

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : STEELE and THE OWNERS OF COCOS BEACH
BUNGALOWS SURVEY STRATA PLAN 42074
[2021] WASAT 101

MEMBER : DR B MCGIVERN, MEMBER

HEARD : 11 MAY 2021

DELIVERED : 3 AUGUST 2021

FILE NO/S : CC 821 of 2020

BETWEEN : ROBERT STEELE
First Applicant

IRENE STEELE
Second Applicant

AND

THE OWNERS OF COCOS BEACH BUNGALOWS
SURVEY STRATA PLAN 42074
Respondent

Catchwords:

Strata titles - Survey-strata scheme designated as holiday accommodation under local planning scheme - Validity of by-law restricting the keeping of animals on scheme property - Refusal of strata company to consent to applicants having pet dog on scheme property - Whether by-law unfairly prejudicial to or unfairly discriminatory against applicants - Whether by-law oppressive or unreasonable - Whether strata company acted unreasonably under by-law

Legislation:

Strata Titles Act 1985 (WA), s 10, s 14(8), s 46(h), s 46(i), s 46(j), s 46(j)(i), s 46(j)(ii), s 119, s 119(1), s 119(1)(a), s 119(1)(b), s 197, s 197(1), s 197(1)(i), s 197(2), s 199, s 200, s 204, s 204(d), Sch 5, cl 4, cl 14, cl 14(1), cl 14(2)

Strata Titles Act 1985 (WA) (before 1 May 2020), s 5C, s 42, s 42(2), s 42(15), s 42A, s 42B, Sch 1, Sch 2

Strata Titles Amendment Act 2018 (WA)

Result:

Application dismissed

Category: B

Representation:*Counsel:*

First Applicant : In Person
Second Applicant : In Person
Respondent : Mr JL Winton

Solicitors:

First Applicant : N/A
Second Applicant : N/A
Respondent : N/A

Case(s) referred to in decision(s):

Blaszkiwicz and The Owners of 7 Henderson Street Fremantle (Strata Scheme 74918) [2021] WASAT 56

Commissioner of Police v Thayli Pty Ltd [2020] WASC 43

Cooper v The Owners - Strata Plan No 58068 [2020] NSWCA 250

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28

Rechichi and Johnston [2021] WASAT 79

Redset Nominees Pty Ltd and The Owners of Spinnakers Apartments Strata Plan 53824 & Ors [2021] WASAT 96

The Owners - Strata Plan No 55773 v Roden; Spiers v The Owners - Strata Plan
No 77953 [2020] NSWCATAP 95

REASONS FOR DECISION OF THE TRIBUNAL:***Introduction***

1 In broad terms, this dispute concerns a by-law of a survey-strata scheme (**Scheme**) which is designated as holiday accommodation in Broome. The by-law in question (**By-Law**) prohibits owners and occupiers from keeping pets without the unanimous written consent of all lot owners. The applicants, who have a pet chihuahua and own a unit in the Scheme, claim that the By-Law is objectionable and invalid. The respondent is the strata company which defends the By-Law as appropriate to the Scheme.

2 The relief sought by the applicants (**Proposed Orders**) is set out in the application lodged with the Tribunal on 15 July 2020, as follows:

A. that by-law 8(1) of the Management Statement is invalid on the grounds that it is:

- (i) oppressive;
- (ii) unreasonable;
- (iii) unfairly prejudicial; or
- (iv) unfairly discriminatory

B. that by-law 8(1) be revoked

C. a declaration that the applicants may keep their pet chihuahua in Bungalow 4 and on common property of the Strata Plan 42074.

3 The application is made pursuant to s 197(4) of the *Strata Titles Act 1985* (WA) (**ST Act**). In these reasons, unless otherwise stated, any reference to a statutory provision is a reference to the ST Act as amended from 1 May 2020.¹ The ST Act as it stood before 1 May 2020 will be referred to as the **Prior ST Act**.

Issue to be determined

4 The principal issue for determination is whether the By-Law falls within the scope of s 46(j), which provides that scheme by-laws are invalid:

¹ Pursuant to the *Strata Titles Amendment Act 2018* (WA), significant amendments came into effect on 1 May 2020.

- (j) to the extent that, having regard to the interests of all of the owners of lots in the strata titles scheme in the use and enjoyment of their lots and the common property -
- (i) they are unfairly prejudicial to, or unfairly discriminatory against, 1 or more of the owners of lots; or
 - (ii) they are oppressive or unreasonable.

