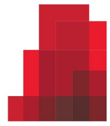

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OPENING SALVO FIRED IN NEW WAR ON PETS

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OPENING SALVO FIRED IN NEW WAR ON PETS

The rules of the game relating to pets in strata buildings have changed. Many owners corporations are not grappling with those new rules and trying to come to grips with them. This has resulted in a shift away from by-laws that ban pets to by-laws which regulate the keeping of pets in strata buildings. But do some of the rules that have been included in new pets by-laws go too far? A recent NCAT case takes a closer look at that issue.

Background

The Elan is a large apartment building in Darlinghurst, Sydney. Previously, the Elan had a by-law banning pets. An owner in the Elan, Mr Roden, applied to NCAT to over turn the "no pets" by-law. Ultimately, Mr Roden was unsuccessful. However, after Mr Roden's case was decided, the NSW Court of Appeal ruled in the *Cooper* case that a "no pets" by-law was not enforceable. For that reason, the Elan repealed its "no pets" by-law and introduced a new by-law regulating pets.

The New Pets By-Law

The new pets by-law requires owners and occupiers of lots in the Elan to obtain the permission of the owners corporation to keep pets or allow their visitors to bring pets into the building. The by-law also contains rules regulating the keeping of pets. Those rules require a $300.00 application fee to be paid to the owners corporation each time an owner or occupier applies to the owners corporation for permission to keep a pet. This is intended to cover the owners corporation's costs for considering the pet application. The by-law also contains rules prohibiting pets in certain areas of the building.

The NCAT Case

Mr Roden objected to the rules in the new pets by-law which require a $300.00 pet application fee to be paid and which also prevent pet owners having their pets with them in the common property lobby when they check their mail. Mr Roden applied to NCAT to over turn those rules on the grounds that they are harsh and unenforceable. Mr Roden's claim was unsuccessful. NCAT considered that those rules are necessary for the proper management, administration, control, use or enjoyment of the lots and common property in the Elan and that those rules enhance or preserve the other lot owners' enjoyment of their lots. For those reasons, NCAT concluded that the rules were not harsh and were enforceable.

The Battle Lines are Drawn

The decision in the *Cooper* case has seen a shift away from by-laws that ban pets to by-laws that regulate the keeping of pets. However, many of the rules that have been included in those new by-

laws are proving to be controversial because often they make it difficult for a pet owner to keep a pet in a strata building. For example, those rules often require pet owners to:

(a) pay the owners corporation a pet application fee or a bond;
(b) carry their animals or keep their animals tethered to a leash when on common property;
(c) ensure their dogs and cats are immunised, microchipped and registered with the local council;
(d) be liable for any damage or injury caused by their pets.

The question remains:

> Are these rules enforceable or do they go too far?

That question is likely to give rise to further litigation in NCAT as pet owners challenge what they perceive to be unreasonable rules regulating the keeping of pets that are included in new pet by-laws.

The Test

Ultimately, the question as to whether rules regulating the keeping of pets are enforceable will depend on several matters. First, the rules will need to be made for the purpose of the management, control, administration, use or enjoyment of the lots in the common property in a strata building. Second, the rules can not be harsh or oppressive. This means that, for example, rules that prohibit pet owners and their animals doing certain things (such as entering or remaining on certain areas of common property) must be necessary to avoid the behaviour of pets that is likely to have a detrimental impact on the use and enjoyment of the lots and common property by other owners and occupiers. However, in our view, those rules will go too far and be harsh and enforceable if they prohibit altogether a pet doing something which is capable of being done in a way that does not have a detrimental effect on the amenity of other owners and occupiers. For example, if it is possible for certain types of pets to enter and remain in common property lifts or gardens without having a detrimental impact on the amenity of other owners and occupiers, a rule in a pets by-law that prohibits pets doing so is likely to be unenforceable.

Conclusion

The shift away from "no pets" by-laws to by-laws that regulate pets has changed the rules of the game regarding pet ownership in strata buildings. What remains to be explored is how far those rules can go. It is likely that there will be further pet owners who will seek to challenge in NCAT rules included in new pets by-laws on the grounds that those rules go too far and are harsh and unenforceable. It remains to be seen how NCAT will deal with those challenges.

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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 all strata law inclusive of by-laws, building defects and levy collections.

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