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PETS OWNERS REJOICE

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PETS OWNERS REJOICE

The NSW Court of Appeal has overturned a by-law banning pets in the Horizon building in Sydney. This decision means that "no pets" by-laws are unenforceable. This will require owners corporations with "no pets" by-laws to rethink their approach to the keeping of pets in their buildings and likely result in the replacement of "no pets" by-laws with by-laws that restrict (but do not ban) the keeping of pets in strata buildings.

Introduction

Earlier this week, the NSW Court of Appeal delivered its decision in *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250. This is the latest decision in a long running dispute involving the question of whether an owners corporation could rely on a by-law that imposes a blanket ban on the keeping of pets in a residential strata scheme in Sydney.

The Court of Appeal overturned the earlier decision of the Appeal Panel of the NSW Civil and Administrative Tribunal (NCAT), and affirmed the earlier decision of NCAT which found that a by-law which imposes a blanket ban on the keeping of pets is invalid because the by-law is harsh, unconscionable or oppressive under section 139 (1) of the *Strata Schemes Management Act 2015* (**Act**).

The decision is likely to have significant ramifications moving forward and beyond by-laws dealing with the keeping of pets and potentially on the powers of owners corporations in regulating activities in strata schemes through by-laws. The validity of by-laws which impose blanket bans on other activities in the strata schemes may also be in doubt and subject to challenge on the grounds they are harsh, unconscionable or oppressive.

Background

An owners corporation's decision to make by-laws imposing controls on the keeping of pets by owners and occupiers is often a contentious issue. Animal lovers often feel that pets are an essential part of daily life and the keeping of pets brings health benefits to their owners, while opponents often have concerns about noise, allergies, safety and increased cleaning costs. This is becoming more so, especially as there are a growing number of people living in strata schemes.

NCAT has made numerous decisions in the past 2 years about the validity of by-laws which impose outright bans on pets in strata buildings, and those decisions have caused a great deal of conflict in several strata schemes across Sydney.

The issue is complicated because the strata legislation preceding the Act contained a model by-law which allowed owners corporations to impose outright bans on the keeping of pets, and many strata schemes have retained those "no pets" by-laws that were validly made at the time they were introduced . It was

unclear whether those by-laws continued to be treated as being validly made or whether the provisions of section 139 (1) of the Act stating that a by-law must not be harsh, unconscionable or oppressive, would render such by-laws invalid or unenforceable.

In May 2020, the NCAT Appeal Panel overturned two earlier decisions which invalidated pet ban by-laws in two large strata schemes in inner Sydney [see the *Cooper* and *Roden* decisions, dated 27 May 2020]. The NCAT Appeal Panel found the "no pets" by-laws in the Horizon and Elan buildings were valid.

Mr and Mrs Cooper appealed to the NSW Court of Appeal against the decision of NCAT's Appeal Panel in an attempt to keep their miniature schnauzer, Angus, in their apartment in the Horizon building.

The Decision

The three-judge decision of the Court of Appeal unanimously allowed the Cooper's appeal and held that the by-law, which imposed a blanket ban on the keeping of pets (with the exception of assistance animals), was invalid because it was a harsh, oppressive and unconscionable by-law within the meaning of the section 139(1) of the Act..

In reaching their decision, the judges found:

- The test of "harsh, unconscionable or oppressive" under the Act is determined by applying contemporary community standards and focuses on the character of the particular by-law itself rather than the specific circumstances of any particular lot owner;

- The power to make by-laws under section 136 of the Act in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots in a strata scheme is not free from constraint and such power must be exercised by an owners corporation for proper purposes;

- A by-law must be for the "benefit of the lot owners";

- A restrictive by-law that prohibits certain activities within a lot is only valid if it protects from adverse affection the use and enjoyment by other occupants of their own lots, or the common property;

- The by-law which imposed a blanket ban on pets in this case was not valid because it did not satisfy this criteria.

- The by-law was also invalid because it prohibited an ordinary incident of the ownership of real property, namely, keeping a pet.

The Court of Appeal also pointed out that there were laws and model by-laws which could be used to regulate problematic animals, such as barking dogs, and it was unreasonable for owners corporations to impose a blanket prohibition on pets in a manner which interfered with the ordinary rights of lot owners for the mere sake of expediency.

The Ramifications

The Court of Appeal decision has significant ramifications for any strata scheme with a by-law that bans pets because the by-law may now be challenged and rendered invalid by NCAT order under section 150 of the Act.

The decision also has ramifications on other by-laws which purport to restrict certain activities within lots, if it can be demonstrated that those activities do not adversely affect other owners or occupiers in the use and enjoyment of their lots or the common property.

Indeed, sections 139(1) and section 150 of the Act might be relied on by owners to overturn not just by-laws prohibiting the keeping of pets, but other by-laws considered to be harsh, unconscionable or oppressive and consideration needs to be given by an owners corporation as to whether any of its particular by-laws might be subject to challenge in this way.

Care should now be taken in making by-laws with blanket bans, or by-laws targeting the behaviour of a particular person or class of persons.

The Court's decision will require owners corporations with "no pets" by-laws to rethink their approach to the keeping of pets in their buildings and likely result in the replacement of "no pets" by-laws with by-laws that restrict (but do not ban) the keeping of pets in strata buildings.

Conclusion

It is unclear at this stage if the decision of the Court of Appeal will be challenged in the High Court or if the *Strata Schemes Management Act 2015* will be amended to deal with the potential impacts of this decision.

However, pet owners in strata schemes which have adopted blanket bans on the keeping of animals will for now at least breathe a sigh of relief in light of this decision.

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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 inclusive of by-laws, building defects and levy collection.

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