



Civil and Administrative Tribunal

New South Wales

Case Name: Bruce v The Owners – Strata Plan No. 98803

Medium Neutral Citation: [2022] NSWCATCD 83

Hearing Date(s): 14 February 2022

Date of Orders: 11 April 2022

Decision Date: 11 April 2022

Jurisdiction: Consumer and Commercial Division

Before: S Hanstein, General Member

Decision: The Tribunal declares that the applicants may keep the French Bulldog Peach on their lot, on the condition that the applicants comply with the requirements set out in paragraph 42 of the reasons for this decision.

Catchwords: LAND LAW — Strata title — Keeping of animals — Where approval refused — Whether refusal unreasonable — Whether by-law prohibits keeping of more than one animal — Whether keeping of animal interferes with other occupant’s use and enjoyment

Legislation Cited: Interpretation Act 1987 (NSW)
Strata Schemes Management Act 2015 (NSW)
Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021 (NSW)
Strata Schemes Management Regulation 2016 (NSW)

Cases Cited: Cooper v The Owners – Strata Plan No 58068 [2020] NSWCA 250

Texts Cited: Nil

Category: Principal judgment

Parties: Andrew Bruce (First Applicant)
Alice Barclay (Second Applicant)

The Owners – Strata Plan No. 98803 (Respondent)
Representation: Hunter Strata Management (Respondent)
File Number(s): SC21/46146
Publication Restriction: Nil

REASONS FOR DECISION

1 The applicants, being owners of a lot in the strata scheme, seek an order under s 157 of the *Strata Schemes Management Act 2015* (“Act”) that they be permitted to keep a French Bulldog named Peach on their lot. They have previously received approval from the respondent (“Owners Corporation”) to keep on their lot their other French Bulldog, Zodiac, and a bird.

2 Section 157 of the Act 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.

3 I am satisfied the Tribunal has jurisdiction to hear and determine the application.

Facts

4 The relevant facts are not in dispute, and I am satisfied of the following matters.

5 The by-law adopted by the Owners Corporation in respect of the keeping of pets is option B of by-law 5 of the Model By-laws contained in the *Strata Schemes Management Regulation 2016* (“Regulation”), which provides relevantly:

Option B

(1) An owner or occupier of a lot may keep an animal on the lot or the common property with the written approval of the owners corporation.

(2) The owners corporation must not unreasonably withhold its approval of the keeping of an animal on a lot or the common property and must give an owner or occupier written reasons for any refusal to grant approval.

(3) If an owner or occupier of a lot keeps an animal on the lot, the owner or occupier must—

(a) keep the animal within the lot, and

(b) supervise the animal when it is on the common property, and

(c) take any action that is necessary to clean all areas of the lot or the common property that are soiled by the animal.

...

6 On 15 June 2021, the applicants lodged a pet application form with the strata manager in respect of the dog Peach (“Pet Application”), and Peach commenced living on the lot on 20 June 2021.

7 On 30 June 2021, the applicants were informed the Pet Application had been refused by the strata committee for the following reasons:

The by-laws state: “An owner or occupier of lot may keep an animal on the lot”, this is interpreted as one animal

Due to a previous dispute with unit 7 regarding two dogs, we do not wish to create a precedent for future request

The current dog barks and runs up and down the fence line

The area of the backyard is considered not conducive to an additional dog.

8 The reference to the “current dog” is understood to be a reference to Zodiac, and the finding about that dog was apparently based on a letter dated 24 June 2021 which stated:

I have concerns about my neighbour having two dogs:

(a) The dog he has jumps and barks at the fence while I peg washing on my clothes line, he also runs up and down the fence sniffing when I am sitting outside having a coffee.

(b) I do not think that these small backyards are suitable to have two medium size dogs.

9 That letter was not provided to the applicants until its inclusion in the documents provided by the Owners Corporation in the course of these proceedings.

10 The dog Peach was subsequently relocated, but returned to live at the applicants’ lot and has remained there since August 2021.

