Court of Appeal
Supreme Court
New South Wales

Summary available

Amendment notes

Medium Neutral Citation: **Cooper v The Owners – Strata Plan No 58068 [2020] NSWCA 250**

Hearing dates: 23 September 2020

Decision date: 12 October 2020

Before: Basten JA at [1];
Macfarlan JA at [75];
Fagan J at [83]

Decision:

(1) Grant the applicants leave to appeal from the decision of the Appeal Panel of NCAT given on 27 May 2020.

(2) Direct that the applicants file, within 7 days of these orders, the draft notice of appeal contained in the white folder.

(3) Subject to compliance with order (2), allow the appeal and set aside orders (1)-(6) made by the Appeal Panel.

(4) Order that the respondent pay the applicants' costs in this Court.

Catchwords:

LAND LAW – strata schemes – by-laws – scope of subject-matter – purposive limits to the power to make by-laws – *Strata Schemes Management Act 2015* (NSW), s 136(1)

LAND LAW – strata schemes – by-laws – restrictions on by-laws – requirement that by-law not be harsh, unconscionable or oppressive – whether by-law imposing blanket prohibition on keeping animals contravenes provision – *Strata Schemes Management Act 2015* (NSW), s 139(1)

STATUTORY INTERPRETATION – use of dictionaries – whether three words comprise a composite statutory criterion

WORDS AND PHRASES – “harsh, unconscionable or oppressive” – Strata Schemes Management Act 2015 (NSW), s 139(1)

Legislation Cited:

Civil and Administrative Tribunal Act 2013 (NSW), ss 80, 83
Contracts Review Act 1980 (NSW), ss 4, 7, 9
Industrial Relations Act 1996 (NSW), s 84
Police Act 1990 (NSW), s 181E
Retirement Villages Act 1999 (NSW), ss 54, 134
Strata Schemes Development Act 2015 (NSW), s 4
Strata Schemes Management Act 2015 (NSW), ss 4, 5, 6, 8, 9, 12, 135, 136, 137, 137A, 139, 141, 142, 148, 150, 153, 157, 158, 246, 253; Pt 8

Strata Schemes Management Regulation 2016 (NSW), Sch 3

Cases Cited:

ADCO Constructions Pty Ltd v Goudappel (2014) 254 CLR 1; [2014] HCA 18
Ainsworth v Albrecht (2016) 261 CLR 167; [2016] HCA 40
Australian Securities and Investments Commission v Kobelt (2019) 93 ALJR 743; [2019] HCA 18
Buck v Bavone (1976) 135 CLR 110; [1976] HCA 24
Byrne v Australian Airlines Ltd (1995) 185 CLR 410; [1995] HCA 24
Carr v Western Australia (2007) 232 CLR 138; [2007] HCA 47
Casuarina Rec Club Pty Ltd v The Owners – Strata Plan 77971 (2011) 80 NSWLR 711; [2011] NSWCA 159
Eclairs Group Ltd v JKX Oil and Gas plc [2016] 3 All ER 641
Hope v Bathurst City Council (1980) 144 CLR 1; [1980] HCA 16
Houghton v Immer (No 155) Pty Ltd (1997) 44 NSWLR 46
In the matter of Jimmy’s Recipe Pty Ltd (No 2) [2020] NSWSC 632
Owners – Strata Plan No 58068 v/ats Cooper [2019] NSWCATCD 62
Paciocco v ANZ Banking Group Ltd (2015) 236 FCR 199; [2015] FCAFC 50
Perpetual Trustee Co Ltd v Khoshaba [2006] NSWCA 41
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28
South Western Sydney Local Health District v Gould (2018) 97 NSWLR 513; [2018] NSWCA 69
Sydney Diagnostic Services Pty Ltd v Hamlena Pty Ltd

	(1991) 5 BPR 11,432 *TAL Life Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68 *The Owners – Strata Plan No 55773 v Roden; Spiers v The Owners – Strata Plan No 77953* [2020] NSWCATAP 95 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528; [2007] HCA 45 *White v Betalli* (2007) 71 NSWLR 381; [2007] NSWCA 243
Texts Cited:	C Sherry, *Strata Title Property Rights – Private Governance of Multi-owned Properties* (Routledge, 2017) F Callaway, *Winding up on the just and equitable ground*, (Law Book Co., 1978) P Harpur, "Rights of Persons with Disabilities and Australian Anti-Discrimination Laws: What Happened to the Legal Protections for People Using Guide or Assistance Dogs?" (2010) 29 U. Tas. L. Rev. 49 P Sales, "Use of Powers for Proper Purposes in Private Law" (2020) 136 LQR 384
Category:	Principal judgment
Parties:	Johanna Anwar Cooper (First Applicant) Leo Bernard Cooper (Second Applicant) The Owners – Strata Plan No 58068 (Respondent)
Representation:	Counsel: C R C Newlinds SC / R J Pietriche (Applicants) G A Sirtes SC / L M Johnston (Respondent) Solicitors: Bartier Perry (Applicants) DEA Lawyers (Respondent)
File Number(s):	2020/187160
Decision under appeal	NSW Civil and Administrative Tribunal
Court or tribunal:	
Jurisdiction:	Appeal Panel
Citation:	[2020] NSWCATAP 96
Date of Decision:	27 May 2020
Before:	Armstrong J, President M Harrowell, Deputy President
File Number(s):	AP 19/55887

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The applicants, Johanna Cooper and Leo Cooper, own a lot in a freehold strata scheme constituted by a 43-storey apartment building in Darlinghurst, Sydney known as The Horizon. The by-laws of the strata scheme relevantly state that “an owner or occupier of a Lot must not keep or permit any animal to be on a Lot or on the Common Property”. The applicants keep an animal (a miniature schnauzer) in their apartment in contravention of by-law 14.

Upon an issue being raised as to the ongoing contravention of the by-law, the applicants commenced proceedings in the NSW Civil and Administrative Tribunal (NCAT) seeking a declaration that the by-law was invalid. The applicants’ primary case was that the blanket ban on animals on a lot or common property contravened s 139(1) the *Strata Schemes Management Act 2015* (NSW) and provided grounds for NCAT to declare by-law 14 invalid under s 150 of that Act. Section 139(1) provides that “A by-law must not be harsh, unconscionable or oppressive”.

On 21 November 2019, Senior Member G K Burton SC, sitting in the Consumer and Commercial Division, upheld the applicants’ claim and declared the by-law invalid. The owners corporation successfully appealed from that decision. On 27 May 2020, an Appeal Panel of NCAT set aside the orders made by the Senior Member. The applicants sought leave to appeal from the Appeal Panel to the Court of Appeal on a question of law.

The Court (Basten JA, Macfarlan JA, Fagan J) allowed the appeal and held:

(by Basten JA):

1. A lot owner in a freehold strata scheme holds a freehold estate, the rights and obligations of which are those attaching to a well-known form of real property: [9], [76]. The fundamental principle of indefeasibility of title to real property under the Torrens system has significance in identifying the attributes of a particular title, including the constraints imposed by by-laws: [9]

2. The phrase “harsh, unconscionable or oppressive” is better understood as a triune, three words conveying a single criterion: [26]. It invokes values, the content of which derives no elucidation from reference to synonyms: [26]. The statute provides context for the individual words: [25]. The provision requires consideration of contemporary community standards: [28]-[29].

Australian Securities and Investments Commission v Kobelt (2019) 93 ALJR 743;

[2019] HCA 18; *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41 at [64]; F Callaway, *Winding up on the just and equitable ground*, (Law Book Co., 1978), discussed.

3. Section 139 focuses on the character of the particular by-law, rather than the state of knowledge, whether actual or constructive, of any particular lot owner: [45].

Ainsworth v Albrecht (2016) 261 CLR 167; [2016] HCA 40; *Casuarina Rec Club Pty Ltd v The Owners – Strata Plan 77971* (2011) 80 NSWLR 711; [2011] NSWCA 159, discussed.

