



NOTICE OF ORDER

The Owners - Strata Plan No. 2371

File No: SC 18/29877
Quota in all enquiries
e-Number: 37295YY10

Application to the Tribunal concerning 50B Ocean Street WOOLLAHRA NSW 2025 Australia - SP2371

Applicant: Harriet McCormick & Michael McGinness
Respondent: The Owners - Strata Plan No. 2371

On 09-Oct-2018 the following order was made:

An order is made pursuant to s 157 of the Strata Schemes Management Act 2015 (NSW) declaring that the applicants are allowed to keep a small to medium sized neutered dog, which they are to acquire from a reputable dog rescue organisation within three (3) months of the making of this order, on the lot property comprised in folio identifier 10/SP2371 ("Lot 10") and the common property of SP2371 (the "strata scheme") subject to the following conditions:

- (1) The order is to apply for the remainder of the life of the dog as acquired within three (3) months of the making of this order and not for any replacement dog if the applicants' dog dies or goes missing;
- (2) The applicants' dog is to stay within the confines of Lot 10 except when leaving and entering the strata scheme;
- (3) When leaving and entering the strata scheme, the applicants' dog is to take the most direct route to and from the outside street across the common property of the strata scheme;
- (4) The applicants' dog is to be on a leash and in the control of a responsible adult at all times when on the common property of the strata scheme;
- (5) When on the strata scheme at all times, the applicants' dog is to be clean and free of worms, fleas and other parasites;
- (6) The applicants are to ensure that the dog does not create any nuisance or annoyance so as to interfere with the peaceful enjoyment of other lot owners, occupiers or other persons lawfully using the common property, and owners of neighbouring properties of the strata scheme;

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(7) The applicants are to ensure that the dog does not soil on any part of the common property and are to immediately remove and appropriately dispose of any soiling which may occur on the common property or within the confines of Lot 10;

(8) The applicants are to ensure that all waste matter generated by the dog is disposed of promptly and hygienically so as to ensure that no unpleasant odour or other nuisance is caused thereby;

(9) The applicants will be responsible for any harm or damage caused by the dog while on Lot 10 or the common property.

Reasons for decision:

1. Since 8 January 2018, the applicants have occupied Lot 10 of the strata scheme under a residential tenancy agreement. It is a ground floor unit within a strata scheme at Woollahra NSW.

2. The applicant obtained permission from their landlord to keep a dog in the residential tenancy premises subject to the consent of the Owners Corporation.

3. The application for approval was made by email correspondence to the strata scheme's agent Joshua Moses ("Mr Moses"). The applicants' application for approval was initiated by an email sent on 23 January 2018 to Mr Moses, in circumstances where the by-laws of the strata scheme then applicable included By-Law 16 as to the keeping of animals, as follows:

(1) Subject to section 49(4) an owner or occupier of a lot must not, without the approval in writing of the owners corporation, keep any animal on the lot or the common property,

(2) The owners corporation must not unreasonably withhold its approval of the keeping of an animal on a lot or the common property.

4. The respondent to the application is the Owners Corporation. Through its agent, Mr Moses (who appeared at today's hearing by telephone, with the Tribunal's prior leave), the Owners Corporation sought particulars (by email of 30 January 2018 and subsequent correspondence) from the applicants as regards the type of dog (size, gender, breed, nature and age) and also expressed concerns about a pet walking through common property and what actions would be taken about picking up dog droppings. The Owners Corporation also sought to know about what plans the applicants have to walk the dog and ensure that the dog's behaviour is acceptable, i.e. not a nuisance to other owners and occupiers of the strata scheme and neighbours, such as the owner of the next door property who has a guide dog.

5. The applicants set out information in response to these matters and the other concerns of the Owners Corporation in their emails to Mr Moses dated 20 February 2018 and 13 March 2018. In essence, the applicants said they intended to get a puppy of small to medium size from a reputable dog rescue organisation. They said that they were committed to training and socialising the dog who they want as a happy, family pet. They gave sworn evidence that they have extensive experience as owners in the past of family friendly dogs and that their work circumstances meant that the dog would not be left unattended for extensive periods of time.

6. On 28 March 2018, the strata scheme passed a special resolution adding Special By-Law 12 as follows:

You must not keep any animal on common property OR within lots. This includes, but is not limited to cats, dogs, guinea pigs, hamsters and birds.

