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| Case Name: | Roden v The Owners – Strata Plan No. 55773 |
| Medium Neutral Citation: | [2021] NSWCATCD 61 |
| Hearing Date(s): | 30 August 2021 |
| Date of Orders: | 30 August 2021 |
| Decision Date: | 30 August 2021 |
| Jurisdiction: | Consumer and Commercial Division |
| Before: | D Charles, Senior Member |
| Decision: | The application is dismissed because having considered the material placed before it, the Tribunal is not satisfied (at the civil standard of proof) that the grounds required to make the orders sought have been established. |
| Catchwords: | STRATA – keeping of animals by-law – challenge to its validity - whether parts of by-law enhance or preserve other lot owners' enjoyment or amenity in the scheme – relevant parts found not beyond power and not harsh unconscionable or oppressive |
| Legislation Cited: | Strata Schemes Management Act 2015 (NSW) |
| Cases Cited: | Cooper v The Owners - Strata Plan No 58058 [2020] NSWCA 250 |
| Texts Cited: | None |
| Category: | Principal judgment |
| Parties: | Robert Roden (Applicant)  The Owners – Strata Plan No. 55773 (Respondent) |
| File Number(s): | SC21/18086 |
| Publication Restriction: | Unrestricted |

REASONS FOR DECISION

1. The applicant is a lot owner in a multi-level strata building at Darlinghurst NSW.
2. There are 280 residential lots in the strata scheme the subject of the application from floor 6 to floor 38 of the strata building. The respondent is the Owners Corporation of the strata scheme (OC).
3. By application lodged with the Tribunal on 26 April 2021, the applicant sought an order under s 150 of the *Strata Schemes Management* Act 2015 NSW (SSMA) invalidating parts of By-Law 14 - Keeping an Animal. There are two limbs to the applicant's argument as to invalidation: that parts of the By-Law are beyond power (first limb) and that parts of the By-Law are, in contravention of s 139 of the SSMA, harsh unconscionable or oppressive (second limb). To support his arguments, the applicant relied upon statements of Basten JA and Macfarlan JA in the Court of Appeal judgment of *Cooper v The Owners - Strata Plan No 58058* [2020] NSWCA 250 (Cooper).
4. At the commencement of today's hearing, the applicant withdrew his objection to By-law 14.1 requiring written approval to the keeping of an animal on a lot, but he pressed his objections to the following other parts of the By-Law:
5. By-Law 14.2(c) - that the form of application must be accompanied by a non-refundable administration fee of $300 (Administration Fee);
6. By-Law 14.2(d) - that applications must be limited to two animals per apartment except for goldfish or small birds in cages;
7. By-Law 14.2(e) - that if an applicant wishes to change or replace the initial animal, he/she must sign a new application form;
8. By-Law 14.6(f) - that 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;
9. By-Law 14.6 (n) - that 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;
10. By-Law 14.9 - Visitor animals.
11. The whole of By-Law 14 (i.e. subparagraphs 14.1 to 14.9) had been passed unanimously by special resolution at an extraordinary general meeting of the scheme on 2 December 2020. The By-Law replaced a by-law which prohibited animals with certain limited exceptions. It was passed shortly after the Court of Appeal decision in Cooper, published on 12 October 2020. The By-Law sets out provisions for the keeping of animals and provides a framework for application to, and permission from, the OC.
12. Relying on both limbs of his argument as to invalidity, the applicant sought an order of the Tribunal repealing those parts of the By-Law referred to above. He relied upon his written submissions which were supplemented with oral submissions made during today's hearing.
13. As to the first limb of his argument, the applicant said, generally, that those parts of the By-Law were beyond power because they are not required to enhance or preserve other lot owners' enjoyment or amenity in the scheme. He relied on statements of Basten JA and Macfarlan JA in Cooper. The statements are relevant but it is pertinent that Cooper was a case (unlike the present case) concerning a by-law with a blanket prohibition on animals. I find that the By-Law contains provisions consistent with the OC's power to enact by-laws: see s 9 and s 136 of the SSMA and that there are a reasonable set of conditions within the By-Law. I do not agree that the parts of the By-Law complained of by the applicant are beyond power. The By-Law in its present form contains a provision that states consent to keep an animal must not be unreasonably withheld: By-law 14.4. This also applies in respect of applications for permission in respect of Visitor Animals (By-Law 14.9). This addresses the issues as to blanket prohibitions which were referred to by the Court of Appeal in Cooper at [61] and [78]. I am satisfied that the By-Law contains reasonable conditions which ensure that in carrying into effect the By-Law there is a rational connection with the enjoyment and amenity of other lots and of the common property.
14. Accordingly, for those reasons, I do not accept the first limb of the applicant's argument for the repeal of certain parts of the By-Law.
15. As to the second limb, I will consider each part of the By-Law complained of in light of the arguments for invalidity put by the applicant:
16. By-Law 14.2(c) - During her oral submissions at today's hearing, the OC's representative confirmed that the administration fee of $300 includes the cost to the OC of processing applications under the By-Law. I accept 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.
17. By-Law 14.2(d) - I do not agree that it is harsh unconscionable or oppressive to limit applications to 2 animals (not including goldfish or small birds in a cage), in circumstances where there are 280 lot owners spread over 32 levels of the strata building. This is a step in the proper administration and management of the scheme.
18. By-Law 14.2(e) - It is also not an unreasonable imposition on a lot owner's right of enjoyment of his/her lot to ask a lot owner to make separate applications in respect of each new animal. Each animal is different and it will be necessary for the OC to make an individual assessment.
19. By-law 14.6(f) - I find that this is a reasonable condition and that the words "without delay" are to be applied objectively and therefore are not apt to be harsh unconscionable or oppressive in the particular instances to which the applicant referred such as persons with disabilities, persons who have an older dog or persons who need to stop momentarily (e.g. to collect mail) on common property while in the company of their animal.
20. By-Law 14.6(n) - In my view this is a reasonable condition as the limitation applies only when the animal is left unattended for a period of time on a lot owner's balcony.
21. By-Law 14.9 - I agree that the oversight by the OC of visitor animals is necessary and reasonable. As referred to, I interpret this part of the By-Law (i.e. By-Law 14.9) to be subject to the OC acting reasonably and that withholding consent on an irrational basis to a visitor animal would open the way for an application that consent was unreasonably withheld within By-Law 14.4.
22. I accept the respondent's submission that all parts of By-Law 14 (i.e. from 14.1 to 14.9) are necessary for the proper management administration control use or enjoyment of the lots of the strata scheme and the common property. I find that the parts of the By-Law which the applicant seeks to be repealed by order of the Tribunal in fact enhance or preserve the other lot owners' enjoyment of their lots and the strata scheme property: see Cooper, and therefore are not harsh unconscionable or oppressive.
23. The applicant has not discharged the onus of establishing a case for orders of the Tribunal under s 150 of the SSMA. His application is therefore dismissed.

Pursuant to s 63 of the Civil and Administrative Tribunal Act 2013 NSW, corrections were made to typographical errors in line 1 of [2] and line 3 of [9(5)].

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.  
Registrar

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