4. The power to make by-laws (s 136) is not unconstrained: [56]. The power may only be exercised for proper purposes: [57]. The function and purpose of by-laws must be derived from the language of s 136 and the statutory structure within which that section is found: [59]. A by-law which restricts the lawful use of each lot but on a basis which lacks a rational connection with the enjoyment of other lots and the common property, is beyond the power to make by-laws conferred by s 136: [61]. A by-law is to be for the "benefit of the lot owners" within the terms of s 9(2): [63].

White v Betalli (2007) 71 NSWLR 381; [2007] NSWCA 243; *Eclairs Group Ltd v JKX Oil and Gas plc* [2016] 3 All ER 641; discussed

(by Basten JA, Macfarlan JA agreeing)

5. A by-law which limits the property rights of lot owners is only lawful (valid) if it protects from adverse affection the use and enjoyment by other occupants of their own lots, or the common property: [46]; [81]. By-law 14 does not meet this description: [46]-[47] and [54]; [79]-[80].

6. Perceived administrative convenience does not determine the validity of a by-law: [46] and [54]; [82].

(by Basten JA, Macfarlan JA and Fagan J agreeing)

7. The regulation of activities and behaviour of persons living in close proximity under a strata scheme will involve evaluative judgments: [46], [51]; [82]; [96].

(by Fagan J):

8. Applying the tests encompassed by the phrase "harsh, unconscionable or oppressive", by-law 14.1 is "oppressive": [90]-[91]. That is because it prohibits an ordinary incident of the ownership of real property, namely, keeping a pet animal, and provides no material benefit to other occupiers: [88].

9. Read in the context of the phrase, the term "oppressive" is not constrained by the contextual meanings of "harsh" and "unconscionable": [91]-[93].

JUDGMENT

1 **BASTEN JA**: The applicants, Johanna Cooper and Leo Cooper, own a lot in a freehold strata scheme constituted by a 43-storey apartment building in Darlinghurst known as

The Horizon. The respondent is the owners corporation established under s 8 of the *Strata Schemes Management Act 2015* (NSW) ("Strata Management Act").

2 A strata scheme is a form of subdivision of land which takes effect when a strata plan is registered by the Registrar-General. The strata plan must include by-laws. Both under the Strata Management Act, which came into force on 30 November 2016, and its predecessor, the *Strata Schemes Management Act 1996* (NSW), an owners corporation may by special resolution amend the by-laws in force for a strata scheme.

3 The by-laws for the scheme in which the applicants own a lot include the following by-law:

> "**By-law 14 Animals**
>
> 14.1 Subject to section 139(5) of the Act, an owner or occupier of a Lot must not keep or permit any animal to be on a Lot or on the Common Property.
>
> 14.2 Should an owner or occupier of a Lot keep an assistance animal on the Lot or on the Common property, they must, upon request of the Strata Committee provide evidence that the animal is an assistance animal as referred to in section 9 of the Disability Discrimination Act 1992 (Cth) within a reasonable period of time following that request."

4 The applicants keep an animal (a miniature schnauzer) in their apartment in contravention of by-law 14. Upon an issue being raised as to the ongoing contravention of the by-law, the applicants commenced proceedings in the NSW Civil and Administrative Tribunal (NCAT) seeking a declaration that the by-law was invalid. On 21 November 2019 Senior Member G K Burton SC, sitting in the Consumer and Commercial Division, upheld the applicants' claim and made the following orders: [1]

> "1. Order under s 150 of the *Strata Schemes Management Act 2015* (NSW) that by-law 14 is declared to be and since its date of registration has been harsh, unconscionable and oppressive.
>
> 2. Order the Owners Corporation SP 48887 promptly to do all acts necessary to record the removal of by-law 14 pursuant to s 246 of the *Strata Schemes Management Act 2015* (NSW), such removal to be recorded as having operated on and from [the] date of registration of the by-law being 21 January 2019."

5 The Tribunal further made an order dismissing the application by the owners corporation with respect to the alleged contravention of the by-law. On 6 February 2020 the Senior Member ordered that the owners corporation pay the applicants' costs of both proceedings and directed that the owners corporation not recoup its costs from the applicants as lot owners.

6 The owners corporation appealed to an Appeal Panel of NCAT, pursuant to s 80 of the *Civil and Administrative Tribunal Act 2013* (NSW) ("Tribunal Act"). Such an appeal lies as of right on a question of law and, with leave of the Appeal Panel, on any other ground: Tribunal Act, s 80(2)(b). On 27 May 2020 an Appeal Panel constituted by the President, Justice Armstrong, and Deputy President Mr M Harrowell, upheld the appeal and set aside the orders made by the Senior Member. It also made orders as sought by the owners corporation, requiring the applicants to remove the dog within 28 days. [2]

7 There is an appeal, with leave, from the decision of the Appeal Panel "on a question of law": Tribunal Act, s 83(1). On 24 June 2020 the applicants filed a summons and draft notice of appeal challenging the order of the Appeal Panel. (The order for removal of

the dog was stayed by agreement pending the determination of the proposed appeal.)

Legislative scheme: Strata Management Act

8 A strata scheme involves a subdivision of real property. Parcels which may be owned as residences, where a purpose of the scheme is residential occupation, are defined as "one or more cubic spaces shown as a lot on a floor plan relating to the scheme but not including common infrastructure". [3] A strata scheme also includes "common property" which is any part that is not comprised in a lot. [4] Further, strata schemes are divided into "freehold strata schemes" and schemes subject to leasehold interests; [5] The Horizon is a freehold strata scheme. It followed that the applicants, as owners of a lot, were the persons for the time being recorded in the register as holding an estate in fee simple in the lot. [6]

9 Two propositions follow from this statutory structure. First, because the lot owner holds a freehold estate in a stratum, the rights and obligations are those attaching to a well-known form of real property. Secondly, the fundamental principle of indefeasibility of title to real property under the Torrens system has significance in identifying the attributes of a particular title, including the constraints imposed by by-laws. Thus in considering the construction of an easement, the High Court noted in *Westfield Management Ltd v Perpetual Trustee Co Ltd* [7] that the use of extrinsic evidence engaged fundamental considerations, described in the following terms:

> "[37] … These concern the operation of the Torrens system of title by registration, with the maintenance of a publicly accessible register containing the terms of the dealings with land under that system. To put the matter shortly, rules of evidence assisting the construction of contracts inter partes, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*, [8] did not apply to the construction of the Easement."

10 The possible subject matter of by-laws is identified in s 136 of the Strata Management Act in the following terms:

> **136 Matters by-laws can provide for**
>
> (1) By-laws may be made in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme.
>
> (2) A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law.

11 The language of s 136(1) is awkward. The subject matter of the by-laws appears to be three functions (management, administration and control) operating in relation to specified subject-matter, (lots, or common property and lots, within a strata scheme). The terms "management", "administration" and "control" refer to functions exercised by the owners corporation. They reflect the language of s 9 of the Strata Management Act, which provides:

> **9 Owners corporation responsible for management of strata scheme**
>
> (1) The owners corporation for a strata scheme has the principal responsibility for the management of the scheme.
>
> (2) The owners corporation has, for the benefit of the owners of lots in the strata scheme—
>
> (a) the management and control of the use of the common property of the strata

> scheme, and
>
> (b) the administration of the strata scheme.
>
> (3) The owners corporation has responsibility for the following—
>
> (a) managing the finances of the strata scheme (see Part 5),
>
> (b) keeping accounts and records for the strata scheme (see Parts 5 and 10),
>
> (c) maintaining and repairing the common property of the strata scheme (see Part 6),
>
> (d) taking out insurance for the strata scheme (see Part 9).