- 11 Further correspondence between the applicants and the strata manager took place over the following few months, expounding the applicants' and Strata Committee's positions, and mediation took place. No resolution was achieved.
- 12 The strata committee decided that the issue should be put before the Owners Corporation for a vote, and an Extraordinary General Meeting was held on 26 October 2021 ("EGM") to consider a motion that the Pet Application be accepted ("Motion"). Circulated to the members of the Owners Corporation prior to the EGM was a document from the Strata Committee which stated:
- The Strata Committee have rejected the [Pet Application] on the grounds of it not being in compliance with the Strata by-laws (see by-law 5(1)).
- This by-law stipulates an owner/occupier of a lot may keep "AN ANIMAL" on the lot with the written approval of the Owners Corporation.
- This Strata Committee interpret this as meaning one animal per lot. (Caged birds or gold fish etc are not considered under this by-law.) To date no owner or occupier has been refused permission to keep an animal on their lot.
- It is our opinion that if a second animal (irrespective of the size or breed of the animal) were to be allowed onto a lot, then it would be difficult to refuse future requests by other owner[s] to increase the number of animals on their lots.
- With 24 lots in the strata this situation could in the future create unsatisfactory outcomes.
- 13 A document was also circulated on behalf of the applicants which addressed what the applicants understood to be the concerns with the Pet Application.
- 14 At the EGM, the Motion was defeated, with four votes in favour and 14 against. The Minutes do not record the reasons for the refusal and the applicants apparently were not otherwise given any written reasons for the refusal.

Relevant law

- 15 In *Cooper v The Owners–Strata Plan No 58068* [2020] NSWCA 250 ("Cooper"), the Court of Appeal held that a by-law which imposed a blanket prohibition on the keeping of animals in the strata scheme was harsh, unconscionable or oppressive, contrary to section 139(1) of the Act.
- 16 Following Cooper, section 137B, commencing on 25 August 2021, was inserted into the Act by the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* ("Amending Act"). Section 137B provides:

137B Keeping of animals

(1) Each of the following has no force or effect to the extent that it would unreasonably prohibit the keeping of an animal on a lot—

(a) a by-law,

(b) a decision by an owners corporation under a by-law.

(2) It is taken to be reasonable to keep an animal on a lot unless the keeping of the animal unreasonably interferes with another occupant's use and enjoyment of the occupant's lot or the common property.

(3) The regulations may specify circumstances in which the keeping of an animal unreasonably interferes with another occupant's use and enjoyment of the occupant's lot or the common property.

(4) A by-law that prohibits the keeping of an animal on a lot is not harsh, unconscionable or oppressive if it does not unreasonably prohibit the keeping of an animal on a lot.

Note—

Section 150(1) provides that the Tribunal may declare a by-law to be invalid if it is harsh, unconscionable or oppressive.

(5) An owners corporation is taken to have given permission for the keeping of an animal on a lot if—

(a) it made a decision about the keeping of the animal in contravention of subsection (1)(b), or

(b) a decision of the owners corporation is required before the animal may be kept on the lot and the owners corporation failed to make a decision within a reasonable time.

(6) If a report has been tabled in Parliament under section 276A, the Minister must not recommend the making of a regulation under this section unless the Minister has considered the report.

(7) Subsection (6) is repealed 5 years after the commencement of this section.

17 Whilst not included in the original Bill for the Amending Act, section 137B was included as an amendment to the Bill, in respect of which the Minister stated in the debate in Parliament on 9 February 2021:

The Government supports the amendments. They strike the right balance between the interests of those who wish to keep animals in strata schemes and those who might be affected by the keeping of animals. The amendments achieve that balance by enshrining the principle that strata residents have the right to use and enjoy their lot as they wish, as long as that does not unreasonably interfere with the ability of other residents to use and enjoy their lot or the common property. In that way, the amendments codify the recent decision handed down by the New South Wales Court of Appeal in *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250, giving certainty to both pet owners and strata owners.

