



Civil and Administrative Tribunal
New South Wales

Case Name: McGregor v The Owners – Strata Plan No 74896

Medium Neutral Citation: [2021] NSWCATCD 1

Hearing Date(s): 3 February 2021

Date of Orders: 1 March 2021

Decision Date: 1 March 2021

Jurisdiction: Consumer and Commercial Division

Before: R C Titterton OAM, Senior Member

Decision: The application is dismissed.

Catchwords: LANDLORD -STRATA TITLE -STRATA SCHEMES
MANAGEMENT ACT 2015, ss150, 157

Legislation Cited: Civil and Administrative Tribunal Act 2013
Strata Schemes Management Act 2015 (NSW)
Strata Schemes Management Amendment
(Sustainability Infrastructure) Act 2021
Strata Schemes Management Regulation 2016 (NSW)

Cases Cited: Cooper v Strata Plan No 58060 [2020] NSWCA 250
R v The War Pensions Entitlement Appeals
Tribunal; Ex parte Bott (1933) 50 CLR 228.

Texts Cited: Judicial Review of Administrative Action (5th Ed)

Category: Principal judgment

Parties: Applicants: Scott McGregor and Bernadette Eichner
Respondent: The Owners – Strata Plan No 74896

Representation: Applicants: Self-represented
Respondent: D Armenrtas, Solicitor

File Number(s): SC 20/21649

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

- 1 The applicants, Mr Scott McGregor and his partner Ms Bernadette Eichner (the Applicants) seek an order allowing them to keep their pet dog “Jimmy” on their lot. They say that Jimmy, who is a 12 year old miniature fox terrier, is a very quiet and well-trained dog. He weighs 4kgs, and has no history of noisy, aggressive or anti-social behaviour. The Applicants’ property is in the Altro building which forms part of the City Quarter Complex in Camperdown. The Applicants say that they have observed other dogs living in the City Quarter Complex. They also say that the Altro by-laws are not consistent with the Model By-Laws set out in the Strata Schemes Management Regulation 2016 (SSM Regulation) or with community standards.
- 2 Accordingly, the Applicants seek an order pursuant to s 157 of the *Strata Schemes Management Act 2015* (NSW) (SSMA) allowing them to keep Jimmy on their lot.
- 3 The application is opposed by the respondent, the Owners – SP 74896 (the Owners) for a number of reasons. They say, in effect, that the application is misconceived, and deny that other dogs live in the City Quarter Complex. The Owners also say that since the registration of the strata scheme and Community Association DP 270241 (of which the strata scheme SP 74896 forms part), dogs have not been permitted to be kept in apartments within the City Quarter Complex.
- 4 For the following reasons, the application is dismissed.

Evidence relied on by Applicants

- 5 The Applicants have been the owners of a lot in strata scheme SP 74896 since February 2020. They live in the apartment for about a third of the year, spending the rest of their time at their Mudgee property.
- 6 Prior to purchasing their lot, they inspected numerous apartments in the City Quarter Complex. They say that on all occasions they noticed owners and their dogs moving in and out of buildings, other than “the Terraces”. (This is a

reference to the townhouses forming part of the Coty Quarter Complex, where lot owners are permitted to keep a small dog.) They talked to many of those owners and were told that while there was a by-law that excluded dogs, the by-law was not enforced.

7 Upon reviewing the contract of sale for their lot, their solicitor told them about by-law 22.1. They say their solicitor told them that “it” (presumably the by-law) was “confusing” in the extreme, and inconsistent with the Model By-Laws set out in the Strata Schemes Management Regulation 2016, and applied inconsistently throughout the City Quarter Complex.

8 On 3 February 2020, Mr McGregor gave the Owners (through the Strata Manager) a letter stating:

My partner and I have recently purchased Apartment 710 at [address omitted] Camperdown.

In accordance with Schedule 3, Item 5 of the Strata Schemes Management Regulation 2016, we are bringing our little dog with us.