12 It follows that by-laws may (i) confer specific functions on the owners corporation with respect to the use and enjoyment of the lots and the common property, (ii) make provision directly in relation to the use and enjoyment of the lots and the common property, but for the purpose of managing, administering or controlling the strata scheme. That reading is consistent with the terms of the model by-laws, which may be found in Sch 3 to the Strata Schemes Management Regulation 2016 (NSW). These are in a common form, of which by-law 9, “Smoke penetration”, is an example:

> (1) An owner or occupier, and any invitee of the owner or occupier, must not smoke tobacco or any other substance on the common property.
>
> (2) An owner or occupier of a lot must ensure that smoke caused by the smoking of tobacco or any other substance by the owner or occupier, or any invitee of the owner or occupier, on the lot does not penetrate to the common property or any other lot.
>
> …

13 In short, this by-law controls the use or enjoyment of both common property and each lot in the strata scheme in relation to a particular activity. (Of course, neither one, nor all, of the model by-laws can confine or determine the scope and operation of the Act.)

14 Other model by-laws permit particular activities to be carried on on a lot or common property only with the approval of the owners corporation. By impliedly conferring powers on the owners corporation to consider and determine applications for approval, such by-laws make provision for the management or administration of the use of a lot or common property. Nevertheless, the effect is that the purpose of the by-law is, in each example, one of managing, administering or controlling an activity, the activity being one which involves the use or enjoyment of the lots or the common property.

15 Other provisions in the Strata Management Act permit a by-law to limit the number of adults who may reside in a lot (s 137); to prohibit a lot being used for short-term rental accommodation (s 137A), and to identify the extent to which by-laws may permit a right of exclusive use and enjoyment of the whole or part of the common property (s 142).

16 Relevantly for present purposes there are restrictions placed on by-laws:

> **139 Restrictions on by-laws**
>
> (1) **By-law cannot be unjust** A by-law must not be harsh, unconscionable or oppressive.
>
> **Note—**
>
> Any such by-law may be invalidated by the Tribunal (see section 150).
>
> (2) **By-law cannot prevent dealing relating to lot** No by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot.
>
> (3) **By-law resulting from order cannot be changed** If an order made by the

> Tribunal under this Act has effect as if its terms were a by-law, that by-law is not capable of being amended or repealed except by a by-law made in accordance with a unanimous resolution of the owners corporation and, in the case of a leasehold strata scheme, with the consent of the lessor of the scheme.
>
> (4) **By-law cannot restrict children** A by-law for a residential strata scheme has no force or effect to the extent to which it purports to prohibit or restrict persons under 18 years of age occupying a lot. This subsection does not apply to a by-law for a strata scheme for a retirement village or housing exclusively for aged persons.
>
> (5) **By-law cannot prevent keeping of assistance animal** A by-law has no force or effect to the extent to which it purports to prohibit or restrict the keeping on a lot of an assistance animal (as referred to in section 9 of the *Disability Discrimination Act 1992* of the Commonwealth) used by an owner or occupier of the lot as an assistance animal or the use of an assistance animal for that purpose by a person on a lot or common property.
>
> (6) A by-law may require a person who keeps an assistance animal on a lot to produce evidence to the owners corporation that the animal is an assistance animal as referred to in section 9 of the *Disability Discrimination Act 1992* of the Commonwealth.
>
> …

17 The proceedings in the present case brought by the applicants invoked the power of NCAT under the following provision:

> **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.

18 Section 246, referred to in s 150(2), provides for the Registrar-General to record in the register an order made under the Strata Management Act. Thus, the order made by NCAT, absent an appeal, should have led to a copy of the order, certified by the Tribunal, being lodged in the office of the Registrar-General.

19 Finally with respect to the statutory scheme, it may be noted that s 150(1) has two limbs. The first arises where the Tribunal finds that a by-law is beyond power; the second, where a by-law is not in accordance with the requirement of s 139(1). Finally, given the limited nature of the appeal to the Appeal Panel, it may be noted that the precondition to a declaration of invalidity is the Tribunal's state of satisfaction as to the lack of power or breach of s 139(1). As the applicants noted, a finding that there had been a contravention of s 139(1) required an evaluative judgment on the part of NCAT. To establish legal error in such circumstances, as Gibbs J explained in *Buck v Bavone*, [9] it must be shown that the Tribunal has not acted in good faith, has acted arbitrarily or capriciously, misdirected itself in law, failed to take account of mandatory considerations, taken into account prohibited considerations, or has acted unreasonably. The applicants contended that the Appeal Panel had failed to identify any such error.

Validity of by-law 14

(a) contravention of s 139(1)

20 By-law 14, set out at [3] above, and drafted with little regard for syntax, is in the form of a qualified prohibition on keeping an animal, or permitting any animal to be, on a lot or common property. The exception, required by s 139(5) of the Strata Management Act, permits the presence of an animal used in animal assisted therapies and aids for persons with disabilities, a category which may cover a significant and expanding range of conditions. [10]

21 The applicants' primary case was that the blanket ban on animals contravened s 139(1) and provided grounds for NCAT to declare the by-law invalid under s 150. This submission required an understanding of how the phrase "harsh, unconscionable or oppressive" was intended to operate with respect to by-laws.

22 At first instance, the Senior Member addressed this question by reference to authority in NCAT, which commenced with the proposition that the words are to be given their ordinary meaning, and considered dictionary definitions of each particular word in the phrase. This exercise was at best of limited assistance. As this Court has noted on prior occasions, [11] the purpose of a dictionary is to supply a range of synonyms: it is rarely of assistance in identifying how a term is used in a particular statutory context. Indeed, to focus on the possible meanings of individual words to the exclusion of contextual considerations is apt to lead to error. [12] The Senior Member acknowledged the relevance of context stating, "the test for words such as 'unconscionable' has always been objective and contextually-related, being an assessment of all connected circumstances by reference to the values and norms recognised by the text, structure and context of the legislation". [13]

23 The Appeal Panel did not address this reasoning in detail in the present case; however, its reasons refer to, and appear to adopt, a more extensive analysis provided in a companion decision delivered on the same day, *The Owners – Strata Plan No 55773 v Roden; Spiers v The Owners – Strata Plan No 77953*. [14] The reasons in that matter set out in significant detail the Tribunal's views as to the legal principles to be applied in construing the language of s 139(1). [15] However, as the applicants submitted, the reasoning of the Appeal Panel in the present case was largely negative. That is, whilst accepting that the test of compliance with s 139(1) should be approached objectively, it failed to identify the standards against which a by-law is to be assessed.

24 First, it should be accepted that a correct understanding of the phrase "harsh, unconscionable or oppressive" is fraught with difficulty. Although attention should be paid to each word, it is far from clear that significant guidance is obtained from that exercise.

25 Secondly, the statutory context casts doubt upon whether the individual words are used in their ordinary meaning. For example, as Gageler J explained in *Australian Securities and Investments Commission v Kobelt*: [16]

> "[81] 'Unconscionable' is an obscure English word which centuries of use by courts administering equity have transformed into a legal term of art. In Australia, the central concern of a court administering equity in identifying conduct as unconscionable has long been understood to be to relieve against a stronger party to a transaction exploiting some special disadvantage which has operated to impair the ability of a

> weaker party to form a judgment as to his or her interests. [17] "

26 Thirdly, the phrase is better understood as a triune, three words conveying a single criterion. [18] It is towards the other end of a scale from the hendiadys "just and equitable". [19] It invokes the application of values, the content of which derives no elucidation from reference to synonyms, nor from a supposed differentiation from other similar words such as "unjust".

27 Fourthly, as Edelman J noted in *Kobelt*, "[l]ike other open-textured criteria, such as 'unfair' or 'unjust', there is no clear baseline moral standard for what constitutes 'unconscionable' conduct" being the term used in the relevant provision of the *Australian Securities and Investments Commission Act 2001* (Cth) there under consideration. [20]

28 Similar language is found in other New South Wales statutes. [21] The *Contracts Review Act 1980* (NSW) empowers a court to declare void, or not enforce, an "unjust" contract, [22] and defines "unjust" to include "unconscionable, harsh or oppressive": s 4(1). In *Perpetual Trustee Co Ltd v Khoshaba* [23] Spigelman CJ stated:

> "[64] When the Parliament adopts so general, and inherently variable, a standard as that of 'justness', Parliament intends for courts to apply contemporary community standards about what is just. Such standards may vary over time, particularly over a period of two decades."

