PROGRESSIVE STRATA SERVICES PTY LTD

Passion and Experience

Level 2 (Suite 206)
332 Oxford Street
Bondi Junction NSW 2022
T: (02) 9389 9599
F: (02) 9389 4440
www.prostrata.com.au
ABN 38 346 563 787

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In this update we look at a compensation case before NCAT which awarded an owner more than $55k. Did they get it right? We also consider options for voting at meetings – other than in person - and how your scheme can prevent short term lettings NOW.

NCAT precident

There is rarely a dull moment in strata land and controversy is not uncommon either. There has been more than one occasion where a decision in NCAT and even the Supreme Court has resulted in a different outcome – even in cases where everything seems to be "equal". This of course makes it hard for both ourselves and strata lawyers to advise scheme's how thing may turn out in litigation – whether the scheme is bringing or is defending a case.

Shum's case

In Issue 24 – October 2017 we wrote about the first decision made by NCAT awarding compensation to the Rosenthal's due to the Owners Corporation's failure to repair and maintain the common property – which resulted in damage and losses. The following is an extract from JS Mueller and Co Lawyers Newsflash Sept 2017 – by Adrian Mueller - which highlights the controversy of these decisions by NCAT.

In the Shum case *(Shum v Owners Corporation SP30621 [2017] NSWCATCD 68)*, NCAT awarded an owner of a commercial lot in a strata building in Cremorne Sydney, compensation against an owners corporation in the sum of $55,943.24 for rental loss, levies and rates and interest. Once again, the Shum case concerned a leaking common property roof, which an owners corporation did not repair within a reasonable time, that allowed water to leak into and damage a lot. In this case, the tenant of the lot terminated their lease and ceased paying rent and outgoings under the lease in the form of levies and rates because water leakage through the roof made the lot uninhabitable. NCAT held that it was able to (and should) order the owners corporation to pay compensation. It found that the owner could recover rental loss, outgoings not paid by the tenant, and interest even back before the 2016 legislation came into effect - as a result of the owners corporation's breach of its duty to repair the common property roof.

The Appeal: This decision was appealed with the result being confirmation that NCAT has the power to award compensation – even beyond the intent of the legislation (ref below) – however it could not be retrospective to the legislation coming into effect. Accordingly, the payment the scheme had to make to the owner was reduced to $28,034.11

The controversy: NCAT have concluded that if Parliament did not intend to give it power to make compensation orders, it would have said so in the 2015 Act (much like it did in the 1996 Act). This reasoning overlooks the fact that the 2015 Act contains a number of provisions which specifically empower NCAT to make compensation orders - but only in very specific circumstances, for example, orders to require payment of compensation:

- to a party to a strata management agency agreement or building management agreement (section 72)
- by an owner for overdue levies, interest and recovery expenses (section 86)
- by a developer for raising inadequate levies during the initial period (section 89)
- to a lot owner when a common property rights by-law benefiting that owner is repealed (section 148) and
- to the owner of abandoned goods that are sold by an owners corporation (regulation 33)

If the 2015 Act gave NCAT power to make compensation orders to settle all strata disputes, there would have been no need for any specific provisions to be inserted into the 2015 Act to give NCAT power to make compensation orders in particular circumstances.

Conclusion: NCAT seems to have based its ability to award compensation for such losses (though not on the above list in the legislation) on the fact that the requirement to repair and maintain common property is a strict one based on precedent law.

Be warned: There was some evidence that the tenant suffered a loss of profit due to the water leak. However, while the Tribunal did not have to take this issue any further, it does allude to the possibility of a future case where an owner-occupier of a non-residential lot conducting business from the lot is unable to do so because of a breach of section 106 – the obligation to repair and maintain. Thus, it is not difficult to imagine a scenario where an owner could claim the following as its losses: loss of profits; relocation costs; and rent and outgoings for alternative premises. The cost of these items could be significant.

ELECTRONIC ATTENDANCE AT MEETINGS

Several of our clients have been utilising the option to attend meetings via skype or teleconference. Whilst it is always a good idea to take the 1 hour in the year to meet up with your fellow owners – face to face – to discuss the business of the past year and plan for the upcoming one – we understand that it is not always physically possible to get to the meeting by 6pm.

If you know in advance that you simply won't be able to make it, but you do want to have your say and vote – please let us know at least 24 hours before the meeting if you wish to attend electronically – and we will arrange for the facility to be set up in the board room so you can communicate with your fellow owners during the meeting.

It is also expected that soon you will be able to pre-vote for meetings – however it is noted by our industry that this will not work for the election of the Committee. It is expected that attendance – in person or electronically will always be required for the AGM to achieve an outcome on this motion. It is not possible to elect your committee before the AGM – as all committee positions are stood down at the commencement of the AGM. Like-wise, it is not practical to seek nominations and vote after the AGM, because as agents we need a functioning committee to provide instructions to us at all times.

Proxies – we would remind owners that **only one proxy can be held by any one person for schemes with less than 20 lots**. If you are planning to vote this way – please speak to the person you plan to give your proxy to – to ensure they are not already holding any other proxies – otherwise your vote may not be counted.

RECYCLING/RUBBISH POSTERS – WAVERLEY COUNCIL

We have been working with Waverley Council officers to develop clearer signs for placement on bins, posts for bins rooms and flyers to be handed to residents – to better inform occupants on what items of refuse goes in which bin.

If you would like any of these for your building – please contact your strata manager who will organise for your cleaner to pick them up and deliver/install them at your property.

SHORT TERM LETTING – DOES YOUR SCHEME HAVE AN ISSUE?

On 5 June 2018, new regulations were announced by the NSW Govt – which are yet to come into effect -regarding short-term letting – ie leases for less than 6 months.

Some of the key points of note are:

> Owners corporations will be able to adopt a by-law, with a 75 per cent majority, to stop short-term letting in their block if the host does not live in the unit they are letting out.

> If the host is not present, that residence can be used for short-term holiday letting up to 180 days per year in Greater Sydney, with 365 days allowed in the rest of the state.

> Two strikes and you're out policy for guests and hosts who commit breaches of code (noise levels, damage).

> Failure to comply with code of conduct will result in significant penalties of up to $1.1million for corporations and $220,000 for individuals.

> The introduction of the new framework will require changes to existing laws which must be approved by Parliament.

A code of conduct will also be introduced and include a new dispute resolution process to resolve complaints. Guests or hosts who commit two serious breaches of the code within two years will be banned for five years and listed on an exclusion register.

The code of conduct will be developed in consultation with government agencies, the industry and community. SCA (NSW) – the NSW industry association of which Progressive Strata Services is a member - will be involved in this process.

NSW Fair Trading says the new framework will require changes to existing laws and this still needs to go before the NSW Parliament.