Civil and Administrative Tribunal

New South Wales

Case Name:	Franklin v The Owners—Strata Plan No. 87497
Medium Neutral Citation:	[2022] NSWCATCD 210
Hearing Date(s):	23 November 2022
Date of Orders:	20 December 2022
Decision Date:	20 December 2022
Jurisdiction:	Consumer and Commercial Division
Before:	S Hanstein, General Member
Decision:	Pursuant to s 150(1) of the Strata Schemes Management Act 2015, paragraphs (1) and (2) of by-law 25 are declared to be invalid.
Catchwords:	LAND LAW — Strata title — By-laws — requirement that by-law not be harsh, unconscionable or oppressive — where by-law prohibits cooking — whether by-law harsh, unconscionable or oppressive
Legislation Cited:	Strata Schemes Management Act 2015
Cases Cited:	Coscuez International Pty Ltd v The Owners-Strata Plan No 46433 [2022] NSWCATAP 147; Cooper v The Owners-Strata Plan No 58068 [2020] NSWCA 250
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Lewis Elliot Franklin (Applicant) The Owners—Strata Plan No. 87497 (Respondent)
Representation:	W Franklin (Applicant) Lake Group Strata, Mr Graham (Respondent)
File Number(s):	SC22/35101

Publication Restriction: Nil

REASONS FOR DECISION

1 The applicant is an owner of a lot in the strata scheme, and the respondent is the Owners Corporation.

2 The strata scheme comprises 87 residential lots and 13 utility lots. The building was previously an aged care facility.

3 A number of issues were resolved between the parties prior to the commencement of the formal hearing. Subsequently the parties also reached agreement in respect of use of a door to the building and the Tribunal notes, by consent, the Owners Corporation will provide to the applicant a swipe card to unlock the exit door on the second floor, to enable him to use that door to facilitate the use and enjoyment of his lot in his personal circumstances. The Tribunal notes also that there may not presently be a swipe card reader on the outside of the door and that the Owners Corporation may install one if the applicant were to pay for that to occur.

4 The issue remaining for determination is whether the Tribunal should, pursuant to section 150 of the *Strata Schemes Management Act 2015* ("Act"), declare paragraphs (a) and (b) of by-law 25 to be invalid.

5 By-law 25 states:

> **25 Cooking within any lot**
>
> (1) Cooking of any nature including toasting bread will not be permitted in any lot unless the lot has cooking facilities installed by the original Owners of the strata.
>
> (2) The use of a kettle will be permitted.
>
> (3) Should any lot owner or occupant engage in cooking within the lot, which then causes a smoke alarm to be triggered resulting in the Fire Brigade attending at the building, then the lot owner will be responsible for reimbursement to the Owners Corporation for any charge levied against the Owners Corporation by New South Wales Fire Brigade.

Applicant's case

6 The applicant's evidence and submissions included the following.

7 The building was originally an aged care facility and has a commercial kitchen for shared use by the building's occupants. The building is now a residential building with no Council restrictions on cooking in the applicant's lot.

8 The by-law prohibiting cooking goes against the applicant's right as an owner to do what he wants in his lot, and is unreasonable and restrictive. He does not agree it is a fire hazard to cook in the apartment, noting there is nothing preventing people from burning candles, fire hazards arise for example from faulty electrical things. Also, the size of the apartment is not a reason to prohibit cooking, noting people cook in caravans and people in other countries routinely live and cook in small apartments.

Respondent's case

9 The respondent's evidence and submissions included the following. By-law 25 has always been in this form. There are four lots that have cooking facilities installed by the original owners of the strata scheme, and those four units are all substantially larger than the other lots. The other lots are essentially a room and a bathroom facility, measuring between 21m^2 and 30m^2. It would likely be difficult to install a kitchenette. If there were a cooker, there might have to be upgrading of the wiring, and a rangehood might be required. The strata scheme is served by a large commercial grade kitchen where residents can cook. There may be a fire issue in cooking in the lots. No issue has arisen in the past with cooking in those four lots with cooking facilities. The odd fire alarm goes off from steam from ensuite showers.

10 If paragraph (1) of by-law 25 were declared invalid, then paragraph (2) should also be removed as it would make little sense on its own.

Consideration

11 Section 150 of the Act provides as follows:

> **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.

> (2) The order, when recorded under section 246, has effect as if its terms were a by-law repealing the by-law declared invalid by the order (but subject to any relevant order made by a superior court).
>
> (3) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

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

13 As discussed by the Appeal Panel of the Tribunal in *Coscuez International Pty Ltd v The Owners-Strata Plan No 46433* [2022] NSWCATAP 147 ("*Coscuez*"), the leading case on s150 of the Act is *Cooper v The Owners-Strata Plan No 58068* [2020] NSWCA 250 ("*Cooper*"), which involved a by-law that prohibited the keeping of certain pets. (See the discussion in *Coscuez* at [147]-[152]). In *Cooper*, the Court of Appeal held that a by-law "that limits the property rights of Lot owners is only valid if it protects from adverse affection the use and enjoyment by other occupants of their own Lots, or the common property" (*Coscuez* at [148]).

14 I am satisfied that by-law 25 is so wide as to impose a blanket ban on cooking in all lots other than the four with cooking facilities originally installed. I am satisfied that cooking in one's lot is a common incident of property ownership. Notwithstanding that there are common area cooking facilities available, I accept that an individual may not wish to use those facilities. Applying *Cooper*, this blanket ban on cooking would not be valid unless it were to protect against unreasonable interference with another occupant's use and enjoyment of the occupant's lot or the common property. I am not satisfied, on the evidence before me, that it does so.

15 I am not satisfied on the evidence before me that cooking in a lot, including by toasting bread, would cause a fire risk that could not be adequately managed. Cooking may from time to time trigger a fire alarm which may disturb other residents. I am not satisfied though that that would necessarily occur in every instance. I expect that a window could be opened, or the exhaust fan in the bathroom utilised, to reduce the risk of this occurring. Although not raised by the respondent as a reason that cooking should be prevented, it is expected any cooking smell might also be reasonably overcome in this way.

16 The cost of a fire alarm being triggered is covered by paragraph (3) of by-law 25 and so is not a reason in itself to prohibit all cooking.

17 The respondent raised the issue of the small size of most of the lots making the installation of a kitchenette impractical. That may be so, but I do not need to determine that issue. By-law 25 prohibits all cooking, including use of a toaster. A toaster can be used in a small space and, on the evidence before me, I am not satisfied that the size of the lots in itself is a reason justifying the blanket prohibition on cooking.

18 I am satisfied that paragraph (1) of by-law 25 imposes a blanket prohibition on cooking without any consideration of whether the cooking would impact on any other occupant's use and enjoyment of their lot or common property. I am satisfied that cooking in one's home is a right connected with property. In the circumstances, I am satisfied that paragraph (1) of by-law 25 is harsh, unconscionable or oppressive and that, because of its consequence on the use of a lot owner's property, an order should be made declaring it to be invalid. The respondent agreed that, should paragraph (1) be declared invalid, then paragraph (2) should also be declared invalid as it was not meaningful without paragraph (1). The applicant did not seek that paragraph (3) be declared invalid and I am satisfied that that paragraph can meaningfully stand on its own.

Orders

19 Pursuant to s 150(1) of the Act, paragraphs (1) and (2) of by-law 25 are declared to be invalid.

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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