5 If that issue is resolved in favour of the applicants, then there would be little need for the relief sought in paragraphs B and C of the Proposed Orders. However, if it is resolved in favour of the respondent, then the Tribunal must consider whether there is nevertheless merit in granting relief in terms of paragraphs B and C of the Proposed Orders.

Evidence and material facts

6 A final hearing of the application was conducted on 11 May 2021.

7 Prior to the hearing, the parties each filed bundles of documents and submissions in support of their respective cases. Those materials were compiled by the Tribunal into a hearing book which was taken into evidence (**Exhibit 1**) and included:

- a) the application;
- b) a search of survey-strata plan 42074 (**Strata Plan**);
- c) a management statement lodged with the Strata Plan (instrument number I187913) on 29 July 2002 (**Management Statement**);
- d) a search of the certificate of title for the applicants' lot (register number 4/SP42074);
- e) the respondent's statement of issues, facts and contentions filed on 2 November 2020 (**SIFC**), and written submissions filed on 21 December 2020 pursuant to the Tribunal's order dated 24 November 2020 (together, **Respondent's Submissions**);
- f) the applicants' written submissions filed in response to the SIFC on 18 March 2021, and further written submissions filed on 22 January 2021 pursuant to the

Tribunal's order dated 24 November 2020 (together, **Applicants' Submissions**); and

- g) various statements in support of, or opposition to, the application by other owners of lots in the Scheme.

8 At the hearing:

- a) the respondent was represented;
- b) the applicants were self-represented; and
- c) the applicants gave evidence, but no other witnesses were called by either party.

Material facts

9 Based on the evidence outlined above, I make the following findings of material fact.

10 The Scheme, known as Cocos Beach Bungalows, was created upon the registration on 29 July 2002 of the Strata Plan.

11 The Management Statement contains the Scheme by-laws.² A reference to a by-law in these reasons is, unless otherwise stated, a reference to a by-law in the Management Statement.

12 The By-Law in contention in this matter is by-law 8 of Schedule 2,³ which relevantly provides:

- (1) A proprietor or occupier of a lot shall not keep a pet on the lot that he or she owns, occupies or resides in without the unanimous written consent of all proprietors, except as provided by section 42(15) of the [Prior ST Act].⁴
- (2) Unless the unanimous written consent of all proprietors is obtained her piece being kept on the lot, the council must serve notice on a proprietor or occupier of a lot with the pet requiring

² Under the Prior ST Act, pursuant to s 5C, by-laws set out in a management statement lodged at the time of registration of a strata plan would have effect under s 42, s 42A and s 42B and, pursuant to s 42(2), could amend or repeal the 'deemed' by-laws contained in Sch 1 and Sch 2. In this case, the Management Statement had the effect of repealing and replacing the 'deemed' by-laws. Further, pursuant to Sch 5, cl 4 of the ST Act, those by-laws continue to have effect.

³ Exhibit 1, page 39.

⁴ Prior ST Act, s 42(15) provided that a by-law had no force or effect to the extent that it prohibited or restricted a guide dog used by a completely or partially blind person. The ST Act, s 46 (h)-(i) provide that by-laws are invalid to the extent that they prohibit or restrict the keeping on a lot of an animal that is used as an assistance animal by a person with a disability who is an owner or occupier of a lot, or prohibit or restrict the use on the parcel of an assistance animal by a person with a disability.

the removal of the pet. The offending pet must be removed within seven (7) days of service of the notice.

- (3) Where the unanimous written consent of all proprietors is obtained to a pet being kept on a lot, the council may serve notice on a proprietor or occupier of any lot with a pet that causes nuisance to other proprietors requiring removal of the pet. The offending pet must be removed within seven (7) days of service of the notice.

13 It was common ground between the parties that the Scheme is designated under the local planning scheme for use as holiday accommodation. Accordingly, lots (other than that occupied by the resident caretakers):

- a) are marketed for short-stay accommodation; and
- b) may not be occupied by a person for more than three months in any twelve-month period.