7. On 9 April 2018 the Owners Corporation, by email of that date, from: Mr Moses to the applicants, informed the applicants that their application to keep a dog had been refused. The email referred to 'legitimate concerns' as follows:

(1) Many of the neighbourhood felines use your patio wall and tree as their main highway. There are already multiple loud cat fights on your patio wall and on the rooftop of 50A which we cannot control as the cats do not belong to any of our residents. Bringing an additional dog/puppy into the picture will create even more chaos with the barking (at the cat sightings and the cat fights).

(2) The owner of 50A (a blind lady with her 'Seeing Eye Dog') shares a common boundary wall (with a window) in your patio. She has lived there for many years and has expressed her concerns against a tenant having a dog/puppy despite her love for animals. Already with loud cat fights on her roof, she feels a dog/puppy will worsen the situation as her 'Seeing Eye Dog' needs to be focused on her full time care and not distracted by cat fights and or dog/puppy barking etc.

(3) Also, the concerns for the dog being left alone during the day.

8. Mediation of the parties' dispute was declined by the Owners Corporation. The applicants brought this application for orders under the Strata Schemes Management Act 2015 (NSW) (the SSMA) on 3 July 2018.

9. The applicants say that they are prepared to agree to reasonable conditions for the keeping of a dog on Lot 10 and that the respondent's approval to the keeping of a dog on Lot 10 was unreasonably withheld.

10. The respondent relies upon Special By-Law 12 (passed by special resolution on 28 March 2018); but says even if Special By-Law 12 does not apply, its reasons were not unreasonable for refusing approval of the keeping of a dog on Lot 10 by the applicants. Mr Moses' submitted that it was reasonable in all the circumstances for the applicants' application for approval to keep a dog to be rejected given the real potential that a dog/puppy would create a nuisance with unwanted noise and disturbance of the peace and quiet enjoyment of other owners and occupiers of the strata scheme and the owners of neighbouring properties.

11. In reply, the applicants submitted that the applicable by-law at the time they brought the application for approval was By-Law 18. They also argued that the new Special By-Law is "unfair" because it provides for a blanket prohibition on pet ownership within the strata scheme in circumstances where there are owners who have prior approval under By-Law 16 to keep cats.

12. The Tribunal found that the application must be considered under By-Law 16 as that was the applicable by-law at the time when the application for approval was made to the strata scheme by the applicants. In this regard, there is no doubt from a reading of the relevant correspondence that the Owners Corporation proceeded to consider the application for approval which had been made on 23 January 2016, on the basis that it could provide approval for the keeping of an animal on Lot 10; otherwise, it would not have sought the further particulars it did in the correspondence sent on its behalf by the agent, Mr Moses (as referred to above). That the Owners Corporation may have been considering amending its by-laws in respect of the keeping of animals from as early as 2016 is of no moment because at all material times when the Owners Corporation was giving consideration to the applicants' request for approval, the applicable by-law on pet ownership for the scheme was By-Law 16.

13. Section 157 of the SSMA provides:

- (1) The Tribunal may on application by the owner or occupier (with the consent of the owner) of a lot in a strata scheme make an order declaring that the applicant may keep an animal on the lot or common property.
- (2) The Tribunal must not make the order unless it is satisfied that:
- (a) the by-laws permit the keeping of an animal with the approval of the owners corporation and provide that the owners corporation cannot unreasonably withhold consent to the keeping of an animal, and
- (b) the owners corporation has unreasonably withheld its approval to the keeping of the animal on the lot or common property.

14. Whether a withholding of consent within By-law 16(2) and s 157(2)(a) of the SSMA is reasonable, is an objective test, requiring the existence of facts and circumstances, which are sufficient to induce that state of mind in a reasonable person: *Richardson v The Owners Corporation - Strata Plan No 55395* [2008] NSWCTTT 928 referring to the corresponding (predecessor) legislation under the now repealed SSMA 1996.

15. The concept of 'reasonableness' within the meaning of s 157(2)(b) of the SSMA is: "sound judgment or good sense ... this means that the decision cannot be made on purely emotive or capricious grounds. Those required to make the decision must consider the factual situation before them": *Kelly v The Owners Corporation - Strata Plan No 5044* [2012] NSWCTTT 54 at [30], also referring to the corresponding predecessor legislation.

16. The applicants bear the onus on the balance of probabilities of making out a case for an order under s 157 of the SSMA.

