Can an Owners Corporation Charge $300 to Consider a Pet Application?

Section 139(1) of the Strata Schemes Management Act 2015 ("**SSMA**") provides that a by-law cannot be unjust, with the provision that *"a by-law must not be harsh, unconscionable or oppressive"*. Over the last few years there have been several cases which considered whether 'no pets' by-laws fall within the scope of being 'harsh, unconscionable or oppressive'.

In the decision of *Cooper v The Owners – Strata Plan No. 58068 [2020] NSWCA 250* ("**Cooper**"), the Court of Appeal held that a by-law which provided an outright ban on pet ownership was 'harsh, unconscionable or oppressive' within the meaning of section 139(1) of the SSMA and accordingly set aside the orders made by the Appeal Panel which, in effect, upheld the invalidation of the by-law pursuant to section 150 of the SSMA as ordered by a Senior Member of the NSW Civil and Administrative Tribunal ("**NCAT**") at first instance.

In their decision, Basten JA considered the limits of section 136 – which concerns the matters that by-laws can provide for – noting:

> *[56] "If, in accordance with the applicants' primary submission, a criterion for concluding that a by-law may be harsh, unconscionable or oppressive is that it interferes with the property rights of a lot owner by controlling or prohibiting a particular use in circumstances where that use does not materially and adversely affect the enjoyment of any other lot, such a criterion may be implied from the language, context and purpose of s 136(1)."*

Notably, the original decision of the Tribunal in this matter (*Owners – Strata Plan no 58068 v/ats Cooper [2019] NSWCATCD 62*) contemplated at [112]-[114] the circumstances in which a 'no pets' by-law *may* be justified, which included:

(a) a very small strata scheme; or

(b) a scheme with a high number of absentee landlord owners and high tenant turnover; or

(c) a scheme which permits short term occupancy e.g. a strata scheme used predominantly for holiday accommodation; or

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(d) where owners buying into the scheme have clear notice, confirmed by express written acknowledgement, of the 'no pets' by law *and* provide a written undertaking not to challenge such a by-law (other than by seeking to do so by resolution at a general meeting).

In the later case of *Roden v The Owners – Strata Plan No. 55773 [2021] NSWCATCD 61* ("**Roden**"), the Applicant sought to invalidate the following parts of a by-law:

(a) the application form must be accompanied by a non-refundable administration fee of $300;

(b) applications must be limited to two animals per apartment except for goldfish or small birds in cages;

(c) if an applicant wishes to change or replace the initial animal, he/she must sign a new application form;

(d) it is the responsibility of the animal owner to ensure when entering and exiting the building with an animal, he/she traverses common property without delay;

(e) it is the responsibility of the animal owner to ensure that the animal is not left on any balcony of the lot while the owner or occupant is absent;

(f) animals that are visiting require approval by the owners corporation.

In their decision the Tribunal upheld the by-law, not being satisfied that the above provisions would be harsh, unconscionable or oppressive, but rather deeming at [10] that they were necessary for *"the proper management administration control use or enjoyment of the lots of the strata scheme and the common property"*.

In respect of item (a) above concerning an application fee, Senior Member Charles accepted that:

> *"the fee is a modest charge and that it is necessary in circumstances where each application (among potentially hundreds of applications) must be considered on its merits having regard to the conditions in the By-Law. In my opinion the amount charged is not unreasonable and it is not harsh unconscionable or oppressive or does not otherwise restrict a lot owner in the enjoyment or exercise of his or her rights incident to ownership of a lot within the scheme."*

Interestingly, this decision was handed down on 30 August 2021 – several days after section 137B of the SSMA and clause 36 of the Strata Schemes Management Regulations 2016 ("**SSMR**") came into operation (on 24 August 2021).

These amendments to the SSMA and SSMR considered a number of items in respect of restriction of keeping of animals and the circumstances in which an animal could be considered to cause 'unreasonable interference'. As these amendments were not referred to in the decision, it does not appear that the Tribunal took them into account when making their determination. It is possible that, had the Tribunal taken these changes into consideration, the outcome may have been different generally.

In light of these amendments however, we expect that further clarification will be provided by the Tribunal on acceptable restrictions on pets through by-laws in future.

In addition to those changes to the SSMA and SSMR on 24 August 2021 mentioned above, on 11 December 2023 the Strata Legislation Amendment Act 2023 ("**Amendment Act**") commenced and reflected a number of proposed amendments into the SSMA and SSMR.

These additional amendments provide:

- that a bond or fee cannot be required in relation to keeping an animal on the lot;
- that an owner cannot be required to obtain insurance for an animal kept on the lot;
- that assistance animals cannot be restricted; and
- the proof that can be required to demonstrate that an animal is an assistance animal,

... and incorporate these provisions, in addition to mirroring those concerning pets under the SSMA, into the Community Land Management Act 2021.

Notably, while the amendments in respect of a 'bond or fee' appear restricted to *"the keeping of an animal on the lot"*, the Second Reading Speech of the Strata Legislation Amendment Bill 2023 by Mr Anoulack Chanthivong clarifies that the intent of the legislation is to extend also to applications to keep pets:

> *"This amendment responds to a number of cases where owners' corporations have imposed a high fee or bond on the keeping of a pet. For example, in one case a strata scheme charged residents hundreds of dollars in fees to consider an application to keep a pet or to allow visitors to bring a pet to their home.*
>
> *Imposing fees, bonds or insurance requirements undermines the intent of the current laws and results in unjust outcomes for people who have pets."*

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Accordingly, any requirement for an 'application fee' to be paid as part of a pet application is likely to be contrary to the legislation and invalid.

For further information in respect of the Amendment Act, please see our article *New Laws for Community and Strata Schemes for 2023!*

Further to the above, additional legislation in respect of pets commenced on 1 November 2024 by way of the Community Land Management Amendment Act (Pets) Regulation 2024. This new piece of legislation amended the existing Community Land Management Regulation 2021 to mirror the circumstances in which an animal could be considered to cause 'unreasonable interference' under the SSMR; with the effect of bringing community laws in line with strata laws.

For further information in this regard, please refer to our article *Time to Review your Community, Precinct and Neighbourhood Management Statement again | Pet Reform commenced on 1 November 2024*

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