Jimmy is an 11 year-old miniature Fox Terrier who is very quiet, well-trained and experienced at apartment living. He is fully vaccinated, very social, non-aggressive and charms everyone he meets. Please see attached a reference for Jimmy from John Miller, Secretary of the Carnegie strata committee in Alexandria, where Jimmy has been residing on and off for the last 8 years.

We are responsible owners and will most certainly ensure that he doesn't cause anyone any inconvenience.

We're very much looking forward to being part of the Altro and wider City Quarter community.

9 At the foot of the letter were three photographs. The first is of the Applicants holding a “SOLD” sign, and a photograph of Jimmy riding a bicycle with Mr McGregor, and one of Jimmy himself.

10 Accompanying the letter was the reference referred to. The author, Mr Miller had been a neighbour of Mr McGregor and Jimmy for a number of years in Alexandria. Mr Miller relevantly states:

I have to say that Jimmy was the quietest neighbour I have ever had, so quiet that in fact we never, ever heard him. He is absolutely delightful dog and epitomises the proverbial ‘good boy’. He is well socialised, friendly, quiet, and extremely well-trained. I have no hesitation in providing a character reference for Jimmy and I am doing so happily.

11 Maddi Sinclair, an employee of the Strata Manager responded, bluntly it might be thought, that same day:

Dogs are not permitted on City Quarter property. It states this in By-law 22 of the Community Management [S]tatement for DP 270241.

- 12 The Applicants responded the following morning. They said that they were confused as they had seen other dogs residing in other apartments in the City Quarter Complex, and noted that recent rulings by the Tribunal had overturned “no pets” by laws for being harsh and unreasonable. The Applicants also suggested that the Altro by-laws may not be in keeping with the latest model by-laws and community standards.
- 13 A more conciliatory email was sent to the Applicants on 4 February 2020 by Ms Toni French:

I am really sorry as this is not the welcome to Altro that you were expecting. By-law 22 of the Community management Statement is clear – no dogs are permitted at City Quarter with the exception of the Terraces.

The CMS does permit cats – the matters before the courts in relation to pets are generally to do with buildings who do not permit any pets.

Whilst we acknowledge that there are some buildings in [City Quarter] who are not enforcing by-law 22, Altro is. In this regard you will not be permitted to bring Jimmy.

It is most unfortunate that neither the agent nor your solicitor advised you of these rules prior to committing to the purchase.

- 14 The Applicants say that this statement is incorrect, that dogs are allowed in 10 of the 11 City Quarter Complex buildings, and that they have met dog owners from each of the 10 buildings. Statements of some of those dog owners, and statements of support from lot owners are discussed below.

Evidence of the Richard McBride, Clinical Psychologist

- 15 Importantly, the Applicants rely on a report of Mr McBride dated 6 August 2020. I will not set out the personal medical information concerning Mr McGregor’s health in these reasons. However, Mr McBride states that “important support and [a] stabilising factor [for Mr McGregor] has been his companion dog Jimmy. Mr McBride states:

It is now well recognised in the psychological literature that companion pets, particularly dogs, can significantly alleviate the burden of depression and anxiety. Consequently, an assistance dog (also known as a service dog) is covered by the Commonwealth Disability Discrimination Act 1992. An assistance dog is trained to assist their handler in public and is guaranteed access to all public places including shopping centres, hospitals, public transport and restaurants. An assistance dog is alleviates disability. While Jim

is not registered as an assistance dog, he certainly fulfills this role for [Mr McGregor].

Since being denied permission to have his dog at his apartment [Mr McGregor] has struggled . . . and his commenced new . . . medication”.

Other evidence

16 Ms Jenny Green: Ms Green has lived in the Aquilon building at the City Quarter Complex since July 2017. She has lived there since July 2017. In summary, she says that:

- she has lived there with her dog Sugar all that time;
- the person who sold her the apartment lived there with his dog until the dog died. He also told her that there is a tolerance of dogs in the City Quarter Complex;
- she suspects that there are more 10 dogs kept in her building.

