



Civil and Administrative Tribunal
New South Wales

Case Name: Yardy v Owners Corporation SP 57237

Medium Neutral Citation: [2018] NSWCATCD 19

Hearing Date(s): 27 October 2017; 2 November 2017

Date of Orders: 19 February 2018

Decision Date: 19 February 2018

Jurisdiction: Consumer and Commercial Division

Before: Ian Bailey AM SC, Senior Member

Decision:

- (1) Pursuant to section 150(1) of the Strata Schemes Management Act 2015 (the Act) By-law 16 introduced by the Respondent in 2009, is invalid because it is harsh, unconscionable and oppressive in breach of section 139(1) of the Act.
- (2) Pursuant to section 229 of the Act, as provided for under section 148(1) of the Act, By-law 16 introduced by the Respondent in 2009 be revoked and the terms of By-law 16 as in place prior to 2009 be revived.
- (3) Pursuant to section 157(1) of the Act, declare that the Applicant may keep a small Maltese Cross terrier, called Baxter, in Unit 26 of the building and on the common property of Strata Plan 57237.
- (4) Pursuant to section 231 of the Act, to the extent

necessary by law, the Applicant may immediately commence to keep Baxter in Unit 26 of the building and on the common property of Strata Plan 57237.

(5) Any application for costs of the proceedings is the filed in the Tribunal within 14 days of the delivery of this decision along with any evidence and written submissions.

(6) Any response to the application for costs along with any evidence and written submissions are to be filed in the Tribunal within 14 days of receipt of the application and submissions.

(7) The costs application shall be determined on the papers.

Catchwords: Strata Schemes Management - By-Law – challenge to validity – blanket prohibition on pet ownership

Legislation Cited: Body Corporate & Community Management Act 1997 QLD
Strata Schemes Management Act 1996 Act
Strata Schemes Management Act 2015
Strata Schemes Management Regulation 2016

Cases Cited: Body Corporate for River City Apartments CTS 31622 v McGarvey (2012) QCATA 47
Cody v J.H. Nelson Pty Limited (1947) 74 CLR 629
Commissioner of Taxation v Industrial Equity Limited (98 FCR 573)
Engelman v Owners Corporation (Strata & Community Schemes) [2003] NSWCTTT 778.
McKenzie V Body Corp for Kings Row Centre CTS 11632 [2010] QCATA57
Murphy v Trustees of Catholic Aged Care Sydney (2017) NSWCATAP 183
Olive Grove Investment Holdings Pty Limited v Owners Strata Plan No. 5942 [2015] NSWCATCD 120 [767]

Owners Corporation Strata Plan 694812 v Want [2013]
NSW CTTT 440
Park Regis CTC Pty Ltd v the Owners SO 3397 [2017]
NSWCATCD 66
Perpetual Trustee Company Limited v Albert and Rose
Khoshaba [2006] NSWCA 41
Rhode Island [2012] QBCC MComr 2027
Trustees of Catholic Aged Care Sydney v Murphy
(2017) NSWCATCD 46
Tutton, W & B v Body Corporate for Pivotal Point
Residential CTS 33550 [2008] QCTBCCM 12

Category: Principal judgment

Parties: Applicant: Kenneth William Yardy
Respondent: Owners Corporation SP 57237

Representation: Counsel:
Applicant: H Morrison
Respondent: M Langemheim

Solicitor:
Applicant: Yardy Legal
Respondent: Monti Lawyers

File Number(s): SC 17/31241

Publication Restriction: Unrestricted

REASONS FOR DECISION

- 1 The Applicant is the owner of Unit 26 in a building (the building) in Sydney for which the Owners Corporation SP 52737 (Respondent) is the owners corporation pursuant to the *Strata Schemes Management Act 2015* (the Act).
- 2 In these proceedings the Applicant seeks orders pursuant to section 150 of the Act including a declaration that By-law 16 introduced in 2009 is invalid because it imposes a blanket prohibition upon pet ownership, and as such, in the particular circumstances, it is harsh, unconscionable or oppressive and contrary to section 139(1) of the Act. The Applicant also contends that By-law 16 is invalid, or of no force or effect to the extent that it is in breach of section 159(5) of the Act.