14 That is reflected in:

- a) by-law 35 of Schedule 1, which provides:

Except where a lot is occupied by the resident caretaker, the proprietor of a lot must ensure that his or her lot is only used for vacation, holiday and recreational purposes in accordance with the policy on strata title of holiday accommodation and tourist development (excluding caravan parks of the Shire of Broome, unless the prior approval of the Shire of Broome is first obtained. Despite any other provisions of the bylaws in schedule one and schedule two, this bylaw cannot be removed or varied without the consent of the Shire of Broome [.]

and

- b) by-law 25 of Schedule 1, which includes:

- (1) Lots in the parcel are intended for use and occupation for vacation, holiday and recreational purposes in accordance with the policy on strata title of holiday accommodation and tourist development (excluding caravan parks) of the Shire of Broome.
- (2) The strata company will endeavour to maintain the appearance and demeanour of the improvements and landscaping on the parcel in keeping with the standard

of similar tourism accommodation and having regard to the fact that the lots are or will be letter to members of the public.

- 15 The Scheme comprises nine lots and common property.⁵
- a) Initially, the lots each comprised land with single storey bungalows occupying between 191m² and 209m² of floor space.
 - b) Following a re-subdivision in 2012, areas previously comprising Lot 1 and a contiguous garden space were consolidated into a new lot, Lot 11, occupying 551m² of floor space.
 - c) The garden of Lot 11 is enclosed by a fence. Otherwise, most of the garden areas in the Scheme are common property and are not enclosed.

16 In or about August 2015, Lot 11 was acquired by and has since been occupied by the resident caretakers for the Scheme. The following month, the respondent approved an application by them to keep two pets within their lot.⁶

17 On 8 December 2017, the applicants became the registered proprietors of Lot 4.

18 The parties agree that:

- a) on 22 September 2017, prior to their acquisition of Lot 4, the applicants applied to the respondent for consent to keep their pet chihuahua (**Matilda**) with them on the lot. That application was refused;
- b) notwithstanding the respondent's refusal, on or about 31 May 2018, the applicants occupied Lot 4 with Matilda, and were issued with a breach notice by the respondent requiring the removal of Matilda from Scheme property;
- c) on 12 June 2018, the respondent made application to the Tribunal for an order under the Prior ST Act that Matilda be removed from Scheme property.

⁵ Pursuant to s 10, common property is that part a strata titles scheme that does not form part of a lot.

⁶ And at the same time approved the erection of the garden fence, referred to above: Exhibit 1, p14.

That application was withdrawn by the respondent upon the applicants' undertaking not to bring Matilda onto Scheme property without obtaining consent as required by the By-Law; and

- d) on 21 January 2019, 22 May 2020 and 16 June 2020, the applicants applied to the respondent for consent to keep Matilda on Lot 4 and each of those applications was refused.

19 On 15 July 2020, the applicants commenced this proceeding by filing an application under s 197(4).

Is the By-Law invalid?

20 The resolution of the primary issue in dispute (see [4] above) requires the key terms in s 46(j) to be construed. That task is to be approached in accordance with the general principles of construction, relevantly summarised in *Commissioner of Police v Thayli Pty Ltd*⁷ as follows:

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The importance of construction of legislation is to begin in the text itself by regard to its context and purpose. Statutory context within immediate provisions and the whole of an Act is to be considered from the beginning of the task.

...

[Further], context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed.

Statutory context

21 As appears above, many of the facts material to the dispute arose before 1 May 2020 when, as noted earlier in these reasons, significant amendments to the Prior ST Act commenced. The transition from the Prior ST Act is dealt with under the ST Act in Sch 5, including relevantly as follows:

- a) in relation to by-laws, cl 4 provides:
- (1) The by-laws (including any management statement) of a strata company as in force immediately before

⁷ *Commissioner of Police v Thayli Pty Ltd* [2020] WASC 43, at [29] and [31].

commencement day continue in force, subject to this Act, as scheme by-laws and as if they had been made as governance by-laws [Sch 1] or as conduct by-laws [Sch 2] according to the classification into which they would fall if they had been made on commencement day.

...

(7) Sections 46 and 47 apply to scheme by-laws whether made or registered before, on or after commencement day and a penalty may be imposed by the Tribunal under section 47 whether or not the particular scheme by-law provides for a penalty as set out in section 42A as in force immediately before commencement day.

b) in relation to disputes, cl 14 provides:

(1) A scheme dispute may involve an event that occurred, or a matter that arose, before commencement day.

(2) In determining a scheme dispute, the Tribunal may apply the objectives set out in section 119 as if that section had been in force when the event occurred or the matter arose.

22 The term 'scheme dispute' (referred to in Sch 5 cl 14(1) above) takes its meaning from s 197.⁸ Relevantly:

a) pursuant to s 197(1)(i), a dispute between 'scheme participants' about the validity of scheme by-laws is a scheme dispute;

b) the term 'scheme participants' is defined in s 197(2) to include both 'the strata company for the strata titles scheme' and 'a member of the strata company for the strata titles scheme'; and

c) pursuant to s 14(8), members of a strata company are the owners for the time being of lots in a strata titles scheme.

