probably inconsistent with the Court of Appeal decision in *Vickery v The Owners – Strata Plan No 80412 [2020] NSWCA 284*.

We have considerable experience in this area, having been involved in a number of cases of this type and could assist you should you be having problems with these issues.

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