29 The Appeal Panel noted a possible comparison between the language of s 139(1) and the *Contracts Review Act*. [24] However, it also noted that the *Contracts Review Act* requires a court in determining whether a contract or a provision of a contract is unjust to have regard to a wide range of circumstances, including "the public interest" and "all the circumstances of the case". [25] It may be accepted that no similar list of considerations appears in the Strata Management Act; it does not follow, however, that the observations of the Chief Justice in *Khoshaba* as to the approach to be taken to the criterion of engagement language is inapplicable.

30 The reasoning of the Appeal Panel in rejecting submissions that regard should be had to contemporary community standards was expressed in the following terms:

> "[99] As the Coopers said in their further submissions in reply dated 8 April 2010, it can be accepted that the meaning of the expression 'harsh, unconscionable or oppressive' may be protean in nature, its meaning in part being informed by the common understanding of those words in the community from time to time. However, in our view, the importation of a test requiring the Tribunal to determine an application under s 150 by reference to 'contemporary community standards' concerning the keeping of animals is not warranted or appropriate having regard to the text of s 139(1)."

31 The relevance of community standards in the present case was quite limited. It went little further than a submission that not only is the keeping of a pet animal a common use of private residential property, but that such conduct can have social and psychological benefits to an extent not previously appreciated.

32 The respondent submitted that, to the extent that "community standards" were relevant, the Act demonstrated that the relevant community was that created by the strata scheme, which was entitled to regulate its own affairs through by-laws and decisions of the owners corporation. In that sense, the unamended by-law constituted a relevant

expression of the expectations of that community. The applicants responded that the very purpose of a requirement such as that encapsulated in s 139(1) was to ensure that minority rights as to the use of residential property should not be overridden by a contrary majority view if such conduct was oppressive. Before the Appeal Panel, the applicants submitted: [26]

> "In other words, the underlying purpose of bylaws is to facilitate and protect the interests of lot owners in the use and enjoyment of their own lots and common property. By-laws ought not be used simply to impose rules and enforce philosophies about how other lot owners should use and enjoy their lots."

33 In support of that submission, the applicants had relied on observations of the High Court in *Ainsworth v Albrecht*, [27] a case dealing with the powers of a body corporate operating under Queensland law to make decisions requiring unanimous approval of lot owners. Where an objection was taken and a dispute arose, an adjudicator could determine whether the objection was "unreasonable" and, if so satisfied, override the objection. In its conclusion, the plurality observed:

> "[63] … [O]pposition to a proposal that could not, on any rational view, adversely affect the material enjoyment of an opponent's property rights may be seen to be unreasonable. …
>
> [64] The proposal in question was apt to create a reasonable apprehension that it would affect adversely the property rights of opponents of the proposal and the enjoyment of those rights. In these circumstances, opposition of the lot owners who dissented from the proposal could not be said to be unreasonable."

34 The applicants' submissions before the Appeal Panel sought to adopt a test of adverse affection as a criterion for imposing limits on the use and enjoyment of individual lots and common property.

35 A similar criterion was adopted by the applicants in this Court. The criterion was, the submission noted, consistent with obligations imposed on owners and occupiers of lots under Pt 8 of the Strata Management Act. Such provisions were to be found in the following sections (emphasis added):

> **153 Owners, occupiers and other persons not to create nuisance**
>
> (1) An owner, mortgagee or covenant chargee in possession, tenant or occupier of a lot in a strata scheme must not—
>
> (a) use or enjoy the lot, or permit the lot to be used or enjoyed, *in a manner or for a purpose that causes a nuisance or hazard to the occupier of any other lot* (whether that person is an owner or not), or
>
> (b) use or enjoy the common property *in a manner or for a purpose that interferes unreasonably with the use or enjoyment of the common property by the occupier of any other lot* (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the common property, or
>
> (c) use or enjoy the common property *in a manner or for a purpose that interferes unreasonably with the use or enjoyment of any other lot* by the occupier of the lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the lot.
>
> **Note—**
>
> Depending on the circumstances in which it occurs, the penetration of smoke from smoking into a lot or common property may *cause a nuisance or hazard and may interfere unreasonably with the use or enjoyment of the common property or another lot*.
>
> (2) This section does not operate to prevent the due exercise of rights conferred on a developer by the operation of section 82 of the *Strata Schemes Development Act 2015*.

> **Note—**
>
> Division 1 of Part 6 contains provisions about the circumstances in which owners of lots may carry out work that affects common property.
>
> …
>
> **158 Order for removal of an animal permitted under by-laws**
>
> (1) The Tribunal may, on application by an interested person, make an order against a person who is keeping an animal on a lot or common property in accordance with the by-laws for a strata scheme, if the Tribunal considers that *the animal causes 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*.
>
> (2) The Tribunal may order that the person—
>
> (a) cause the animal to be removed from the parcel within a specified time, and be kept away from the parcel, or
>
> (b) within a time specified in the order, take such action as, in the opinion of the Tribunal, will terminate the nuisance or hazard or unreasonable interference.

36 To similar effect, the model by-laws contained the following provisions:

> **6 Noise**
>
> An owner or occupier of a lot, or any invitee of an owner or occupier of a lot, must not create any noise on a lot or the common property *likely to interfere with the peaceful enjoyment of the owner or occupier of another lot* or of any person lawfully using common property.
>
> …
>
> **9 Smoke penetration**
>
> **Note—**
>
> Select option A or B. If no option is selected, option A will apply.
>
> (1) An owner or occupier, and any invitee of the owner or occupier, must not smoke tobacco or any other substance on the common property.
>
> (2) An owner or occupier of a lot must ensure that smoke caused by the smoking of tobacco or any other substance by the owner or occupier, or any invitee of the owner or occupier, on the lot *does not penetrate to the common property or any other lot.*
>
> (1) An owner or occupier of a lot, and any invitee of the owner or occupier, must not smoke tobacco or any other substance on the common property, except—
>
> (a) in an area designated as a smoking area by the owners corporation, or
>
> (b) with the written approval of the owners corporation.
>
> (2) A person who is permitted under this by-law to smoke tobacco or any other substance on common property *must ensure that the smoke does not penetrate to any other lot*.
>
> (3) An owner or occupier of a lot must ensure that smoke caused by the smoking of tobacco or any other substance by the owner or occupier, or any invitee of the owner or occupier, on the lot *does not penetrate to the common property or any other lot.*
>
> …
>
> **12 Appearance of lot**
>
> (1) The owner or occupier of a lot must not, without the prior written approval of the owners corporation, maintain within the lot anything *visible from outside the lot* that, viewed from outside the lot, is *not in keeping with the rest of the building*.
>
> (2) This by-law does not apply to the hanging of any clothing, towel, bedding or other article of a similar type in accordance with by-law 14.

37 Each of these provisions is expressly designed to deal with activities which may adversely affect the amenity of other lots, including the use of common property and the external appearance of the building.

38 The submissions, identified by the Appeal Panel at [120]-[121], were rejected on what

appear to have been four bases. First, the Panel noted that *Ainsworth* was concerned with voting rights under the *Body Corporate and Community Management Act 1997* (Qld). By contrast, s 139(1) was not concerned with the exercise of voting rights. [28] The Panel accepted that a by-law passed by a requisite majority could nevertheless contravene s 139(1). [29]

39 The Appeal Panel continued:

> "[128] Secondly, the reasons of the High Court (which concerned Queensland strata legislation) do not suggest that the fact the by-law may prevent an individual lot owner from enjoying his or her lot in a particular manner itself was unreasonable, let alone harsh, unconscionable or oppressive."

40 This statement appears to misunderstand the proposition for which the applicants contended, namely that a criterion of the validity of a by-law prohibiting conduct on the part of a lot owner was that such conduct could adversely affect the material enjoyment of another lot owner's property rights.

41 The Appeal Panel continued:

> "[129] Thirdly, whether or not a particular animal might be regarded as "inoffensive or offensive" is not, of itself, a reason why a by-law preventing the keeping of animals is harsh, oppressive or unconscionable."