17 Mr Mark Burton: Mr Burton supports the Applicants keeping Jimmy in Altro. He says he is currently aware of a dog being kept in the Vie block and in Trio. He says he has had friends who lived for years in Trio for years with a dog. He says no by-law breach notices were ever issued. He also says that an agent has told him that having a no dog policy is detrimental to the marketability of the apartments.

18 Mr Larry Agriesti: He also supports the Applicants keeping Jimmy in Altro, and believes it is in the best interest of the Owners to “align itself with current community standards and practice, and allow responsible, registered ownership of dogs”.

19 Mr Grant McDonnell: Mr McDonnell bought an apartment in Altro in 2006. He says the strata agent at the time told him that dogs were allowed as another lot owner kept two very large dogs in his apartment. So Mr McDonnell moved in with his two Cocker Spaniels, Tracey and Fletch. While he later adopted out those dogs, he estimates that at the time there were more than 10 dogs living happily in Altro – until the by-law started to be enforced in about 2008/2009.

Evidence relied on by the Owners

20 The Owners also filed evidence of lot owners, 10 in fact, and a witness statement of the strata manager. Given the decision of the Tribunal, I will

simply summarise the principal reasons stated by lot owners for objecting to the Applicants' application:

- “it will set a precedent for future residents to also be permitted to keep a dog in their apartment”;
- the “no dog policy” is a feature considered by residents in making the decision to reside in Altro;
- the “no dog policy” is important for residents who are allergic to dogs, and for families with young children;
- permitting dogs will result higher operating costs;
- dogs often create a noise nuisance for other residents by barking and foul outdoor areas;
- is cruel to keep a dog in a small space available in an apartment. He also points out that some people are phobic about dogs;
- allowing dogs will lead to a loss of property value.

21 A number of lot owners stated that the reason they bought their lots was because of the “no dog policy”. One lot owner stated that he had to forgo his own desire to own a dog in order to respect and abide by the by-law.

22 Mr Glen Farquhar has been a member of the strata committee of Altro since 2010. He provided a detailed affidavit giving a history of previous attempts by lot owners to change by-law 22. Such a motion was defeated in November 2012, and again in August 2020. Significantly, he says that he is only aware of two instances where an occupant of an apartment in Altro kept a dog in their apartment. On each occasion the lot owner was asked to remove the dog.

23 Finally, I note the witness statement of Ms Antoinette French. Ms French has been the strata manager for the Owners since May 2016. Relevantly she states that she is not aware of any dogs ever being permitted to be kept in Altro, either in the past or at present. She says that the “no dogs policy” has always been strictly enforced. She points to enforcement action being taken against dogs which were being kept at Altro in September 2020 (when she was the strata manager), and (from the records available to her), in January 2012 and February 2013. She also says that the Applicants have never requested any motions to be put to the Owners at a general meeting.

Findings of Fact

24 The first task of the Tribunal is to make relevant findings of fact. As it happens, apart from the issue of whether other dogs are in fact permitted to be kept elsewhere, there were few factual issues in dispute. As will be discussed, the real issues in this matter were legal issues, which I will identify and discuss below.

25 Before doing so, it is trite to observe that the Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice: *Civil and Administrative Tribunal Act 2013* (NCAT Act), s 38. That said, it is appropriate to recall the caution of Evatt J in *R v The War Pensions Entitlement Appeals Tribunal; Ex parte Bott* (1933) 50 CLR 228. His Honour stated at 256:

But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice".