- 3 The Applicant also seeks a declaration pursuant to section 157 of the Act that he is entitled to keep the pet, a small Maltese Cross Terrier, called Baxter, on the lot comprising Unit 26, owned by the Applicant and his wife, or on the common property.
- 4 It seems that this matter is the first in which the Tribunal has been required to deal with an application under section 150 of the Act, concerning the interpretation of a parcel of reforms introduced during 2016 which dealt with the keeping of animals within strata units. The principal reform, and the central issue in these proceedings, concerns the introduction of section 139(1) of the Act which created a new basis for assessment of the validity of by-laws.

Legislative Scheme

- 5 Section 136 of the Act deals the matters which 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.
- 6 Section 139 deals with Restrictions 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.

- 7 Section 150 provides jurisdiction to the Tribunal to invalidate a by-law:

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.

- 8 Section 157 provides the Tribunal with jurisdiction to make an order permitting an owner or occupier to keep an animal on the premises:

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.

- 9 The reforms introduced under the Act included model by-laws in the *Strata Schemes Management Regulation 2016* (the Regulation). Schedule 3 Clause 5 provides:

5 Keeping of animals

Note. Select option A or B. If no option is selected, option A will apply.

Option A

(1) An owner or occupier of a lot may keep an animal on the lot, if the owner or occupier gives the owners corporation written notice that it is being kept on the lot.

(2) The notice must be given not later than 14 days after the animal commences to be kept on the lot.

(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.

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.

(4) An owner or occupier of a lot who keeps an assistance animal on the lot must, if required to do so by the owners corporation, provide evidence to the owners corporation demonstrating that the animal is an assistance animal as referred to in section 9 of the Disability Discrimination Act 1992 of the Commonwealth.

Former Legislative Provisions

10 Section 43 of the former *Strata Schemes Management Act 1996* Act (the former Act) gave a broad list of matters about which by-laws could be made. Section 49 identified the restrictions on by-laws. There was no restriction as to the form, 'quality' or characteristics of by-laws. Relevantly, subsection 49(4) provided:

By-law cannot prevent keeping of guide dog.

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 a dog used as a guide or hearing dog by an owner or occupier of the lot or the use of a dog as a guide or hearing dog on a lot or common property.

11 Clause 16 of Schedule 1 By-laws of the former Act provided:

16 Keeping of Animals

(1) Subject to section 49(4), an owner or occupier of a lot must not, without the approval in writing of the owners corporation, keep any animal on the lot or the common property.

(2) The owners corporation must not unreasonably withhold its approval of the keeping of an animal on a lot or the common property.

Note.

This by-law was previously by-law 27 in Schedule 1 to the Strata Schemes (Freehold Development) Act 1973 and by-law 28 in Schedule 3 to the Strata Schemes (Leasehold Development) Act 1986.

- 12 Under these provisions an owner or occupier could keep an animal on the particular lot or the common property if the owners corporation approved an application to do so. The only consideration as to the validity of a decision by an owners corporation to withhold approval was whether the approval was **unreasonably** withheld.

Background

- 13 Prior to 2009, the Respondent had in place a by-law in the terms as set out in Clause 16 of Schedule 1 under the former Act, see [11].
- 14 One owner of a lot had a dog which was neglected and became something of a nuisance. The extent of the problem was explained in the Affidavit of Susan Ryan. Clearly the problem was substantial and the owner involved was uncooperative. These circumstances precipitated action by the Respondent to amend By-law 16.
- 15 In December 2009 the Respondent made extensive changes to By-law 16 which dealt with keeping of animals. The principal amendment was to sub-clause 16.5 which was amended to read:
- Subject to section 49(4) of the Act and paragraphs 16.6 to 16.13 hereto, an owner or occupier of a lot must not keep any animal on the lot or the common property.
- 16 Sub-clauses 16.6 to 16.13 dealt only with Existing Animals.
- 17 Consequently, the by-laws of the Respondent provided a complete prohibition upon the keeping of animals as pets, to the extent possible under the former legislation.