That decision overturned a by-law that imposed a blanket ban on the keeping of pets. The court decided that a by-law could be harsh or unconscionable if it

limits the ability of a lot owner to use their property on a basis that has no connection to the impact on other lot owners. Some stakeholders have objected to the Court of Appeal decision. Some are unhappy that it interferes with the property rights of strata lot owners to use their property as they wish, while others are unhappy that it limits the ability of owners corporations to make the by-laws they wish to govern their scheme. However, the Government's view is that a balance needs to be struck between allowing lot owners to use their property as they wish and not unreasonably interfering with the rights of other owners to also enjoy their lots and the common property.

18 Following a review conducted under section 276A of the Act, a report was published in August 2021: "*Review of the keeping of animals in strata schemes in NSW: Report under section 276A of the Strata Schemes Management Act 2015*" ("Report").

19 The Report stated (at page 12) that:

the prescribed circumstances in the regulations [in which the keeping of an animal unreasonably interferes with another occupant's use and enjoyment of the occupant's lot or the common property] should be those that can be objectively assessed by an owners corporation without special expertise

and recommended the circumstances that became reg. 36A in the Regulations (which also commenced on 25 August 2021):

36A Keeping of animals—circumstances of unreasonable interference

For the purposes of the Act, section 137B(3), the circumstances in which the keeping of an animal unreasonably interferes with another occupant's use and enjoyment of the occupant's lot or the common property are—

(a) the animal makes a noise that persistently occurs to the degree that the noise unreasonably interferes with the peace, comfort or convenience of another occupant, or

(b) the animal repeatedly runs at or chases another occupant, a visitor of another occupant or an animal kept by another occupant, or

(c) the animal attacks or otherwise menaces another occupant, a visitor of another occupant or an animal kept by another occupant, or

(d) the animal repeatedly causes damage to the common property or another lot, or

(e) the animal endangers the health of another occupant through infection or infestation, or

(f) the animal causes a persistent offensive odour that penetrates another lot or the common property, or

(g) for a cat kept on a lot—the owner of the animal fails to comply with an order that is in force under the Companion Animals Act 1998, section 31, or

(h) for a dog kept on a lot—

- (i) the owner of the animal fails to comply with an order that is in force under the Companion Animals Act 1998, section 32A, or
- (ii) the animal is declared to be a menacing dog or a dangerous dog under the Companion Animals Act 1998, section 34, or
- (iii) the animal is a restricted dog within the meaning of the Companion Animals Act 1998, section 55(1).

20 The Report continued (at page 13):

Other circumstances suggested in the consultation are not suitable to be included in the regulations. The circumstances should not include personal preferences or fears, which are difficult to objectively assess, may involve someone with extraordinary sensitivity, and are not a sound basis on which to restrict another occupant's right to use their property. ...

'There are already too many animals in the scheme' was raised in public feedback as grounds for unreasonable interference. However, this should not be included in the regulations. There is no objective way to assess how many is too many, and the applicable test is instead whether the keeping of the animal or animals in question impacts unreasonably on other occupants.

21 In respect of the welfare of kept animals, the Report set out findings as follows:

7. The evidence does not support assertions that it is harmful to an animal's welfare to allow them to live in strata schemes.

8. There are appropriate channels in place to report concerns about animal cruelty or neglect.

9. The Act is not the appropriate legislative mechanism to set requirements for consideration of animal welfare.

10. Owners corporations and strata committees do not have expertise in assessing animal welfare and therefore should not be required to make such assessments.

22 Section 8 of the *Interpretation Act 1987* ("Interpretation Act") provides, relevantly:

8 Gender and number

In any Act or instrument—

...

(b) a reference to a word or expression in the singular form includes a reference to the word or expression in the plural form,

Consideration

23 The Tribunal cannot make an order under section 157 unless satisfied that 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 the owners corporation has

unreasonably withheld its approval to the keeping of the animal on the lot. If those preconditions are satisfied, the Tribunal has a discretion as to whether an order should be made.