26 As is observed by Aronson and Groves in *Judicial Review of Administrative Action* (5th Ed) at 581:

Provisions which free a tribunal or other body from the rules of evidence are best regarded as facultative. They are intended to provide procedural flexibility but not to displace logic or reasons. A decision-maker freed from the rules of evidence must therefore still consider the whether the material it can consider should in fact be considered. The litmus test is usually whether the material is rationally probative. It follows that provisions which free tribunals from the rules of evidence do not allow decision-makers to "draw inferences or jump to conclusions, which the available material did not adequately support".

27 The point is that there were various opinions expressed in various statements of lot owners (for instance that changing the "no dogs policy" would lead to a loss in property value), on which the Tribunal would be very reluctant to place any weight. In addition, while hearsay evidence is not prohibited by reason of s 38 of the NCAT Act, some statements contained "hearsay on hearsay" and again, very little, if any, weight could be placed on such evidence.

28 Finally, I note that none of the makers of the various statements or affidavits were required for cross-examination.

29 I make the following relevant findings of fact.

Facts relating to the strata scheme and Community Association

- 30 The Applicants reside (for part of the year), in the Altro apartment building. Altro is an apartment building in Camperdown NSW. Altro is part of a Community Association DP 270241 known as the "City Quarter Complex". The Complex includes a combination of apartment buildings and townhouse blocks, as well as other communal facilities.
- 31 Altro is the subject of the by-laws for SP 74896. Other apartments or townhouses buildings in the City Quarter Complex (which includes Aquilon, Trio and Vie (but the evidence was not complete on this issue) are the subject of other strata plans. Each is in turn subject to the community management statement for Community Association DP 270241 (the CMS).
- 32 Since registration of both SP 74896 and Community Association DP 270241 in around 2005, dogs have not been permitted to be kept in apartments within the City Quarter Complex. In this respect, by-law 22.1 of the CMS provides:
- If you are then owner of an Apartment, you must not keep an animal in your Apartment or in City Quarter other than:
- (a) one cat;
 - (b) goldfish or other fish in an indoor aquarium;
 - (c) canaries, budgerigars or similar birds kept indoors at all times; and
 - (d) a guide dog or a hearing dog if you need the dog because you are visually or hearing impaired.
- 33 By-law 22.2 is to similar effect in respect of owners or occupiers of Townhouses within the City Quarter Complex. However, those owners or occupiers are permitted to keep, in addition to the animals identified above, "one small dog". If they do, the applicable obligations are set out in by-laws 22.5 and 22.6. By-law 22.5 deals with keep the animal in the lot and not letting it wander, and restraining it on Community Property or Common Property. By-law 22.6 deals with being responsible in respect of noise and damage caused by the animal, and "cleaning up".
- 34 By-law 2.3 of the consolidated by-laws for SP 74896 provides that the Community Association, owners corporations and the owners and occupiers of

lots in the City Quarter Complex (including the Owners) must comply with the CMS.

- 35 By-laws 22.4-22.7 impose conditions on owners who keep animals in accordance with by-law 22.1.
- 36 On 3 February 2020, as noted above, Mr McGregor gave the Owners (through the Strata Manager) a letter stating that he and Ms Eichner would be bringing Jimmy with them when they moved into their apartment.
- 37 On 3 February, and again on 4 February 2020, the strata manager informed the Applicants that Jimmy would not be permitted to be kept in the apartment.
- 38 On 19 February 2020, CCTV footage identified that the Applicants had brought Jimmy into Altro.
- 39 On 25 February 2020, Ms French sent the Applicants an email to remind them of by-law 22, and to find an alternative home for Jimmy within 30 days.
- 40 In April 2020, the parties attended a medication facilitated by the Department of Fair Trading.
- 41 On 1 October 2020, Ms French sent the Applicants another email to remind them of by-law 22, and to find an alternative home for Jimmy within 30 days.
- 42 It is not necessary to make any other findings of fact, particularly in relation to whether or not other dogs are in fact kept in the City Quarter Complex. In *Cooper v Strata Plan No 58060* [2020] NSWCA 250, the Court of Appeal stated at [68] per Basten JA (with whom McFarlan agreed) that:
- evidence was called as to the circumstances of the applicants and the identity, size and nature of their dog. That evidence was also addressed by the Appeal Panel. The primary position of the applicants was that these considerations were entirely irrelevant to the proper assessment of the validity of the by-law. That submission should be accepted; the circumstances of the applicants and their dog may be put to one side. There are no relevant factual issues to be determined.
- 43 And to similar effect was Fagan J at [102] who stated that the circumstances surrounding any owner's acquisition of his or her lot could have no bearing upon the assessment of the by-law according to the standard.

