

NEWSLETTER ISSUE 31 FEBRUARY 2020

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NCAT APPEAL PANEL DECISION – THE TRIBUNAL CANNOT MAKE COSTS AND/OR DAMAGES ORDERS AGAINST STRATA SCHEMES

Last month the NCAT Appeal Panel – consisting of three members – including two presidential members who are judicial officers – overturned two orders given by NCAT Members with respect to S106(5) applications. File reference NSWCATAP 5. The Panel not only considered the provisions of S106, but also S232 which also deals with costs.

S106 (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.

S232 Orders to settle disputes or rectify complaints

(1) Orders relating to complaints and disputes The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following--

(a) the operation, administration or management of a strata scheme under this Act,

(b) an agreement authorised or required to be entered into under this Act,

(c) an agreement appointing a strata managing agent or a building manager,

(d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,

(e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,

(f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.

The Panel, in considering these two sections of the Act, spent considerable time reviewing the powers of NCAT, when an application against a scheme can be lodged for breaching S106 – the obligation to repair and maintain – and finally who can determine the awarding of cost or damages due to a failure to maintain.

The two cases reviewed were SP80412 (in Newcastle) who was instructed to pay Graham Vickery \$97,000.00.

The other was SP74835 (in Sydney) and that scheme was ordered to pay \$73744.76 to the Pullicin's in damages. They had suffered loss of rent due to water penetration to their lot.

Powers of NCAT and its role in disputes

The Appeal Panel found that the Tribunal does not have the power to order damages or compensation for failure to comply with the duty in S106(1) (to repair and maintain). In fact, it is the role of NCAT to only “resolve” an issue lodged before them.

Transcript at (8) the Panel said “*The words “to settle” do not mean that the Tribunal is restricted to making consent orders under s232.*”

(9) Having decided that s232 is not confined to consent orders, the literal or grammatical meaning of the words “to settle” is “to resolve”. These are general words that do not, either expressly or impliedly, confer or impose power on the Tribunal to make an order for damages under s106(5).....



(11) *The 2015 Management Act does not, expressly or impliedly, impose or confer power on the Tribunal to make orders by way of compensation for failure to comply with the duty in s106(1).*”

The Panel concluded that the NCAT Act or other legislation needed to have explicit provisions with respect to order-making powers.

It was noted that the 2015 Management Act did have provisions for the payment of damages, HOWEVER, the important point being that such orders are a matter to be referred to a court of competent jurisdiction, usually either the Local or District Court (depending on the sum involved). This is in keeping with the original Supreme Court case on the requirement to repair and maintain per Siewa’s - see our first Newsletter on our website, as that matter was determined in court, not a Tribunal so Tobias J had the power to award the significant costs to the owner as a result of their losses at the hand of their scheme. Likewise, other cases of importance regarding repairs and maintenance where costs and damages were awarded by Judges, so they stand. No doubt there will be many more appeals lodged since NCAT first issued such orders in error since 2017 when the first one was made after the new legislation started.

When is a scheme in breach of a provision in the legislation (eg S106)

The Judicial Officials note that S232 sets out when a scheme is in breach of a duty, and cost orders may be sought (via a suitable court). *“Failure to exercise a function – For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if –*

- *It decides not to exercise the function, or*
- *Application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.”*

Note – “a function” can be a wide variety of duties under the Act, S106 to repair is only one of these.

Of further note – the loss suffered due to the failure to repair and maintain (S106(1) must be “reasonably foreseeable” before a lot owner may recover damages as a result of contravention of this section.

EASY TO FIND INFORMATION AND ACTION REQUESTS

If you have a **quick repair request**, the fastest way to log this with us is via our website “Self Services Forms”.

Access this via the tab at the top of our home page.

You can also complete one of these forms for a **key or remote enquiry, to obtain a copy of your scheme’s bylaws, or change your service address for levies and meeting info.**

If you haven’t already looked – you will find a variety of information regarding your scheme on the portal. Each owner has been issued with a password etc to access this.

To log-in, please choose “Client log-in” located above our logo on the home page. You are able to **view and print your lot statement at any time**, to check you are financial before a meeting, or print a copy to take to your accountant for tax purposes.

Committee members can **access copies of work orders and view invoices** paid for up to 2 years from the time the information was entered.

This means you can easily make these enquiries and see certain information, even when we are closed.

PAST NEWSLETTERS

All our past Newsletters, most of which cover a case in NCAT, or Supreme Court, are posted on our website for reference. There’s a good chance whatever your scheme is currently dealing with – we’ve covered a case on it. If not, please let us know through our “How can we help” page on our website and we’ll see what we can find that may help. Just look for the big yellow tick on our home page.

HAVE YOU BEEN AFFECTED BY DODGY BUILDING WORKS?

If you have – or know someone who has been affected by some of the poor building practices of NSW contractors, now is your opportunity to be part of effecting change. The ***Design and Building Practitioners Bill*** is to be put to Parliament very soon. It is currently being held up in the NSW Upper House. **Please write a quick email to your local member asking them to vote in favour of this Bill.**

The loss of faith by the public in this area has had wide reaching ramifications, including people being hesitant to purchase into schemes. To restore this, we need to start with changes to legislation that ensure protection of the consumer from those who do not care about the product they place on the market. It is in all our interests, if we wish to buy or sell a unit in the future, to ensure that changes are made, starting here.