Are Long Tail Building Management Agreements still Enforceable?

A common source of frustration for owners corporations trying to ensure good building management is the long-term building management agreement negotiated by the developer and inherited by the owners corporation. Frequently, this involved sale of building management rights, with little if any regard to the owners corporation's needs and best interests.

Decided cases suggest that the NSW Civil & Administrative Tribunal may be able and willing to terminate such agreements in the right circumstances and that an owners corporation stuck with one should consider taking legal advice to assess whether that is an option for them.

In particular:

- In the New Zealand High Court decision of *Body Corporate 396711 v Sentinel Management Limited* [2012] NZHC 1957 the Court concluded that a management rights agreement was harsh or unconscionable in terms of relevant NZ legislation, because of the combination of its ultra vires clauses, the potential length of its term and the difference in termination rights.

- NCAT Appeal Panel decisions in *Sunaust Properties Pty Ltd v The Owners Strata Plan No 64807 [2022] NSWCATAP 246 (27 July 2022)* and *Sunaust Properties Pty Ltd v The Owners Strata Plan No 64807 (No 2) [2022] NSWCATAP 335 (27 October 2022)* provide some guidance with this issue:

The Owners — Strata Plan No 64807 and Sunaust Properties Pty Ltd were in dispute in relation to a caretaker agreement which had a 10 year term, with 3 x 5 year options to renew, i.e. a total term of 25 years. At the time the dispute came before NCAT, the agreement was in its final option term and due to expire on 15 March 2026.

The owners corporation applied to NCAT for various orders, including an order terminating the caretaker agreement under Section 72 of the Strata Schemes Management Act 2015. Section 72(1) gives NCAT discretion to terminate a building management agreement and Section 72(3) sets out six grounds on which NCAT may do so, three of which were relied on by the owners corporation in this case:

- that the building manager has failed or refused to perform the agreement or has performed it unsatisfactorily.

- that the charges payable under the agreement are unfair.

- that the agreement is harsh, oppressive, unconscionable or unreasonable.

At first instance, the owners corporation was successful and NCAT held (apparently for the first time) that it should exercise its discretion to make an order terminating the agreement on the basis that it was harsh, oppressive, unconscionable or unreasonable. NCAT considered the meaning of "harsh,

BANNERMANS LAWYERS
T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

Liability limited by a scheme approved under Professional Standards Legislation

© Copyright Bannermans Lawyers 2022.

oppressive, unconscionable or unreasonable" and found that the relevant agreement met the criteria on various bases, including:

- Section 72(3)(a) [failure to perform]. NCAT found that Sunaust had refused to perform the agreement by failing to provide various services (e.g. providing access to CCTV footage), had unsatisfactorily performed the agreement by charging fees to which it was not entitled, by a representative being a strata committee member, by its representatives improperly commencing Supreme Court proceedings on behalf of the owners corporation and by its representatives attempting to prevent an AGM taking place by dishonestly representing that the meeting had been cancelled and misrepresenting the nature of NCAT orders.

- Section 72(3)(b) [unfair charges]. NCAT found the charges under the agreement were unfair, including application of an annual increase which had not been agreed (5% rather than CPI) and unauthorised charges for various services.

- Section 72(3)(f) [agreement harsh, oppressive, unconscionable or unreasonable]. NCAT found the agreement to be harsh, oppressive, unconscionable or unreasonable on various grounds, including disparity of termination rights between the parties, lack of preclusion of the caretaker or its shareholders/directors/employees being strata committee members, lack of requirement that the caretaker comply with the strata management legislation and lack of provisions preventing appointment of Sunaust representatives as point of contact for the strata committee.

This was overturned by the appeal panel, but on jurisdictional grounds and the decision remains useful in demonstrating the sort of circumstances which may lead to an order for termination of a building management agreement, where the same jurisdictional problems do not apply. Key points:

- The problem here was that Supreme Court proceedings were already on foot and that Clause 5(7) of Schedule 4 of the Civil and Administrative Tribunal Act 2013 in effect negated NCAT's jurisdiction in these circumstances.

- At first instance, NCAT did not see Clause 5(7) as precluding jurisdiction, essentially because the two sets of proceedings involved different issues and because the principal remedy sought in the NCAT proceedings was termination, that remedy not being available to the Supreme Court.

- The appeal panel took a different view, finding that Clause 5(7) did preclude jurisdiction to hear the application as framed, on the basis that the two sets proceedings arose from the same context of legal and factual issues, giving rise to a realistic risk of concurrent and inconsistent findings by the Supreme Court and NCAT.

- However, the appeal panel also found that NCAT would have jurisdiction to hear an application, if framed so as not to engage Clause 5(7) and rather than dismissing the application, remitted the application to the Consumer and Commercial Division, effectively leaving the owners corporation to decide whether to withdraw the application or prosecute it again in the Consumer and Commercial Division without reliance on issues before the Supreme Court.

NCAT considered an additional jurisdictional point relating to building management agreements in place on commencement of the SSMA on 30 November 2016. Essentially, NCAT held that caretaker agreements commencing on or after 30 November 2016 are vulnerable to a termination order under

© Copyright Bannermans Lawyers 2022.

Section 72, regardless of whether the caretaker has exclusive possession of a lot. The building manager had advanced a technical argument that the effect of transitional provisions under the legislation and a change in the definition of building manager was that NCAT's power to order termination of a prior agreement was limited to circumstances in which the building manager was not entitled to exclusive possession of a lot.

In the circumstances, there will be building management agreements which are vulnerable to challenge. If your owners corporation has been stuck with a building management agreement with which it is having problems, it would be worthwhile taking legal advice, as you may have options.

Key takeaways

- Long-term building management agreements can be challenged in NSW under certain circumstances.
- The NSW Civil & Administrative Tribunal has discretion to terminate agreements deemed harsh or unconscionable.
- Case law indicates that unfair charges and failure to perform can be grounds for termination.
- Owners corporations are encouraged to seek legal advice regarding their building management agreements.
- Recent NCAT decisions provide guidance on the criteria for terminating such agreements.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

Prepared by Bannermans Lawyers
Updated 2 November 2022

BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

Liability limited by a scheme approved under Professional Standards Legislation

© Copyright Bannermans Lawyers 2022.