STRATA LIVING AND PET BY-LAWS: WHERE DO WE STAND NOW?

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The Appeal Panel of NCAT has recently held that by-laws which prohibited the keeping of pets in three large strata schemes in Sydney are valid and not harsh, oppressive and unconscionable.

The decisions in *The Owners – Strata Plan No 58068 v Cooper* [2020] NSWCATAP 96 ("**Cooper Case"**) and *The Owners – Strata Plan 55773 v Roden; Spiers v The Owners – Strata Plan 77953* [2020] NSWCATAP 95 ("**Roden Case"**) have reversed NCAT's position regarding the validity of by-laws which prohibit pets in strata schemes and have further implications on other types of by-laws which prohibit certain conduct in strata schemes.

The Background

Pet ownership in strata is a contentious issue, especially in strata schemes where a majority of owners do not support the keeping of pets.

The *Strata Schemes Management Act 2015 (NSW) ("***SSMA 2015"***)* contains a new section 139(1) which prohibits by-laws which are harsh, oppressive and unconscionable. There was no equivalent provision in the former *Strata Schemes Management Act 1996 (NSW)* ("**SSMA 1996"***)*.

In 2018, NCAT handed down a decision in *Yardy v Owners Corporation Strata Plan 57237* [2018] NSWCATCD 19 in which it held that a by-law which imposed a blanket ban on pets in a strata scheme was invalid because it was harsh, oppressive and unconscionable. In *Yardy* NCAT said that a prohibition on pets was contrary to contemporary community standards.

Subsequently, in 2019, NCAT issued two high profile decisions involving the keeping of pets in two large strata buildings in Darlinghurst. In both of those decisions, NCAT overturned no pets by-laws.

The Roden Case

The Roden Case involved the Elan, a 40-storey building in Darlinghurst which has over 200 lots. In 2013, the owners corporation of the Elan passed a by-law which imposed a blanket ban on the keeping of pets in the lots or the common property. An owner who was dissatisfied with the pet ban challenged the by-law in NCAT on the basis that the owners corporation did not adequately review the arrangements for the keeping of pets and the no pets by-law was harsh, oppressive and unconscionable.

The Cooper Case

The Cooper Case involved the Horizon, a 43-storey building in Darlinghurst. The Horizon had a developer by-law which imposed an outright ban on the ownership of animals in the strata scheme. In 2016, the developer by-law was repealed and was replaced with a similar by-law on almost identical terms except for allowing assistance animals. In 2019, the owners corporation of the Horizon commenced proceedings in NCAT to enforce the by-law against an owner who moved her dog into the apartment in 2016. The owner responded by challenging the validity of the by-law.

NCAT's Initial Decisions

NCAT held in both cases that the by-laws which imposed blanket pet bans were invalid because they were harsh, oppressive and unconscionable in their operation. NCAT concluded that the no pets by-laws contravened section 139(1) of the SSMA 2015 and should be invalidated under section 150.

The first instance decision in *Cooper* stated that the no pets by-law was harsh, oppressive and conscionable in the specific circumstances of the case because there was uncontradicted evidence that the owner's dog was suitable for strata living.

The owners corporations of the Elan and the Horizon appealed the first instance decisions of NCAT.

NCAT's Appeal Decisions

The Appeal Panel of NCAT held that the no pets by-laws in the Elan and Horizon were valid. The Appeal Panel set out the following general principles in reaching its decision:

(a) a by-law which prohibiting the keeping of animals that was valid under the SSMA 1996 did not become invalid upon the passage of the SSMA 2015;

(b) a valid by-law under the SSMA 1996 is capable of being declared invalid under section 150 SSMA 2015 on the basis it is harsh, oppressive and unconscionable;

(c) a by-law which bans pets is not in itself harsh, oppressive and unconscionable;

(d) there is no obligation on an owners corporation defending an application by an owner under section 150 to invalidate a by-law to prove that it has reviewed that by-law or that such a by-law is objectively justified;

(e) the test of whether a by-law is harsh, oppressive and unconscionable is objective;

(f) the degree of severity for the standard of "harsh, oppressive and unconscionable" is higher than the standard of "unreasonable". In other words, the bar to show that a by-law is harsh, oppressive and unconscionable is set very high.

The Appeal Panel placed significant weight on the circumstances of the case in deciding whether a by-law is harsh, oppressive and unconscionable in its operation. In the Cooper Case, the Appeal Panel found Ms Cooper's awareness of the pet prohibition when she purchased her lot in the Horizon, made it much more difficult for her to demonstrate that the no pets by-law was harsh, oppressive or unconscionable.

When will a by-law be harsh, oppressive or unconscionable?

The Appeal Panel said that any type of by-law might be invalid because it is harsh, oppressive or unconscionable in the following circumstances:

(a) by its terms, the by-law is harsh, oppressive or unconscionable;

(b) by the passing of the by-law, an owners corporation may impose an obligation upon or remove an existing right from a lot owner;

(c) Upon consideration of the particular facts and circumstances of a lot owner that might arise from time to time, an existing by-law may operate in a manner which is harsh, unconscionable or oppressive.

What does this all mean?

The Appeal Panel decisions have confirmed that, in most cases, no pets by-laws are valid and enforceable. The decisions also have broader implications on other types of by-laws which prohibit conduct in a strata scheme. It is now more difficult to argue that by-laws which prohibit certain activities should be invalidated on the basis they are harsh, oppressive and unconscionable.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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