By-laws

24 The by-laws in this case satisfy the precondition set out above.

Consent unreasonably withheld

25 I am satisfied that the Owners Corporation unreasonably withheld its approval to the keeping of the dog Peach, for the following reasons.

26 No written reasons appear to have been given for the Owner's Corporation decision made at the EGM, and the evidence provided at the hearing was to the effect that the reasons were those set out in the strata committee's document provided to the EGM: namely that the by-laws permit the keeping of one animal on a lot (excluding animals such as caged birds or gold fish); that if a second animal "irrespective of the size or breed of the animal" were permitted, it may be difficult to refuse future requests by other owners – in effect, creating a "precedent"; and that with 24 lots in the strata scheme that could in the future "create unsatisfactory outcomes".

Do the by-laws permit the keeping of only one animal?

27 The relevant by-law which, is an adoption of Option B from the Model By-laws contained in the Regulation, uses the expressions "keep an animal" and then "the animal". Similar drafting is found in the Act including in sections 137B and 157. I am satisfied that this drafting does not limit to one the number of animals that may be kept on a lot, for the following reasons.

28 The expression "an animal" in the by-law and sections 137B or 157 of the Act uses an indefinite article followed by "the animal" which drafting directs consideration to the particular animal that is the subject of an application in a given case. The expression "keep an animal" does not need to be read as indicating an occupant may keep "one only".

29 The application of section 8 of the Interpretation Act is, in my view, to the effect that the references in the Model By-laws (and section 137B and 157) to "an

animal” and “the animal” in the singular form also includes “animals” in the plural form.

- 30 This construction of the Model By-laws and sections 137B and 157 of the Act (to the effect that they do not prohibit the keeping of more than one animal) promotes the purpose or object of the Act and Regulations in that it is consistent with the position that is clear following Cooper and the subsequent legislative amendments to the Act and Regulations, as confirmed by the Minister’s speech to Parliament and the Report required under the Act which formed the basis of the reg. 36A – that is, that the regulation of the keeping of animals in strata schemes involves balancing the rights of occupants to use their property as they wish with the right of other occupants not to suffer unreasonable interference with the enjoyment of their property as a result.
- 31 That is, an owners corporation’s decision on whether to grant permission to keep an animal is to be based on how the animal in any given case will impact other residents. Regulation 36A does not include, as a circumstance in which the keeping of an animal unreasonably interferes with another occupant’s use and enjoyment of the occupant’s lot or the common property, that there is already an animal kept on the lot. To foreclose the inquiry as to whether an animal unreasonably interferes with another occupant’s use or enjoyment of their lot or common property on the basis that there is already an animal kept on the applicant’s lot - without any consideration of whether and how an additional animal might impact on other occupants’ use and enjoyment of their lots including by considering the matters set out in reg. 36A - would seem to be contrary to the requirements of section 137B of the Act. A construction of the by-law that leads to that result is therefore to be avoided.
- 32 The effect of section 137B(1) is that the by-law would have no force or effect to the extent that it would unreasonably prohibit the keeping of an animal on a lot. This confirms, in my view, that the by-law here should be read in accordance with the approach made clear by Cooper and section 137B, confirming for the reasons set out above that it should not be read as permitting only one animal.

33 To the extent that the Owners Corporation's decision was based on the view that the by-law did not permit more than one animal to be kept (other than animals such as fish or caged birds) it was in error and therefore unreasonable.

Another reasonable basis for the Owners Corporation's decision?

34 Section 137B(2) provides that it is taken to be reasonable to keep an animal on a lot unless the keeping of the animal unreasonably interferes with another occupant's use and enjoyment of that occupant's lot or the common property, and reg 36A sets out circumstances in which the keeping of an animal unreasonably interferes with another occupant's use and enjoyment of the occupant's lot or the common property.

