Fur Dinkum!

Court of Appeal rules against blanket ban on pets in Strata Scheme

Today in Cooper v The Owners – Strata Plan No 58068 [2020] NSWCA 250, the NSW Court of Appeal ruled that a by-law placing a blanket ban on pets being kept in a strata scheme contravened section 139(1) of the Strata Schemes Management Act 2016 (the SSMA), that a by-law must not be "harsh, unconscionable or oppressive".

Background

This matter was first brought before the NSW Civil and Administrative Tribunal (**NCAT**) on an application made by the Owners Corporation of a residential apartment building in Darlinghurst known as "The Horizon". The Owner Corporation sought an order against the Coopers, the owners of an apartment within the building, for the removal of their dog and a monetary penalty for non-compliance with by-law 14 under section 147 of the SSMA. By-law 14 read as follows "*[s]ubject to s 139(5) of the Act, an owner or occupier of a Lot must not keep or permit any animal to be on a Lot or on the Common Property".* (Note: section 139(5) of the SSMA provides that a by-law cannot prevent the keeping of an assistance animal).

The Coopers lodged a cross-application seeking an order that by-law 14 be declared invalid.

The Coopers were successful at first instance, with the Tribunal finding the by-law to be invalid on the basis that it contravened section 139(1) of the SSMA. However, this decision was overturned by the Appeal Panel of NCAT which found that "A by-law that prohibits the keeping of animals in a strata scheme is not, of itself, impermissible under the SSMA". The Appeal Panel also considered the fact that the Coopers were aware of the prohibition on pets in the strata scheme prior to purchasing their apartment.

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The Coopers appealed this decision to the New South Wales Court of Appeal.

Decision of the NSW Court of Appeal

The Court of Appeal upheld the initial NCAT decision that a by-law imposing a blanket ban on the keeping of pets contravenes section 139 of the SSMA on the basis that a by-law must not be "harsh, unconscionable or oppressive".

The Court of Appeal found that a "by-law which limits the property rights of lot owners is only lawful (valid) if it protects from adverse affection the use and enjoyment by other occupants of their own lots, or the common property" which was not the case for by-law 14.

The Court of Appeal found that section 139 SSMA focuses on the character of the particular by-law, rather than the state of knowledge of any particular lot owner, and to that end, the fact that the Coopers purchased the lot knowing about the pet prohibition by-law, was irrelevant.

The Court of Appeal found that the by-law in question was oppressive as it prohibited an ordinary incident of the ownership of real property, namely, keeping a pet, and provided no material benefit to other occupiers.

Where to from here?

The decision of the Court of Appeal takes precedent over any other NCAT decision previously made regarding the banning of pets. As such, any by-law of a strata scheme which attempts to enforce a blanket ban on pets may be subject to challenge.

As an alternative to imposing a blanket prohibition on pets, owners corporations should consider implementing a by-law which places certain conditions and rules around the keeping of pets. Such a by-law can permit the owners corporation to take action, such as requiring the removal of a pet if the conditions of the by-law are breached.

The *Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2020* includes a recent proposed amendment to the SSMA which, if passed through both houses of Parliament, would have introduced an express section prohibiting an owners corporation from passing a by-law which "purports to unreasonably prohibit the keeping of an animal on a lot". It may well be that as a result of the Court of Appeal decision in Cooper, this addition to the SSMA is no longer pursued.

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Disclaimer: This article is a general summary with focus on issues of interest to the authors. It is not intended to be used as legal advice.

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