Submissions

Applicants' Submissions

- 44 The Applicants' submissions are primarily set out in the document accompanying their application titled "Reasons for asking for the above orders", which I will reproduce in part:

Essentially, we wish to be provided the same consideration that residents of other buildings in the city Quarter complex are afforded - that is, to be allowed to have our small, aging dog on the lot on the occasions we are in residence.

Jimmy is a 12-year-old miniature Fox Terrier who is very quiet, well trained and experienced at apartment living. Only weighing 4kg, he is fully vaccinated, non-aggressive and has no history of causing anyone any problems. A reference for him is attached to this application.

For other residents, this means he would be part of the Altro community only for about 1/3 of the year as we spend most of our time at our property near Mudgee or travelling as part of Scott's business. In the 90+ days since we moved in on February 11th 2020, Jimmy has been at Altro on about 20 days in total across that period. CCTV footage will be able to verify the exact dates of his attendance.

After our first day with Jimmy, we received an email from the Strata Management Company advising we had breached By-law 22 and saying "You are requested to make alternative arrangements for a permanent home for your dog within 30 days. Should the dog remain resident at the complex after 30 days, we have been instructed to commence action against you for enforcement of by-law 22 in NCAT".

At no time has anyone attempted to speak to us about their concerns. As a result, we sought Mediation on the matter. Our position at mediation was:

- Jimmy has been an integral part of our family since birth. His involvement in our lives is immeasurable in terms of our sense of well-being, and our attachment to him is profound, as his to us. To be separated from him now is simply a harsh and unreasonable requirement and that we wished to be able to keep him with us until he passes.
- we feel the ability to rehome Jimmy, given his advanced years, is highly unlikely and the alternative, euthanasia, is completely unacceptable to us.
- given his lovely temperament and his previous experience living in an apartment, and the limited time he spends at Altro, we don't believe this will cause any issues for anyone.
- that unilaterally discriminating against dogs is inconsistent with other By-Laws in NSW
- that while there are some residents of Altro who may not like dogs, there are many who have come forward and expressed their support to us, encouraging us to fight what they too see as an unjust By-Law
- we would support and agree to any guidelines around the keeping of dogs, relating to behaviour, barking, fouling public areas and so on. As responsible dog owners, we are completely accepting of ensuring the comfort of others is not unduly interrupted.

45 In that document, the Applicants also state that prior to purchasing their apartment:

We were aware of the By-Law 22, which allows for cats, birds and fish to be kept as pets, and while it does not include dogs, it does not expressly exclude them. However, we had noticed numerous 'No Dogs' signs around the complex. Our enquiries of real estate agents and dog owners alike (including some who sit on their own building strata committees) met with the same response "Well, the By Law doesn't expressly exclude dogs but it doesn't include them. Its just that they need something to fall back on if a dog becomes a problem. Just bring your dog and as long as he doesn't cause any problems you'll be fine".

We noted the By-Law was inconsistent with the model By-Laws set out in Schedule 3 of the Strata Schemes Management Regulation 2016 and sought legal advice on this. We were advised that essentially a Strata Committee could make any By-Laws it wanted and enforce them. However, it was noted that a By-Law that allows the keeping of some pets but excluding a small dog was perplexing, as it was both inconsistent with the usual By-Law model that either includes a small dog or rules out pets altogether and was inconsistent with community standard. To be honest, we have found the whole thing rather confusing! What we have come to understand though, is that Altro seems to be the only building in the City Quarter complex that takes an inflexible approach to dogs.