23 I am satisfied that the present proceeding is a scheme dispute within the meaning of s 197(1)(i) (and, as noted above, the proceeding was commenced as such under s 197(4)).

⁸ Discussed in detail in *Blaszkiwicz and The Owners of 7 Henderson Street Fremantle (Strata Scheme 74918)* [2021] WASAT 56.

24

The objectives referred to in Sch 5 cl 14(2) are contained in s 119 as follows:

- (1) In performing its functions, a strata company is to have the objective of implementing processes and achieving outcomes that are not, having regard to the use and enjoyment of lots and common property in the strata titles scheme -
 - (a) unfairly prejudicial to or discriminatory against a person; or
 - (b) oppressive or unreasonable.
- (2) In achieving that objective, a strata company -
 - (a) must take into account any failure of a person to act consistently with this Act or the scheme by-laws; and
 - (b) must consider the merits of any proposal put to it and the options that are reasonably available in any particular circumstances; and
 - (c) must be aware that -
 - (i) a resolution or other conduct may be overturned for failure to meet that objective despite the fact that it reflects the will of the majority of members of the strata company as expressed through the exercise of their voting powers; and
 - (ii) the fact that a person has chosen to become the owner of a lot does not prevent the person challenging the performance of a function for failure to meet that objective.
- (3) Without limitation, a strata company acts oppressively or unreasonably in passing or not passing a resolution if -
 - (a) the resolution would not have been passed, or not have been passed as a particular type of resolution, but for the fact that a person was improperly denied a vote on the resolution; or
 - (b) the resolution would have been passed, or would have been passed as a particular type of resolution, if a person had properly been given an opportunity to vote on the resolution.

25 As may be seen, the language of s 46(j) (set out at [4] above) is reflected in s 119(1).

NSW case law

26 In the course of the proceeding, the parties were directed to the recent decision of the NSW Court of Appeal in *Cooper v The Owners - Strata Plan No 58068*⁹ and were invited to make submissions to the Tribunal on its relevance to the resolution of this dispute.

27 In *Cooper* the Court:

- a) was concerned with a challenge to the validity of a by-law which provided that (excepting assistance animals) 'an owner or occupier of a Lot must not keep or permit any animal to be on a Lot or on the Common Property', on the basis that it offended a statutory restriction that a by-law 'must not be harsh, unconscionable or oppressive';
- b) reasoned that the offending by-law could be contrasted with the model by-laws concerning animals which were not absolute, and permitted the keeping of pets subject to conditions (including consent of the owners corporation, which could not be unreasonably withheld);
- c) construed the words 'harsh, unconscionable or oppressive' as a composite (or 'triune') expression, grouped disjunctively, such that none of the three words could be limited by one another or disregarded. However, that phrase was directed to the character of a particular by-law;
- d) held that a by-law which restricts the property rights of lot owners is only lawful if there is a rational connection between that restriction and the protection of the enjoyment of other lots and the common property;

⁹ *Cooper v The Owners - Strata Plan No 58068* [2020] NSWCA 250 (*Cooper*), which in turn considered *The Owners - Strata Plan No 55773 v Roden; Spiers v The Owners - Strata Plan No 77953* [2020] NSWCATAP 95.

- e) found that, even though not harsh or unconscionable, the by-law in question was oppressive, because it prohibited an aspect of the use of lots in the strata plan that is an ordinary incident of the ownership of real property - namely, keeping a pet – and because that prohibition:
- i) had a 'blanket' operation, without any qualification or exception for animals that would create no hazard, nuisance or material annoyance to others; and therefore
 - ii) interfered with lot holders' use of their real property in a respect and to an extent that was unjustified by any legitimate concern of others in the building, and provided no material benefit to other occupiers of the building in their use or enjoyment of their own lots or of the common property.

28 The language and structure of s 46(j) is somewhat different to the statutory phrase considered in *Cooper*. Of note, there are two distinct limbs of s 46(j): one concerning whether by-laws are 'unfairly prejudicial' or 'unfairly discriminatory'; the other with whether by-laws are 'oppressive or unreasonable'.