42 The submission to which this responded was expressed as follows: [30]

> "Thus, it is difficult, if not impossible, to see how the keeping of fish in a secure aquarium in one lot could in any way affect the use and enjoyment of other lots or common property by other owners …."

That submission was not answered by the response set out above.

43 The fourth reason was expressed as follows:

> "[130] As was pointed out in the *Roden appeal reasons*, by-laws for a strata scheme are registered and the rights and limitations of ownership in the particular strata scheme are, in part, recorded in the by-laws. Lot owners acquire their interest in a strata scheme in the knowledge of existing by-laws and the limitations thereby imposed. Strata schemes provide the means by which a community with particular rules might be created, whether residential, commercial or mixed-use. As with other aspects of community living, this inevitably involves a choice of how people wish to live, including with or without animals."

44 This passage approached the issue from a different direction: it appears to be saying that a by-law of which a lot owner has notice when purchasing his or her lot is one about which no complaint can be made on the basis that it is harsh, unconscionable or oppressive. Perhaps echoing a similar concern, in *Casuarina Rec Club Pty Ltd v The Owners – Strata Plan 77971*, [31] Young JA proposed that "if an original by-law is to be declared invalid, a very strong case must be made out as people make their purchases on the basis of the original by-laws as filed": [90].

45 However, this reasoning disregards the nature of s 139, which focuses on the character of the particular by-law, rather than the state of knowledge, whether actual or constructive, of any particular lot owner. Acceptance of this reasoning would seem to render all by-laws immune from challenge, except those added by special resolution after a particular lot owner purchased his or her interest in the strata scheme, and then only at the behest of such a lot owner and not by a challenge raised by a subsequent purchaser. As the applicants submitted in reply, even a purchaser with constructive

knowledge of a particular by-law might not be prevented from challenging the by-law, because he or she would also have actual or constructive knowledge of the ability to challenge it under s 150 the Strata Management Act.

46 On one view, the respondent may be understood as asserting a power to control the presence of animals within the property administered by it, with the dispute being as to whether the blanket prohibition was merely a form of overreaching in the interests of administrative certainty and the need not to overburden the work of the owners corporation or the strata committee. However, that is to reject a by-law permitting discretionary approval (which merely runs the risk of arbitrariness), in favour of one which will inevitably operate arbitrarily in some cases. Fixed sentences for criminal offences would create certainty, and no doubt operate efficiently in the sense that much time could be saved in the criminal courts, but many results would be arbitrary and unjust. There is no basis to read s 139 as tolerating that result.

47 Further, the fact that in some cases the blanket prohibition will produce a result in conformity with the criterion for rule-making adopted above, does not mean that the criterion is satisfied by the adoption of such a rule. (There is no power in this Court to reformulate the by-law so that it would, as amended, comply with the criterion.)

48 There are further problems with relying on democratic governance principles. First, by-laws are not formulated by an owners corporation, but are registered prior to the existence of an owners corporation, and are not variable by a simple majority vote. Secondly, a liberal democracy is not a majoritarian dictatorship; it operates under legal constraints designed to protect minorities from oppression. The Strata Management Act contains such restraints, both in s 136 and s 139, enforceable by NCAT under s 150.

49 It follows that none of the reasoning of the Appeal Panel came to terms with the submission that a by-law which limited the property rights of lot owners was only lawful (valid) if it protected from adverse affection the use and enjoyment by other occupants of their own lots, or the common property.

50 Finally, the respondent sought to justify by-law 14 on a pragmatic basis. That is, while it was true that the effect of the by-law was to prohibit lot owners (other than those with a disability requiring an assistance animal) from keeping an animal, or permitting any animal to be on a lot, including animals which had no material impact on any other lot, it was appropriate to formulate the prohibition in blanket terms to avoid the need to draw invidious distinctions which might in turn invite a flood of applications in a large building with some 341 lots. [32]

51 It is inevitable that the regulation of activities and behaviour of persons living in close proximity under a strata scheme will require a degree of regulation which must involve evaluative judgment. The current by-laws for The Horizon include the following (emphasis added):

> "**By-Law 3 Behaviour of Owners and Occupiers**
>
> 3.1 An Owner or Occupier of a Lot:
>
> (1) must be *adequately and appropriately* clothed when on common property and must

> not use language or behave in a manner *likely to cause offence or embarrassment* to the owner or occupier of another lot or to any person lawfully using Common Property;
>
> (2) must not create any noise or behave in a manner *likely to interfere with the peaceful enjoyment* of the owner or occupier of another lot or of any person lawfully using Common Property…." [33]

52 There are many situations in which legal regulation requires an evaluative judgment; it is not common experience that, although the outcome in a particular case may be contestable, such decisions will be necessarily be open to challenge as capricious, arbitrary or unreasonable. Nor was there any reason to suppose the owners corporation or the strata committee would be flooded with applications, if some alternative by-law (such as one of the model by-laws) were to be adopted. Rather, it appears to have been the respondent's position that by-law 14 reflected the widely accepted view of lot owners, who presumably do not wish to keep an animal.

53 This issue was anticipated in the Strata Management Act. Sections 157 and 158 provide for steps to resolve disputes as to the unreasonable refusal of permission to keep an animal, and for the removal of an offending animal, albeit kept in accordance with the by-laws.

> **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.
>
> **158 Order for removal of an animal permitted under by-laws**
>
> (1) The Tribunal may, on application by an interested person, make an order against a person who is keeping an animal on a lot or common property in accordance with the by-laws for a strata scheme, if the Tribunal considers that the animal causes 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.
>
> (2) The Tribunal may order that the person—
>
> (a) cause the animal to be removed from the parcel within a specified time, and be kept away from the parcel, or
>
> (b) within a time specified in the order, take such action as, in the opinion of the Tribunal, will terminate the nuisance or hazard or unreasonable interference.

54 This submission is, in effect, a variant on the submission as to overreaching in the interests of administrative certainty, discussed at [45] above, and should be rejected on the same basis.

(b) purposive limits to s 136

55 As was discussed in the course of the hearing in this Court, the applicants' case might have adopted, as an alternative focus, the constraints implicit in the by-law making power under s 136 of the Strata Management Act. Both parties accepted that was so.

56 If, in accordance with the applicants' primary submission, a criterion for concluding that

a by-law may be harsh, unconscionable or oppressive is that it interferes with the property rights of a lot owner by controlling or prohibiting a particular use in circumstances where that use does not materially and adversely affect the enjoyment of any other lot, such a criterion may be implied from the language, context and purpose of s 136(1). Attention seems to have focused on the constraint under s 139(1) because of an assumption that the language of s 136(1), conferring the power to make by-laws, is unconstrained. However, few, if any, statutory conferrals of power can be so characterised. Rather, it is necessary to identify the purpose for which the power is conferred. It is true that purposes may not be pursued without qualification, [34] but a limiting purpose must be obeyed.

57 The courts have long held that a conferral of power, whether under an instrument executed by individuals, or by statute, can only be exercised for the purpose for which it was created. The exercise of a power in particular circumstances may, without more, demonstrate that the real purpose and object of the power has been exceeded; in other cases the subjective intention of the donee of the power may reveal its exercise for an improper purpose. Both cases fall within the concept of "fraud on a power", as understood in both public and private law, although in relation to public law it is usually referred to as an improper purpose. [35] This Court has held that the making of by-laws is subject to invalidation if they constitute a fraud on a power. [36]

58 That reasoning is not contradicted by the statutory provision that by-laws will bind the owners corporation and the owners of lots in the strata scheme as if contained in a deed involving mutual covenants. [37] As explained by Lord Sumption in *Eclairs Group Ltd v JKX Oil and Gas plc*: [38]

> "It is true that a company's articles are part of the contract of association, to which successive shareholders accede on becoming members of the company. I do not doubt that a term limiting the exercise of powers conferred on the directors to their proper purpose may sometimes be implied on the ordinary principles of the law of contract governing the implication of terms. But that is not the basis of the proper purpose rule. The rule is not a term of the contract and does not necessarily depend on any limitation on the scope of the power as a matter of construction."