35 In refusing the Motion in this case, the Owners Corporation did not find any of the circumstances set out in reg 36A existed and has not made a finding that the keeping of the dog Peach does, or would, otherwise unreasonably interfere with another occupant's use and enjoyment of their lot or the common property.

36 There was apparently a concern (as stated by the strata committee) that approving more than one animal per lot in the strata scheme create a precedent and could in the future create unsatisfactory outcomes. However, without directing consideration to the particular pet and circumstances the subject of the application before the Owners Corporation, I am not satisfied that reflects consideration of the real issue to be determined, that is whether the keeping of the dog Peach by the applicants would unreasonably interfere with another occupant's or occupants' use or enjoyment of their lot or the common property. To, in effect, impose a blanket ban on a second animal being kept on a lot without considering whether, and if so how, that might impact on another occupant's use and enjoyment of their lot and the common property would seem contrary to the approach to be adopted, as is clear from Cooper and the subsequent legislative amendments.

37 In all the circumstances, I am satisfied the Owners Corporation has unreasonably withheld its approval to the keeping by the applicants of the dog Peach.

Should the applicants be permitted to keep the French Bulldog Peach on their lot

- 38 I am also satisfied that an order should be made allowing the applicants to keep the dog.
- 39 In addition to the matters raised for consideration by the Owners Corporation, there was also evidence before the Tribunal of concerns as set out in the letter of 24 June 2021 (set out above), namely that the dog Zodiac jumps and barks at the fence when the author of the letter pegs washing on the clothes line and also runs up and down the fence sniffing, and that the small backyards might not be suitable for two medium size dogs.
- 40 That letter was written nearly eight months prior to the hearing, there is no indication of what the situation was like after the dog Peach also commenced living at the applicants' lot, the author of the letter did not give evidence at the hearing and, significantly, the concerns set out in the letter were not raised for consideration at the EGM (which suggests they were either no longer current or it was not considered by the strata committee that they should be relied upon as a basis for refusing the application). Having regard to these matters, I am not satisfied on the basis of the 24 June 2021 letter and/or any other evidence before me that the dog Peach makes a noise, or would likely make a noise, that persistently occurs to the degree that the noise unreasonably interferes with the peace, comfort or convenience of the author of the 24 June 2021 letter or any other occupant. None of the other circumstances set out in reg 36A are made out either, and I am not satisfied the keeping of the dog does, or would be likely to, otherwise unreasonably interfere with another occupant's use and enjoyment of their lot or common property.
- 41 Section 137B(5) is also noted, which is to the effect that the Owners Corporation has taken to have given permission for the keeping of an animal on a lot if it has made a decision that unreasonably prohibits the keeping of the animal on the lot. In this case, that supports the making of an order that the applicants be permitted to keep the dog Peach.
- 42 In all the circumstances, a declaration permitting the applicants to keep the dog Peach on the lot should be made. In keeping the dog Peach, the applicants are to comply with the requirements of paragraph 3 of by-law 5 and the other

conditions that they agreed to when completing the pet application form. That is, the applicants are to:

- (1) keep the animal within the lot,
- (2) supervise the animal when it is on the common property,
- (3) keep the pet under control at all times within the lot or common property
- (4) monitor the noise from the dog Peach, ensuring that it does not unreasonably cause annoyance or disturbance to neighbours
- (5) maintain a high standard of cleanliness and sanitation at all times, disposing of any animal waste and taking any action that is necessary to clean all areas of the lot or the common property that are soiled by the animal
- (6) maintain a high standard of preventative health care, eg. flea and worm treatment.

43 The Tribunal notes that, should the presence of the dog Peach cause a nuisance or hazard to the owner or occupier of another lot or unreasonably interferes with the use or enjoyment of another lot or of the common property, then the Owners Corporation can seek removal of the animal (see section 158 of the Act).

Order

44 The Tribunal declares that the applicants may keep the French Bulldog Peach on their lot, on the condition that the applicants comply with the requirements set out in paragraph 42 of the reasons for this decision.



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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