29 In line with the Court's approach in *Cooper*, I consider that each of the limbs of s 46(j) is addressed to the *character*, objectively assessed, of the by-law in question. In determining the character of a by-law:

- a) the focus is on the inherent nature of the by-law, not on how it has been *implemented* (which may give rise to an objection, but on the ground of the decision being objectionable, not that the by-law is invalid);
- b) it is certainly proper (and indeed necessary) to consider the impact or likely impact of the by-law on an owner, but that is to be undertaken by reference to:
 - i) the way the by-law operates or is likely to operate on an objective basis (rather than by reference to the subjective perception or experience of it on the part of a particular owner); and

- ii) the context in which the by-law must operate, notably including nature of the strata titles scheme itself.

Is the By-Law unfairly prejudicial to, or unfairly discriminatory?

30 In the course of their oral and written submissions, the applicants contended that whether the By-Law is unfairly prejudicial to, or discriminatory against, them should be determined taking account of their experience of it (that is, that they feel unfairly treated and oppressed by it). I do not accept that submission.¹⁰

31 The phrases 'unfairly prejudicial' and 'unfairly discriminatory' are not defined in the ST Act, and so take their ordinary and natural meaning, including by reference to the context in which they are used.¹¹ Relevantly:

- a) prejudicial means causing prejudice, which may in turn be understood as 'an unfavourable opinion or feeling formed beforehand or without knowledge, thought, or reason' or 'disadvantage resulting from some judgement or action of another';¹²
- b) discriminatory means treating persons differently based on some attribute they have (which may include gender, race, religion or sexuality); and
- c) each of those terms is qualified, such that a by-law may validly give rise to different treatment or disadvantage if it does not do so 'unfairly'.

32 In this case, the By-Law is expressly directed to all owners and occupiers of lots. It is true to say that a by-law that applies to all persons may disproportionately impact on some, both because of their circumstances or perceptions of its effect. But that does not necessarily make the by-law prejudicial or discriminatory in character, let alone unfairly so.

33 There is nothing:

¹⁰ For the reasons below, and because that submission is at odds with the approach outlined at [299] above.

¹¹ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [69].

¹² *Macquarie Dictionary* (2020), 'prejudice'.

- a) inherently unfair (in the sense of being partial, biased or unjust)¹³ in the terms of, or likely operation of, the By-Law; and/or
- b) that would make it more or less likely that the applicants (as owners of Lot 4) would either have a pet or be more restricted by the terms of the By-Law than any other owner in the Scheme.

34 I find that the By-Law is not unfairly prejudicial to, or unfairly discriminatory against, the applicants within the meaning of s 46(j)(i).

Is the By-Law oppressive or unreasonable?

35 The applicants contend that the By-Law is oppressive and unreasonable, and argue that the decision in *Cooper* supports such a finding. Those terms being undefined in the ST Act, their meaning must be construed.

36 The ordinary meaning of 'unreasonable' includes things that are not based on or in accordance with reason or sound judgment,¹⁴ while 'oppressive' encompasses things that are 'burdensome, unjustly harsh, or tyrannical'.¹⁵ In *Cooper*, the Court cautioned against defining terms without regard to context, however, and reasoned that in the context of strata law, a by-law could be 'oppressive' if it restricted rights of occupation or ownership without there being a rational connection between such a restriction and the protection of the interests of other strata owners or occupiers.

37 In my view, the decision in *Cooper* offers limited support for the application.

- a) First, I am unaware of any Western Australian authority to the effect that keeping a pet is an incident of property ownership. Further, even if *Cooper* were to be followed in this regard, I do not think the decision can be read as implying pet keeping as an ordinary incident of *all* real property ownership.¹⁶ Rather, read in the context in which it was decided, it is plainly directed to residential property.

¹³ *Macquarie Dictionary* (2020), 'unfair'.

¹⁴ *Macquarie Dictionary* (2020), 'unreasonable'.

¹⁵ *Macquarie Dictionary* (2020), 'oppressive'.

¹⁶ I do not think it is open, for example, to argue that *Cooper* stands for the proposition that any such incident would arise in connection with owning a lot in a commercial complex.

- b) Second, in *Cooper* the Court emphasised the 'blanket ban' nature of the by-law in question, noting that:
- i) there was no discretion to be exercised under it, including in relation to the species or impact of the animal in question (noting that the keeping of even a goldfish or axolotl would be prohibited); and
 - ii) related to the above, there was no rational connection between the rights of other owners or occupiers and the restriction.