Lord Sales has explained that that statement involves the rejection of the idea that "the only constraints on the exercise of the power had to be derived, if at all, from the very restrictive test for implication of terms in a contract or other instrument." [39]

59 The fact that the power to make a by-law may only be exercised for proper purposes was accepted by this Court in *Sydney Diagnostic Services Pty Ltd v Hamlena Pty Ltd*, dealing with an earlier form of the legislation. [40] The function and purpose of by-laws must be derived from the language of s 136 and the statutory structure within which that section is found, which was broadly described by Campbell JA in his historical account of the origins of the term by-law in *White v Betalli*: [41]

> "[204] … Such legislation creates a statutory framework within which a type of local community can be created and administered. It is a type of community where co-ownership, and the physical proximity of the spaces that the owners are entitled to occupy, create the opportunity for both co-operation and conflict. It is a type of community that was new in 1961, though it had some analogies with the communities that had previously existed through the creation of home unit companies under the Companies Act, or allowing for individual occupation of apartments in a building through

> a tenancy in common scheme."

60 Section 9 of the Strata Management Act provides a statutory basis for understanding the concepts used in s 136(1). Thus, in accordance with s 9(2), the owners corporation shall, for the benefit of the lot owners, manage and control the use of the common property: s 9(2)(a); and administer the strata scheme: s 9(2)(b).

61 It is not necessary for present purposes to enter into the debate as to the extent to which by-laws can expand the functions of an owners corporation so as to allow it to provide benefits to lot holders which are only indirectly or distantly related to the administration of the strata scheme. [42] On the other hand, there is no sound basis to construe the by-law making power as permitting a by-law which is *not* for the benefit of the owners of lots in the strata scheme. To adopt the language of senior counsel for the applicants, a by-law which restricts the lawful use of each lot, but on a basis which lacks a rational connection with the enjoyment of other lots and the common property, is beyond the power to make by-laws conferred by s 136.

62 In relation to the powers of NCAT, s 148 provides as follows (emphasis added):

> **148 Order revoking amendment of by-law or reviving repealed by-law**
>
> (1) The Tribunal may, on application by a person entitled to vote on the amendment or repeal of a by-law or addition of a new by-law …, make one of the following orders—
>
> (a) an order that the amendment be revoked,
>
> (b) an order that the repealed by-law be revived,
>
> (c) an order that the additional by-law be repealed.
>
> (2) The Tribunal may make an order only if the Tribunal considers that, *having regard to the interest of all owners of lots in a strata scheme in the use and enjoyment of their lots* or the common property, the change to the by-laws should not have been made by the owners corporation.
>
> (3) An order under this section, when recorded under section 246, has effect as if its terms were a by-law (but subject to any relevant order made by a superior court).
>
> …

63 This provision requires the Tribunal to have regard to "the interests of all owners of lots", an approach which is consistent with the reasoning set out above as to the limits of the power to make a by-law. A by-law which restricts the rights of all owners as to the use and enjoyment of their lots in circumstances where the prohibited use would not interfere with the use and enjoyment of any other lot, is not a by-law which has regard to the interests of all lot holders; nor is it "for the benefit of the lot owners", within the terms of s 9(2).

64 It is true that in *Casuarina Rec Club*, Young JA stated that "[t]he power to make by-laws is to be liberally interpreted subject to the doctrine of fraud on the power and with the proviso that an unreasonable by-law will be held to be invalid": at [89]. However, it is difficult to be sure what is meant by a liberal interpretation. The owners corporation is created for specific purposes identified in s 9 of the Strata Management Act. Any expansion of its powers to control the use and enjoyment of lots by lot owners might tend to contravene those purposes. Further, as was explained by the High Court in *ADCO Constructions Pty Ltd v Goudappel*, [43] legislation having a remedial character may require a beneficial construction "if open", but "to accept the beneficial purpose of

the [Act] as a whole does not mean that every provision or amendment to a provision has a beneficial purpose or is to be construed beneficially." There is no sound reason to construe a by-law making power broadly so as to permit a by-law which limits the choice of all lot owners in the use and enjoyment of their lots, without conferring any material benefit on those who would not have exercised the right if available.

Leave to appeal

65 The appeal from the decision of the Senior Member was dealt with by the Appeal Panel purely on the basis that there was an error of law; it was, accordingly, not necessary to determine other grounds of appeal which may have required leave. The Appeal Panel did not take that step. [44] The appeal to this Court is also limited to an error on a question of law.

66 The proper principles to be applied in determining the validity of by-laws made under the Strata Management Act is a matter of some importance. Associate Professor Sherry has noted that "by 2011, over one quarter of Sydney's population, just over 1 million people, lived in strata title apartments." She continued: [45]

> "The New South Wales government predicts that within 20 years, half of the State's population will live or work in a strata or community scheme."

67 There can be little doubt that the issue raised is one of general public importance. As the foregoing analysis indicates, the error asserted was more than reasonably arguable, indeed it was correct. It follows that there is no reason to refuse an application for leave to appeal. Indeed, it was not opposed.

Orders

68 Before the Senior Member, 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.

69 The applicants submitted that, if the appeal were to be allowed, this Court should reinstate the orders made by the Senior Member. The respondent noted in its written submissions that, if the by-law were to be declared invalid, it could have unintended consequences for the strata scheme, which would then be left without a by-law governing the keeping of animals. Those potential or possible consequences have no doubt been understood by the respondent from the time that the challenge to the validity of the by-law was raised in the Tribunal. They do not provide a basis for overturning the orders made by the senior Member of NCAT; nor were they presented as having that effect.

70 The respondent did not challenge the relief sought by the applicants, in the event that

they were successful. That relief is appropriate and should be granted.

71 The effect of allowing the appeal will be to set aside the orders made by the Appeal Panel, which in turn set aside orders made by the Senior Member. Accordingly, the orders made by the Senior Member will stand and need not be "reinstated" as sought in the draft notice of appeal.

72 Each party sought its costs in this Court, and on the basis that costs should follow the event. It follows that the applicants should have their costs of the proceedings in this Court.

73 There remains an outstanding issue as to the costs before the Appeal Panel and the Senior Member. The orders made on 27 May required the filing of an application and written submissions in support, pursuant to a timetable permitting 28 days until the filing of the applicants' response. The Court is aware that costs orders were made by the Appeal Panel whilst this judgment was reserved. [46] Those orders cannot be addressed in this judgment.

74 The Court should make the following orders:

(1) Grant the applicants leave to appeal from the decision of the Appeal Panel of NCAT given on 27 May 2020.

(2) Direct that the applicants file, within 7 days of these orders, the draft notice of appeal contained in the white folder.

(3) Subject to compliance with order (2), allow the appeal and set aside orders (1)-(6) made by the Appeal Panel.

(4) Order that the respondent pay the applicants' costs in this Court.

75 **MACFARLAN JA:** I have had the advantage of reading the judgments of Basten JA and Fagan J in draft. I agree with the orders proposed by Basten JA. My reasons for decision are as follows. They are consistent with and draw on their Honours' judgments.

76 The starting point for consideration is that the registered proprietors of the lots in The Horizon apartment building have freehold interests in them and that they are entitled to enjoy and exercise the ordinary incidents of ownership of property except to the extent that they are lawfully constrained from doing so.

77 A potential lawful constraint arises from the subjection of the owners to the terms of the strata scheme by-laws made in accordance with s 136 of the *Strata Schemes Management Act* (see [10] above). This section permits by-laws to be made concerning the use or enjoyment of the lots and the scheme common property. By reason of s 139(1) (see [16] above), the by-laws must not however be "harsh, unconscionable or oppressive".

78 For a by-law to restrict a lot owner in the enjoyment or exercise of his or her rights incident to ownership would in my view be "harsh, unconscionable or oppressive" at least where the restriction could not on any rational view enhance or be needed to

preserve the other lot owners' enjoyment of their lots and the scheme common property.

