



Précis Paper

Blanket Bans in Strata Schemes

A discussion about the recent decision of *Cooper v The Owners in Strata Plan No 58068* (2020) NSWCA 250.

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In this edition of BenchTV, Robert Pietriche (Barrister, Banco Chambers, Sydney), Sharon Levy (Partner, Bartier Perry Lawyers, Sydney) and Robert Newlinds (SC Barrister, Banco Chambers, Sydney) discuss the recent decision of *Cooper v The Owners in Strata Plan No 58068* (2020) NSWCA 250.

Background

1. Jo Cooper was the owner of a strata unit in the Horizon Building in Sydney. She had a dog named Angus. The Body Corporate had a rule that said in terms, no pets allowed. The issue before the court was whether that by-law was valid or not.

Position prior to the decision

2. Before *Cooper v The Owners in Strata Plan No 58068* (2020) NSWCA 250 came before NCAT and ultimately the Court of Appeal the legislation had stood from about 2015 and provided that any by-law that was harsh, oppressive or unconscionable was invalid.
3. However, not many people had tried to challenge pet by-laws under the *Strata Schemes Management Act 2015* (NSW). Two cases had come before NCAT and had yielded the same result as ultimately Jo received in the Court of Appeal.
4. The first was a case in 2018 known as *Yardy v Owners Corporation SP 57237* [2018] NSWCATCD 19. In this case, NCAT found at first instance that a blanket pet ban in a Strata Scheme was also invalid under section 139 of the *Strata Schemes Management Act 2015* (NSW).
5. The judgement focused on the fact that a blanket pet ban was not consistent with community standards, it was a type of blunt instrument which did not take into account the interests of all lot owners and it really only prioritised the interests of lot owners who were opposed to pets rather than those who wanted to have pets within the scheme.
6. The position remained consistent and relatively silent on the matter until another case came before NCAT in *Roden v The Owners-Strata Plan No 55773* [2019] NSWCATCD 61. Mr Roden did not own a pet but lived in a building that had a blanket pet ban and he decided it would be nice if the building could allow pets as he wanted his daughter to be able to bring their pet over. He brought an application to NCAT challenging the validity of the blanket ban under section 139 of the *Strata Schemes Management Act 2015* (NSW).

7. It followed the decision in Yardi and concluded that the by-law banning pets entirely was harsh, unconscionable and oppressive.

Timeline of *Cooper v The Owners in Strata Plan No 58068* (2020) NSWCA 250

8. The matter related to a building which was a 43 story strata scheme at Darlinghurst which had a strict blanket ban on all animals being kept in the building. The relevant by-law was by-law 14 which at that time provided that an owner or occupier of a lot must not keep or permit any animal to be on a lot or on the common property.
9. Despite this by-law there were a number of lot owners who secretly kept pets in the building which was a matter of a lot of contention during the proceedings. Mrs Cooper was one such person, keeping her miniature schnauzer, Angus on her lot.
10. She had purchased her lot in 2015 with the knowledge of the no pet by-law but also with the knowledge that a lot of people did keep pets in the building.
11. In November 2018 - March 2019 the strata committee did issue a number of notices to comply to Jo under section 146 of the *Strata Schemes Management Act 2015* (NSW). In response, Mrs Cooper filed with the Strata Committee a proposed motion to amend the no pet by-law. That motion was denied. In April 2019, the Owner's Corporation commenced proceedings against Jo in the NCAT seeking an order that Angus be removed under section 156 of the *Strata Schemes Management Act 2015* (NSW) and also a monetary penalty for alleged persistent noncompliance with by-law 14 under 147.
12. Shortly after, Jo filed her own proceedings seeking orders that the by-law was invalid under section 150 of the *Strata Schemes Management Act 2015* (NSW). In November 2019 NCAT found in favour of Jo and declared that the by-law was invalid because it was harsh, unconscionable, and oppressive under section 139 of the *Strata Schemes Management Act 2015* (NSW).
13. In December 2019, the Owners filed an appeal against the decision at first instance with the NCAT Appeal Panel. In May 2020, the Appeal Panel found in favour of the Owner's Corporation and found that the tribunal had erred in finding that by law harsh unconscionable and oppressive. It was held to be valid and Angus was ordered to be removed from the building.
14. Jo then appealed to the Court of Appeal.

Findings of Court of Appeal

15. The arguments that were put forward to the Court of Appeal were largely of the NCAT Appeal Panel reasoning.
16. Fundamentally the arguments against Jo were firstly that the majority should rule since Strata Plans are a majority rule enterprise.

17. Secondly it was argued that it would be difficult to police any sort of regime that involved permission to be given for people to have particular pets and thirdly, that harsh, unconscionable and unjust has to be read in the context of majority rule. There was also a catch all submission that if the Court overturned the decision there could be pet anarchy that would break free in strata plans in NSW.
18. Justice Baston held that one should not look at each of these words- harsh, oppressive and unconscionable to work out their meaning. Instead, the three words together convey a single criterium.
19. Justice Baston determined that any by-law would fail if it interferes with the use and ownership of a lot owner without giving a corresponding benefit to another lot owner.
20. Justice Baston also looked at through the prism of fraud on the power. Like any power, the statutory power of the body corporate to make by-laws is not unconditioned and that a by-law can only be validly made under that power if it has been done for a proper purpose. It could only be a proper purpose if it is to benefit the use of other people's lots.
21. Another argument, the 'majority rules' argument' was also fundamentally flawed as the way the act works is that it assumes by-laws have been passed and then it has a section that says a by-law will not be valid if it is harsh, unconscionable, or oppressive.