17. The evidence provided by the applicants is that it is their intention to obtain a small to medium sized dog of puppy age (e.g. a Fox Terrier X Maltese Mix dog, or a Jack Russell Terrier X Labrador Mix Dog) from a reputable dog rescue organisation, that such dog is to be health checked, assessed for temperament and will have started basic training (including toilet training) with the dog rescue organisation, and also that in the applicants' experience, 'rescue' puppies are well socialised with other dogs, cats, children and other animals.

18. The evidence before the Tribunal further establishes that the applicants are committed to appropriately training and managing the dog they acquire from a dog rescue organisation (e.g. ensuring that the dog attends 'obedience' classes).

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19. The Tribunal is of the view that it is within the applicants' power to keep any dog they obtain from a rescue organisation quiet and clean and to ensure that the dog does not damage the strata building through faecal droppings or in any other way, does not harm or disturb other residents and neighbours and does not harm the local wildlife.

20. Furthermore, if any dog acquired by the applicants and permitted to live with in the strata scheme causes a nuisance or unreasonably interferes with the use or enjoyment of another lot or common property by another owner or occupier, or a neighbour, it is open to the Owners Corporation to take action against the applicants under s 153 of the SSMA.

21. There is nothing about the circumstances of a dog/puppy acquired from a reputable rescue organisation per se to which the Tribunal has been referred that precludes such a dog from strata living.

22. The Tribunal is also satisfied that the concerns relating to hygiene, odour and the cleanliness of common property are reasonable concerns for the respondent to hold but that such concerns can be met by the imposition of conditions on the keeping of a dog on lot property and common property.

23. The Tribunal had regard to the objections put in the email of the respondent's agent sent to the applicants on 9 April 2018. However, there is no evidence to suggest that the concern about exacerbating the potential for loud cat fights in and around the patio wall of Lot 10 is made out on the evidence. The applicants' evidence (supported by photographs of the patio area), which the Tribunal accepts, is that the applicants are unaware of any loud catfights in the nine (9) months they have been living there. Any concerns of the neighbour with the Guide Dog are also addressed by the imposition of reasonable conditions on the keeping of a dog at Lot 10. In any event, the suggestion of there being a disruption to the neighbour's Guide Dog seems unlikely in light of the substantial training received by Guide Dogs in their dealing with everyday distractions (such as other dogs).

24. The Tribunal further accepted the applicants' evidence that the dog will be a family pet which will not be left unattended for long periods of time, as was suggested at point (3) of the respondent's email of 9 April 2018.

25. In all the circumstances, the Tribunal found that the respondent's reasons for refusing approval as put in the email of 9 April 2018 are not soundly based and as such, they are not reasonable. In essence, the Tribunal found that on all of the evidence the strata scheme did not have valid, rational reasons for opposing approval and that its decision was not based on reasonable grounds.

26. There is no doubt that the respondent must act in the interests of all Lot-owners and residents of the strata scheme. Yet it seems to the Tribunal that most, if not all, of the objections (however reasonable) could have been dealt with by imposing conditions on any granting of approval and/or seeking further information from the applicants before making a decision. The residents' concerns are not sufficient, in the Tribunal's view to deny the applicants the pleasure, comfort and support of having a 'rescue' dog live with them.

27. The Tribunal also found that any reasonable concerns of other residents and neighbours may be addressed by the imposition of conditions in the Tribunal's order.

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28. Therefore, the Tribunal's central finding was that the respondent Owners Corporation had unreasonably refused to give its approval to the keeping of a dog on Lot 15 and that a case for an order of the Tribunal under s 157 of the SSMA is made out.

29. Furthermore, even if the Tribunal had decided By-Law 16 did not apply because Special By-Law 12 operated in the circumstances (i.e. the Owners Corporation had communicated its disapproval on 9 April 2018 and this was after the passing of the Special By-Law on 29 March 2018), the Tribunal would not have reached a different conclusion as to the appropriate order in response to the applicant's application. This is because the Tribunal found Special By-Law 12 is harsh, unconscionable and oppressive contrary to s 139(1) of the SSMA (see also s 150(1) of the SSMA), in that a blanket prohibition on the keeping of animals in a strata scheme especially when there is no possible discretion or capacity, to consider the particular needs and desires of individual pet owners or occupiers, does not reflect a notion of fairness: see *Yardy v Owners Corporation* 8P 57237 [2018] NSWCA710 49.

30. The Tribunal's order reflects its findings of fact and law as set out above.

D Charles
Senior Member
09/10/18