We are asking that they make exceptions where it is reasonable to do so and come into line with how the other buildings in the City Quarter are approaching the dog issue.

In our conversations with past and present owners at Altro, it has become apparent that until 2010, dogs were present at Altro. We understand that at that time, a new owner aggressively and vigorously sought to have them all removed.

We're seeking a ruling on this matter because we believe

- the By-Law is out of step with community standards
- it is harsh and unreasonable that we be forced to either rehome or euthanise Jimmy at this stage of his life
- it is harsh and unreasonable that we be forced to be separated from a treasured pet who brings us so much joy and good mental health
- the 'no dogs' ruling at Altro is being aggressively driven by a single person

46 In their submissions of 3 December 2020, the Applicants also say, correctly, that the SSMA is currently under review by the State Parliament. They note that in August 2020 the Legislative Council passed a motion amending prohibiting by-laws that "unreasonably prevent owners and occupiers from having companion animals".

47 They also invoke s 150 of the SSMA which relevantly provides:

150 Order invalidating by-law

(1) The Tribunal may, on the application of a person entitled to vote on the motion to make a by-law or the lessor of a leasehold strata scheme, make an order declaring a by-law to be invalid if the Tribunal considers that an owners corporation did not have the power to make the by-law or that the by-law is harsh, unconscionable or oppressive.

48 They place significant reliance on the decision of the Court of Appeal in *Cooper*. In that decision, the effect of the Court's decision was that a "blanket ban" on the keeping of pets and animals was "harsh, unconscionable or oppressive".

49 Finally, they submit:

45. We believe it is appropriate for the Tribunal to grant our application on the basis that:

a. the City Quarter Community Association DP 270241 no longer enforces by-law 22.1 prohibiting dogs, nor does it "instruct" or "require" individual strata plans to enforce it, thereby rendering Altro by-law 2.3 of SP 74896 irrelevant.

b. the findings of the NSW Court of Appeal in the *Cooper* case make it clear that any by-law which restricts a lot owners normal property rights, including keeping a pet animal is invalid. This includes a "blanket ban" on dogs.

c. the continued enforcement of Altro by-law 2.3 of SP 74896 is harsh and oppressive and denies us the right to enjoy and exercise the ordinary rights of property ownership as set out in *Cooper*.

Owners' Submissions

50 The Owners' first primary submission is that the application is misconceived. They note that the application seeks relief pursuant to s 157 of the SSMA, where that section provides:

157 Order permitting keeping of animal

(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.

51 The Owners say that s 157 is not engaged, and that the Tribunal cannot make an order (“The Tribunal must not make the order unless”) allowing the Applicants to keep Jimmy in their apartment because:

- the by-laws do not 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
- the Owners have not unreasonably withheld their approval to the keeping of the animal on the lot or common property.

52 To put the matter simply, the Owners say the application ought to be dismissed on the basis that relief under s 157 cannot be ordered.

53 The Owners further submit:

Conclusion

35. The Application ought to be dismissed on the basis relief under s.157 cannot be ordered.

36. Despite this - were NCAT to consider the application, the application ought to be dismissed as consideration of by law 2.3 of SP 74896 (the Respondent) would provide no relief as sought or alleged.

37. Community Association DP 270241 is not a Respondent to the application and orders cannot be made in respect to consideration of by law 22.1 of the CMS.

