

## WHAT NOT TO DO AS A BUILDING MANAGER

### BACKGROUND

A recent decision of the NSW Civil and Administrative Tribunal (NCAT) has provided Owners Corporations in NSW with what is now seen as a more “risk free” pathway to terminate a Building Management Agreement.

Until recently, if an Owners Corporation was not satisfied with the performance of its Building Manager, it has been usual practice that the Owners Corporation would commence legal action to terminate the Agreement, by alleging that the Building Manager was in substantial breach of one or more of the Agreement terms – or failed to satisfactorily perform the building management duties under the Agreement.

The danger however with this approach has always been that if the Court later decides that the Building Manager was not in substantial breach of the Agreement, the Owners Corporation is then liable to pay substantial damages to the Building Manager for the wrongful termination of the Building Management Agreement.

### SECTION 72 OF THE STRATA SCHEMES MANAGEMENT ACT 2015

1. an order terminating the Agreement,
2. an order requiring the payment of compensation to a party to the Agreement,
3. an order varying the term, or varying or declaring void, any of the conditions of the Agreement,
4. an order that a party to the Agreement take any action or not take any action under the Agreement, or
5. an order dismissing the application.

The section further states that NCAT may make an order under this section on any of the following grounds:

- (a) that the Building Manager has refused or failed to perform the Agreement, or has performed it unsatisfactorily,
- (b) that charges payable by the Owners Corporation under the Agreement are unfair,
- (c) that the Building Manager failed to disclose that he had a direct or indirect pecuniary interest in the strata scheme, or was connected to the developer, and
- (d) that the Agreement is, in the circumstances of the case, otherwise harsh, oppressive, unconscionable or unreasonable.

## THE CASE

The strata plan in this matter was registered in January 2001 and covered 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. However, for whatever reason, the Owners Corporation did not receive a full copy of the Building Management Agreement until 2020!

When the Owners Corporation eventually reviewed the Building Management Agreement, they discovered that the Agreement only provided for annual increases in management fees in accordance with the CPI. The building manager however, had been charging annual increases of 5% – since October 2000.

The Owners Corporation was also dissatisfied with the performance of the Building Manager and ultimately commenced proceedings in NCAT, seeking an order that the Building Management Agreement be terminated pursuant to s72 of the Act. Specifically, the Owners Corporation sought an order on the basis of several parts of s72, including:

- that the Building Manager had performed the Agreement unsatisfactorily;
- that the charges payable by the Owners Corporation under the Agreement were unfair;
- that the Building Management Agreement was, in the circumstances of the case, harsh, oppressive, unconscionable, or unreasonable.

## WHAT THE BUILDING MANAGER DIDN'T DO

On my reading of the case, the Building Manager made a lot of mistakes that would have been avoided, if they had read and understood their Agreement.

For example, the Building Manager:

1. refused to provide the Owners Corporation access to CCTV footage;
2. failed to provide keys when requested by the secretary of the Owners Corporation;
3. failed to provide the Owners Corporation with a proper copy of the Building Management Agreement until 2020;
4. had been charging the Owners Corporation based on 5% annual increases, instead of the CPI increases as specified in the Building Management Agreement;
5. allowed the principal of the Building Management company to be a member of the strata committee, although prohibited under the Building Management Agreement;
6. allowed its employee to improperly commence and pursue 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
7. had, through the conduct of the principal and employees of the Building Manager prior to the 2020 AGM, falsely represented that the AGM had been cancelled, which conduct was allegedly borne out of a desire to control the Owners Corporation, rather than to serve the Owners Corporation, as required by the Building Management Agreement.

## THE DECISION

The finding in this case was that the Building Manager had failed to perform the relevant Agreement satisfactorily, and that the Building Management Agreement, in the circumstances of the case, was harsh, oppressive, unreasonable or unconscionable.

## TAKEAWAYS

- This sounds really basic, but always have a 100% understanding of what your duties are under your Building Management Agreement and don't deviate from the performance of those duties.
- Although not relevant to this case:
  - (a) Diarise your option exercise dates and don't miss them. If you are one day late, you lose the ability to exercise the option (and later options) and your remaining term falls away.
  - (b) Stay in regular touch with your owners by way of a newsletter. Let them know the good things that you do at the complex and remember, you only need 51% of those owners that vote at a meeting of the Owners Corporation (or Body Corporate) to extend the term of your Building Management Agreement.
  - (c) Wherever possible, maintain good lines of communication with your committee and strata manager.

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