38 In this case, the Scheme is not a residential complex; it is designated for holiday accommodation. The practical import of this is significant - in the absence of consent to keep an animal, the By-Law does not operate such that the proprietor or occupier of a lot in the Scheme (in this case, the applicants) cannot have a pet; it operates such that they cannot bring their pet with them on holiday. The nature of such a restriction does not, in my view, properly meet the description of oppressive (including as that term was construed in *Cooper*) or unreasonable.

39 Further, the By-Law:

- a) is qualified in nature - although it is restrictive in the sense that it requires the unanimous consent of all owners, it does allow for exceptions;
- b) is capable of responding to differences in species and circumstances (the latter evidenced by the consent given to the resident caretakers to keep pets); and
- c) operates in the context of a Scheme which is designed for holiday accommodation (and associated high turnover of occupation), with significant shared space. In that context, I am satisfied that a restriction on pets has a rational connection with the interests of other owners, and is reasonably responsive to the nature of the Scheme.

40 In the premises, I find that the By-Law is not oppressive or unreasonable within the meaning of s 46(j)(ii).

41 It follows from my conclusions at [34] and [40] above that I find that the By-Law is not invalid by reason of s 46(j).

Should the By-Law be revoked?

42 The applicants rely on the invalidity of the By-Law as the basis for revoking it.

43 It follows from the conclusion at [41] above, and the absence of any other basis on which I could be satisfied that it was appropriate to do so, that I decline to make such an order.

Should a declaration that the applicants may keep Matilda on Scheme property be made?

44 The Tribunal has a very broad discretion to make orders¹⁷ and declarations¹⁸ to resolve a proceeding under the ST Act. However, that discretion is to be exercised subject to:

- a) consideration of the basis upon which the substantive dispute is to be resolved;¹⁹ and
- b) any limitations specific to the subject matter of the orders.²⁰

45 As to the merits, the applicants contend that the respondent's implementation of the By-Law (in refusing their four applications for consent to keep Matilda on Scheme property) is contrary to the objectives in s 119. They argue that the decision of the respondent to allow the resident caretakers to keep pets points to an unfairly discriminatory exercise of power contrary to s 119(1)(a). They also contend that the respondent's refusal is oppressive or unreasonable contrary to s 119(1)(b).

46 However, even if the Tribunal were satisfied of the applicants' contentions above, s 204 limits the orders that can be made, relevantly as follows:

In a proceeding under this Act, the Tribunal cannot -

¹⁷ ST Act, s 200: In a proceeding under this Act, the Tribunal may make any order it considers appropriate to resolve the dispute or proceeding.

¹⁸ ST Act, s 199: In a proceeding under this Act, the Tribunal may make a declaration concerning a matter in the proceeding instead of any order the Tribunal could make, or in addition to any order the Tribunal makes, in the proceeding.

¹⁹ See *Redset Nominees Pty Ltd and The Owners of Spinnakers Apartments Strata Plan 53824 & Ors* [2021] WASAT 96 at [82].

²⁰ See *Rechichi and Johnston* [2021] WASAT 79.

...

- (d) make an order to allow the keeping of an animal on specified conditions or prohibit the keeping of an animal on a lot or common property unless satisfied that the strata company has acted unreasonably[.]

47 In this case, I am not satisfied that the respondent has acted unreasonably (or unfairly) in refusing consent to the applicants keeping Matilda on Scheme property.

- a) As to the respondent's consent to the resident caretakers keeping a pet, I am satisfied that there is a rational and non-discriminatory basis upon which to treat those owners differently. It is clear from the evidence that the resident caretakers' lot is a permanent residence, with an enclosed outdoor space. That distinguishes those owners, and the impact of the By-Law on them, from other occupiers of Scheme property.
- b) In relation to refusing consent to the applicants:
 - i) there is a reasonable basis on which to determine an application from a non-resident owner differently to that of the residential caretaker;
 - ii) although I accept that there is evidence that Matilda is well behaved,²¹ it is not unreasonable for a strata company to make decisions about pets on the basis of a species (rather than an individual animal). Indeed, in *Cooper* the Court cited dogs as an example of a pet that may be expected to carry a risk of nuisance or disturbance to other owners; and
 - iii) further, as noted above, the Scheme is designated for holiday accommodation with shared open spaces, increasing the risks that may reasonably be associated with the occupation of animals.

²¹ Exhibit 1, pages 77-82.

48 Since I am not satisfied that the respondent acted unreasonably, by reason of s 204(d) it is not open to me to make a declaration in the terms sought by the applicants.

Orders

The Tribunal orders:

1. The application is dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

DR B MCGIVERN, MEMBER

3 AUGUST 2021