79 The by-law at issue in the present case (By-law 14) imposes a blanket prohibition (save in respect of assistance animals) on keeping any animal, or permitting it to be, on any lot or the common property. Its scope is broad enough to prevent lot owners using their lots in a way which could not, on any rational view, adversely affect other lot owners' enjoyment of their lots or the common property. The keeping of goldfish in a secure aquarium was an obvious example given in the course of submissions in this Court. Other examples, such as the keeping of a small bird in a cage, could also be given.

80 The keeping in units of many other types of animals could however of course adversely affect other lot holders' enjoyment of their units, barking dogs being an obvious example. As Basten JA describes, there are statutory and model by-law provisions well capable of dealing with such issues (see [35]-[37] above).

81 The Court's role does not extend to reformulating an invalid by-law or making suggestions as to alternative forms of by-law that might be valid. It is sufficient that the subject by-law is readily capable of operating in a manner that is "harsh, unconscionable or oppressive". That it may in some circumstances operate fairly cannot save it from invalidity.

82 I agree with Basten JA (see [46]-[52] above) that the possible administrative convenience for the owners corporation or strata committee that might result from a blanket ban could not justify interference with the ordinary rights of lot owners by means of the subject by-law. As his Honour points out, the making of evaluative judgments in response to applications by lot owners, or concerning their behaviour, is a common incident of the management of strata schemes. Moreover, as his Honour also says, there is in any event no basis here for concluding that there would be a flood of applications for permission to keep animals if a different type of by-law (allowing the keeping of animals with approval) were to be adopted.

83 **FAGAN J**: I agree with the orders proposed by Basten JA. With the benefit of his Honour's statement of the case I can record my own reasons briefly.

84 At first instance the Senior Member of the Tribunal decided that by-law 14.1 of Strata Plan 58068 is "harsh, unconscionable or oppressive" within the meaning of s 139(1) of the *Strata Schemes Management Act 2015*. Accordingly, he declared the by-law invalid pursuant to s 150(1). Those two provisions are as follows:

> **139 Restrictions on by-laws**
>
> (1) **By-law cannot be unjust** A by-law must not be harsh, unconscionable or oppressive.
>
> Note—
>
> Any such by-law may be invalidated by the Tribunal (see section 150).
>
> …
>
> **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.

85 By-law 14.1 is a blanket prohibition against keeping animals within the strata building, qualified only with respect to assistance animals. It is in the following terms:

> 14.1 Subject to section 139(5) of the Act, an owner or occupier of a Lot must not keep or permit any animal to be on a Lot or on the Common Property.

86 The Senior Member applied the statutory standard in s 139(1) to the text of the by-law taking into account the nature of the property to which the strata plan applies, being a high rise apartment building in which the lots are used as private residences. His decision was the outcome of applying a legal standard to facts fully found and was therefore a decision on a question of law: *Hope v Bathurst City Council* (1980) 144 CLR 1; [1980] HCA 16.

87 The Appeal Panel reversed the Senior Member's declaration of invalidity. Leave may be granted to appeal from the Panel to this Court only on a question of law: *Civil and Administrative Tribunal Act*, s 83(1). Whether the Panel erred in reversing the first instance decision and finding that the by-law is not prohibited by s 139(1) is, like the Senior Member's decision itself, a question of the application of a statutory standard to facts fully found – and therefore a question of law for which leave may be granted.

88 By-law 14.1 is "oppressive" contrary to s 139(1) because it prohibits 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 animal, and the prohibition provides no material benefit to other occupiers of the building in their use or enjoyment of their own lots or of the common property. In an apartment building such as that to which Strata Plan 58068 applies, an animal could be kept within a lot without creating the least interference with other lot owners. The by-law is oppressive because it prohibits the keeping of animals across the board, without qualification or exception for animals that would create no hazard, nuisance or material annoyance to others. By-law 14.1 thus interferes with lot holders' use of their real property in a respect and to an extent that is unjustified by any legitimate concern of others in the building.

89 The by-law is to be contrasted with the model by-laws concerning animals as set out in Sch 3 of the Strata Schemes Management Regulation 2016. Option A of model by-law 5 would permit an owner to keep an animal subject to it remaining within the owner's lot and entering common areas only under supervision. Option B would permit an animal to be kept within a lot or on the common property subject to the approval of the owners corporation, such approval not to be unreasonably withheld. These are examples of by-laws that avoid oppression by restricting individual lot owners' exercise of their property rights only to an extent that is adapted to the preservation of others' enjoyment of their own lots or of the common property.

90 The words "harsh, unconscionable or oppressive" are grouped disjunctively in s 139(1) and that sub-section is breached if any one of them is applicable to the by-law in question. None of the three words is to be disregarded. As they appear in a composite expression, each of them is to be considered for any contribution that it may make to

the interpretation of the others. In my opinion “oppressive” is the word engaged by by-law 14.1. The conclusions expressed above as to why that by-law is oppressive represent what I take to be the correct interpretation of the word in its setting in the *Strata Schemes Management Act 2015*, so far as relevant to the resolution of this appeal.

91 I do not consider that by-law 14.1 falls within the description “harsh”. I do not find it necessary for present purposes to envisage what characteristics or operation of any by-law might engage that statutory description in this context of residential strata plan governance. Where that word appears in s 139(1) it does not convey a meaning that is sufficiently clear to influence the proper interpretation of the associated word, “oppressive”.

92 The context of strata plan management does not readily suggest what features or scope of operation of a by-law might make it “unconscionable”. As Basten JA has pointed out at [25], that term is generally understood in equity as concerned with a stronger party to a transaction exploiting some special disadvantage of a counterparty. By-laws are added, amended or removed by voting in accordance with unit entitlements at a general meeting of the owners corporation, not by negotiation or by the making of a transaction between persons with greater or lesser bargaining strength or special disadvantage. I do not regard the word “unconscionable” as applicable to the present by-law. Nor does it have sufficiently clear import in this context to influence the meaning of the word that I find presently relevant, namely, “oppressive”.

93 There is nothing about either of the words “harsh” or “unconscionable” that would suggest that “oppressive” should be understood in some sense other than that which I have attributed to it, above, in connection with by-law 14.1.

94 In its prohibition of by-laws that are oppressive, s 139(1) does not require that there be identified some group within an owners corporation that oppresses, by means of the by-law, the lot owners affected. The inherent qualities of the by-law and the way it impacts upon lot owners make it oppressive if, as in the case of by-law 14.1, it forbids a common incident of property ownership without providing benefit to others. Accordingly, it is immaterial whether the by-law in question may have been adopted or maintained by a large majority or even unanimously. If a by-law that contains an oppressive prohibition were adopted unanimously, that would suggest that no lot holder at the time of the vote wished to undertake the prohibited use. That would not detract from the quality of oppression, which does not depend upon whether any current lot holder desires to act contrary to the by-law. By-laws bind incoming purchasers. The oppressive character of a by-law, inherent from the time of its adoption, unanimous or not, may come to be felt by a person who acquires a lot at a later date.

95 In the present case, where a by-law prohibiting the keeping of animals has been in force from the inception of the plan, a special resolution to remove it could be defeated by the holders of anything over 25% of the unit entitlement of votes cast at a general meeting: see ss 5 and 141 of the Act. Even if opposition to the repeal should be much

greater than 25%, that would have no bearing upon whether the by-law is oppressive and amenable to being declared invalid under s 150(1).

96 The respondent owners corporation submitted that a rule prohibiting only animals that interfere with other occupiers' enjoyment of the property would require the corporation to adjudicate on a case-by-case basis. It submitted that a benefit flowing from by-law 14.1 is the avoidance of this administrative burden. It is argued that this justifies the by-law and precludes it being characterised as "oppressive". As Basten JA has shown, there are other by-laws, as well as provisions of the Act, that require the owners corporation to make case by case judgments about whether conduct in connection with individual lots exceeds the limits necessary to preserve peaceful enjoyment of other parts of the building. The need to make evaluative judgments from time to time in the administration of the by-laws of residential strata buildings is an inescapable incident of this type of property ownership. It is not a consideration that could preserve by-law 14.1 against invalidation under ss 139(1) and 150(1).