Takeaway principles

22. This was a decision about a blanket by-law and there has been a lot of press and commentary which has overstated the principle that comes from this case.
23. The same argument can be applied to any blanket ban. At its heart, what this case stands for is if you want to justify one of these bans you have to identify, a benefit to other lot owners.
24. There have been many Owner's Corporations and strata managers who have ignored the principles set out and are turning a blind eye and maintaining the blanket ban.
25. In the Act there is a mechanism for a body corporate to deal with unruly animals even if they don't have a by-law.
26. A Strata Scheme should amend their by-laws to accord with the new rules and pick either model by-law option A or B. One option is that an owner can have a pet on the lot so long as they give notice alternatively, they can do it but only with permission with the permission not to be unreasonably withheld. Some Owner's Corporations require a bond to be put down for damage and some applications require references of the pet by someone who is not in the family and who have known the pet for a certain length of time. Arguably, these type of application processes themselves can be unreasonable and opens the scheme up to another appeal by a lot owner.
27. The application process itself all needs to go back to the principles that came down in the Cooper case about what is reasonable and what is unreasonable

By-Laws limiting types of pets/size of pets

28. Jo's case only deals with a blanket pet ban. The principles by the Court of Appeal apply quite obviously in blanket pet ban situations, they could also apply fairly clearly in situations where there are other forms of indiscriminate or irrational or unjustified by-laws that draw a line between certain pets and not others.
29. It ultimately comes down to what rational connection could there be between the particular type of pet that the by-law applies to and the impact that pet could have on other lot owners.
30. Drawing a line between species of animal means that there may not be that rational connection that the court requires there to be.
31. It is safer for a strata scheme to put together a by-law that allows for flexibility and to accommodate the variety of different pets people might want to keep. It is not just the by-law itself that is relevant it is also the local development controls and the development consent itself.
32. The pet application process is one consequence of the Cooper decision which is Owners Corporations trying to push the envelope in not accepting the reality of the decision which is that there needs to be a greater accommodation for pets.
33. What these processes create is a blanket ban but under a different name, that is a blanket ban in substance, if not in form.
34. Whilst the Act provides some protection in schemes where a body corporate cannot unreasonably withhold consent, these types of protections do not apply to situations such as this where there is no condition in the by-law itself.
35. If discretion is vested in the body corporate itself and there is no check or balance within the by-law as to the exercise of discretion, then the owners are back at square one and the owner has no recourse except to approach NCAT and have the entire by-law struck out

Rentals and holiday rentals

36. Holiday rentals are a bit more difficult as there may not be anyone on site to manage whether the pets are being a nuisance, how many or coming in etc. What it comes down to is the characteristics of the scheme itself.
37. An issue that the Court of Appeal fixed upon is that in deciding whether a by-law is harsh, oppressive or unconscionable, the focus of the court or tribunal is not meant to be on the particular pet nor the characteristics of the person.
38. An objective approach needs to be taken which focuses on the objective characteristics of the scheme itself and the impact the by-law can have on anyone in the scheme.
39. In a holiday rental, you could possibly see justifications as to why a blanket pet ban could be required because otherwise how would you go about regulating other types of pets coming into the scheme.

40. The situation in regard to the permissibility of pets where somebody is a renting, is not governed by the same type of legislation. As much as a by-law might be invalid if it imposes a blanket ban on pets, it is completely within the discretion of a land lord who is renting a unit out to a tenant as to whether or not they would allow pets. Tenants cannot appeal to NCAT against a decision of a landlord.

Parliamentary movement

41. At the same time as the Cooper case, Jo was also in the process of lobbying government for changes to be made at that level. Following this the *Strata Scheme Management Amendment (Sustainability and Infrastructure)* Act 2020 (NSW) was passed in February 2021 which introduces changes in relation to the keeping of animals on strata lots.
42. The changes mean that a by-law or an owner's corporation decision under a by-law that unreasonably prohibits a keeping of an animal on a lot has no force or effect. It is reasonable to keep an animal on a lot unless the keeping of the animal on that lot unreasonably interferes with another resident's use and enjoyment of their lot or common property.
43. A by-law that prohibits the keeping of an animal is not harsh, unconscionable or oppressive if it reasonably prohibits the keeping of an animal.
44. An Owner's Corporation is taken to have approved the keeping of an animal on a lot if it makes a decision under a by-law that unreasonably prohibits the keeping of the animal or if it fails to make a decision that an animal can be kept within a reasonable time.
45. The Act makes provision for the implementation of regulations and it is thought that those regulations will give us some clarity with respect to what it means to unreasonably interfere

BIOGRAPHY

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Mr Newlinds is one of Australia's pre-eminent barristers. For more than 25 years he has practised widely across all jurisdictions in Australia with a particular emphasis on commercial disputes, corporation matters and insolvency.

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Ms Levy regularly appears in the District and Supreme Court, as well as the NSW Civil and Administrative Tribunal (NCAT). With extensive experience and knowledge in general commercial disputes, she has a particular expertise in building and construction and strata disputes.

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Mr Pietriche accepts briefs in all areas of law, but practises principally in commercial law, competition and consumer law, regulatory proceeding, class actions, corporations and insolvency and public and administrative law.

References

Legislation

Strata Schemes Management Act 2015 (NSW)

Strata Scheme Management Amendment (Sustainability and Infrastructure) Act 2020 (NSW)

Cases

Cooper v The Owners in Strata Plan No 58068 (2020) NSWCA 250

Yardy v Owners Corporation SP 57237 [2018] NSWCATCD 19

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61