38. By law 2.3 of SP 74896 is not invalid on proper consideration as it is in compliance with the rules and principles set out in Cooper in that:

- a. it has a clear rational connection with the enjoyment of other lots and the common property;
- b. it specifically takes into account use an ownership of the lots, and permits pets appropriately;
- c. it is in no way a "blanket ban" as considered by Cooper,
- d. the proposed use as propounded for by the Applicants would have a clear and evidenced impact on the use and enjoyment of other lots;
- e. the by law is not harsh and oppressive as it does not prohibit the keeping of animals across the board without qualification or exception;
- f. The by-law does what the Court in Cooper seeks to establish-and that is an analysis of the weighing up of rights of use and enjoyment for all lot owners in a strata complex;
- g. any preference to the Applicants desires to override the by-laws would significantly impede the use and enjoyment of other lots-as outlined in the evidence.

Consideration

- 54 A community management statement is a set of by-laws and plans that regulate the management and operation of a community scheme. A community management statement tells a community association, owners and occupiers what they must and must not do. It is an essential document for everyone who lives in a community scheme: see cl 1.1 and 1.2 of the CMS.
- 55 Relevantly, generally, the owner of an apartment (such as the Applicants) must comply with the community management statement: see cl 5.1(a) of the CMS. In addition, the owner of an apartment (such as the Applicants), must also comply with the by-laws of their owners corporation.
- 56 Clause 2.3 of the Owners' by-laws states that the Community Association, owners corporations and relevantly the owners of lots in the City Quarter Complex must comply with the CMS.
- 57 Accordingly, the starting point is that the Applicants as lot owners are under an obligation, an obligation that they knew about when they purchased their lot, not to keep a dog on their lot.
- 58 The Applicants' primary application is one pursuant to s 157 of the SSMA. However, the Owners are correct when they submit that that application is misconceived. While the Tribunal may make an order declaring that the applicant may keep an animal on the lot or common property, it must not do so 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.
- 59 Here, neither limb of s 157(2) is satisfied (and both must be). Section 157(2)(a) is not satisfied as the by-laws do not 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 s 157(2)(b) cannot be satisfied as there is no s 157(2)(a) by-law allowing the keeping of an animal with the approval of the Owners. There cannot be as this would be inconsistent with by-law 22.2 of the CMS.

- 60 Therefore the application must fail.
- 61 However, through their submissions, and anticipated and addressed by the Owners in their submissions, the Applicants also appear to be relying on s 150 of the SSMA, and are asking the Tribunal, albeit indirectly, to declare by-law 22.2 invalid, on the basis that “the continued enforcement of Altro by-law 2.3 of SP 74896 is harsh and oppressive and denies us the right to enjoy and exercise the ordinary rights of property ownership as set out in”.
- 62 Putting aside the question of whether or not that application is properly constituted without the Community Association being a respondent, (and in my view it should have been), no reasons at all have been advanced why by-law 2.3 of SP 74896 is harsh and oppressive. By-law 2.3 is the requirement of the Owners to comply with the CMS. What the Applicants are attempting to submit is that by-law 22.2 of the CMS is harsh and oppressive (or rather, “harsh, unconscionable or oppressive” to invoke the language of s 150), but they have gone about this inappropriately. As the Owners submitted, even if by-law 2.3 was found to be invalid, this of itself would not permit the Applicants to keep Jimmy on their lot.
- 63 Therefore, that “application” must also fail.
- 64 In the circumstances, it is not necessary for the Tribunal to consider the effect of *Cooper* on a by-law such as by-law 22.2, which does not constitute a “blanket ban” of the type considered in that decision.

Other matters

- 65 Reference was made by both parties to “*Help Shape the Future*”, a review by the NSW Government of the SSMA and the SSM Regulation in 2020 (the Review). However, on 24 February 2021 the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* (the Amendment Act) was assented to. As I understand it, the Amendment Act took into account the Review.
- 66 Relevantly, the Amendment Act inserts a new s 137B into the SSMA “Keeping of Animals”. At the time of preparing these reasons the Amendment Act had been assented to, it had not been proclaimed, that is, it had not come into

effect. Accordingly, I have had no regard to the contents of the Amendment Act and its effect, if any, on the present application.

Order

67 The Tribunal orders that:

(1) The application is dismissed.

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.