97 At [70(6)] of their decision the Panel listed the matters that they considered relevant to whether the by-law contravenes s 139(1). The list was adopted from reasons the Panel had given on the same day in *The Owners – Strata Plan* 55773 *v Roden* [2020] NSWCATAP 95. The list of considerations includes the following:

> (c) the circumstances in which the by-law came to operate on various lot owners (including the circumstances in which any lot owner acquired a legal interest in property in the strata scheme).

98 The Panel said at [130]:

> Lot owners acquire their interest in a strata scheme in the knowledge of existing by-laws and the limitations thereby imposed.

At [149] they said:

> The simple facts are that the Coopers chose to purchase a lot in a strata scheme that did not permit the keeping of animals. They commenced residing at the scheme appreciating this fact. At that time their dog was not present.

99 In the final paragraphs of their reasons for overturning the Special Member's decision the Appeal Panel held as follows:

> [158] [The Coopers' arguments against by-law 14.1 lead] to the result that, in a community living situation, the majority cannot choose what is permissible and impermissible in a particular strata scheme despite the [Act] permitting them to do so.
>
> [159] Further, if accepted, such approach would lead to the result that even where lot owners in a strata scheme were unanimous in passing a by-law imposing a prohibition or restriction, a by-law would be susceptible to challenge by a subsequent lot owner who acquired his or her lot with knowledge of the limitation simply because that lot owner's views were not in conformance with the provision of any by-law that existed at the time he or she purchased the lot.

100 Contrary to these conclusions, ss 139(1) and 150(1) show that the Act significantly qualifies the finality of by-laws that have been adopted or retained by an owners corporation in general meeting. By-laws adopted unanimously or by majority are not inviolate; they are amenable to declaration of invalidity if they infringe a statutorily prescribed standard.

101 Further, the Appeal Panel erred in treating the circumstances of the Coopers'

acquisition of their lot, with knowledge of a by-law that prohibited the keeping of animals, as relevant to whether by-law 14.1 is contrary to s 139(1). The question before the Senior Member and again before the Panel was not whether it was "harsh, unconscionable or oppressive" that by-law 14.1 applied to the Coopers, by reason of any matter specific to them, including the history of their relationship with the Strata Plan. The Tribunal was required to evaluate the inherent qualities of the by-law as a rule of general application to all lot owners. The question posed by s 139(1), whether the by-law is "harsh, unconscionable or oppressive", had to be answered by measuring the scope and effect of the by-law against the statutory standard, irrespective of which lot owner, if any, might fail to comply with the by-law or seek to have it declared invalid.

102 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. The Appeal Panel erred in law in holding that by-law 14.1 did not contravene s 139(1). A step in the Panel's reasoning towards that error was their misapprehension that the circumstances of the Coopers' purchase of their lot were relevant to the subject.

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Endnotes

1. Owners – Strata Plan No 58068 v/ats Cooper [2019] NSWCATCD 62 ("primary decision").
2. The Owners – Strata Plan No 58068 v Cooper [2020] NSWCATAP 96 ("Panel decision").
3. Strata Schemes Development Act 2015 (NSW), s 4(1), lot.
4. Ibid, common property.
5. Ibid, freehold strata scheme.
6. Ibid, owner: these definitions are relevantly picked up by s 4 of the Strata Management Act from the Strata Schemes Development Act.
7. (2007) 233 CLR 528; [2007] HCA 45.
8. (1982) 149 CLR 337 at 350-352.
9. (1976) 135 CLR 110 at 118-119; [1976] HCA 24.
10. See P Harpur, "Rights of Persons with Disabilities and Australian Anti-Discrimination Laws: What Happened to the Legal Protections for People Using Guide or Assistance Dogs?" (2010) 29 U. Tas. L. Rev. 49, 51-54.
11. South Western Sydney Local Health District v Gould (2018) 97 NSWLR 513; [2018] NSWCA 69 at [78]-[81] (Leeming JA; Meagher JA and I agreeing); TAL Life Ltd v Shuetrim (2016) 91 NSWLR 439; [2016] NSWCA 68 at [80] (Leeming JA; Beazley P and Emmett AJA agreeing); see also In the matter of Jimmy's Recipe Pty Ltd (No 2) [2020] NSWSC 632 at [35].
12. Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 at [69].
13. Primary decision at [107] referring to the reasoning of Allsop CJ in Paciocco v ANZ Banking Group Ltd (2015) 236 FCR 199; [2015] FCAFC 50 at [304]-[306].
14. [2020] NSWCATAP 95 ("Roden")
15. Roden at [64]-[128].
16. (2019) 93 ALJR 743; [2019] HCA 18.
17. Blomley v Ryan (1954) 99 CLR 362 at 392, 405; Commercial Bank of Australia v Amadio (1983) 151

CLR 447 at 462; Bridgewater v Leahy (1998) 194 CLR 457 at [39]-[40], [74]-[76]; Thorne v Kennedy (2017) 263 CLR 85 at [38].

18. That may not be true in another context, such as dismissals: see Byrne v Australian Airlines Ltd (1995) 185 CLR 410, 465 (McHugh and Gummow JJ); [1995] HCA 24.

19. The etymology of which was explored by F Callaway, Winding up on the just and equitable ground, (Law Book Co., 1978) pp 4-6, referring to the phrase as a “statutory hendiadys”: p 5.

20. Kobelt at [295].

21. Cf Industrial Relations Act 1996 (NSW), s 84, and Police Act 1990 (NSW), s 181E, dealing with “harsh, unreasonable or unjust” dismissals. The Retirement Villages Act 1999 (NSW) refers in s 54(1)(b) and s 134(5) to “unjust, unconscionable, harsh or oppressive" village rules; and in s 123 to “harsh, oppressive, unconscionable or unjust" village contracts.

22. Contracts Review Act, s 7(1).

23. [2006] NSWCA 41 at [64]; cited with approval by Allsop CJ in Paciocco at [298].

24. Appeal Panel decision at [102].

25. Appeal Panel decision at [102], referring to s 9(2) of the Contracts Review Act.

26. Submissions for respondents, 23 March 2020, par 74.

27. (2016) 261 CLR 167; [2016] HCA 40 at [63] (French CJ, Bell, Keane and Gordon JJ).

28. Appeal Panel decision at [124]-[126].

29. Appeal Panel decision at [127].

30. Respondent’s written submissions before Appeal Panel, par 75.

31. (2011) 80 NSWLR 711; [2011] NSWCA 159 at [90] (Young JA; Macfarlan JA and Handley AJA agreeing).

32. Respondent’s Outline of Submissions, 3 August 2020, par 74.

33. Similar language is used in By-law 18, requiring floor coverings “sufficient to prevent the transmission of noise … likely to disturb the peaceful enjoyment of the owner or occupier of another Lot.”

34. Carr v Western Australia (2007) 232 CLR 138; [2007] HCA 47 at [5] (Gleeson CJ).

35. See generally, P Sales, “Use of Powers for Proper Purposes in Private Law” (2020) 136 LQR 384, 388-389.

36. Houghton v Immer (No 155) Pty Ltd (1997) 44 NSWLR 46, 52D-53G (Handley JA; Mason P and Beazley JA agreeing); Casuarina Rec Club at [89]; Strata Management Act, s 253(1).

37. Strata Management Act, s 135(1).

38. [2016] 3 All ER 641 at [30].

39. P Sales, p 391.

40. (1991) 5 BPR 11,432.

41. (2007) 71 NSWLR 381; [2007] NSWCA 243.

42. See Casuarina Rec Club at fn 31 above: C Sherry, Strata Title Property Rights – Private Governance of Multi-owned Properties (Routledge, 2017), pp 131-142.

43. (2014) 254 CLR 1; [2014] HCA 18 at [29] (French CJ, Crennan, Kiefel and Keane JJ).

44. Appeal Panel decision at [7].

45. Strata Title Property Rights, p 10.

46. The Owners – Strata Plan No 58068 v Cooper (Costs) [2020] NSWCATAP 198 (29 September 2020).

Amendments

12 October 2020 - Correcting spelling of junior counsel's name on coversheet.

Decision last updated: 12 October 2020