- 18 In 2015, the wife of the Applicant adopted a rescue dog called Baxter. The strata manager of their then residence was informed and there was no opposition, so Baxter continued to reside with them.
- 19 In early 2017, the Applicant and his wife, who were considering purchasing a new unit, partly because of the injuries Mrs Yardy had suffered to her leg and the consequent necessity for better access than was available at the residence which they previously occupied. During an inspection of the building, the Applicant observed that the strata by-laws were on display in a strata notices panel. The by-laws displayed were those which preceded the 2009 amendment.
- 20 In the course of considering the possible purchase of Unit 26 in the building the Applicant obtained a Strata Report for the strata scheme which stated that the model standard by-law 16, see [11], applied.
- 21 This advice and terms of the by-laws on display, see [19], provided comfort to the Applicant and his wife that they would be able to keep Baxter in Unit 26, and the purchase was completed in February 2017.
- 22 In April 2017, the Applicant's wife made an application to the Respondent for permission to keep Baxter on the premises. This application was made on the understanding that the by-laws were as displayed which permitted the keeping of an animal with the approval in writing of the Respondent.
- 23 Shortly after the initial application, the Applicant was informed that there was a pet prohibition in the by-laws amended in December 2009.
- 24 On 2 May 2017 the Applicant made a further application to the Respondent which included comprehensive details about Baxter and made reference to the amendments introduced under the Act. The application sought an amendment of the by-law so as to permit Baxter to be kept in Unit 26. The application was addressed at a body corporate meeting on 27 June 2017 at which, although the motion for the change to the by-law was supported by the majority of voters present, more than 25% of voters, by entitlement, dissented. The application was accordingly unsuccessful.

Evidence

25 The evidence before the Tribunal at the hearing comprised:

For Applicant

- (1) Affidavit of Applicant dated 8 September 2017 which annexed:
 - (i) Attachment 1 – photographs of by-laws on display in lift foyer
 - (ii) Attachment 2 – Change of by-law notice dated 4 December 2009 (5 pages)
 - (iii) Attachment 3 – letter Yardy Legal to Respondent dated 2 May 2017 (with supporting documents, 24 pages)
 - (iv) Attachment 4 – Paper by Emma Power, dated May 2016 as to apartment living and pets and the proposed reforms
 - (v) Attachment 5 – Submission by Pets Australia to Strata Law Review
- (2) Affidavit of Mrs Yardy dated 8 September 2017 which annexed:
 - (i) Attachment 1 – Strata Report with respect to property dated 3 February 2017
- (3) Affidavit of Shirley Teenan dated 10 September 2017, Owner / Occupier and applicant for permission to keep a small dog
- (4) Affidavit of Applicant dated 26 September 2017 which annexed the following documents:
 - (i) Copies of records of Respondent's resolutions in relation to pets
- (5) Affidavit of Trudi Thorpe dated 1 October 2017 which annexed:
 - (i) Annexure A – Letter from Yardy Legal dated 4 October 2017
 - (ii) Annexure B – Report relating to the suitability of pets in strata buildings dated 12 October 2017
 - (iii) Annexure C – Information about Trudi Thorpe
 - (iv) Annexure D – document "Pet Ownership in Australia 2016" published by Animal Medicines Australia
 - (v) Annexure E – Dog training document "Help My Dog Needs Leadership and Manners"
 - (vi) Annexure F – Session Notes concerning Baxter
 - (vii) Annexure G – Pet Dog Manners Course
 - (viii) Annexure H – Photographs of unit 26

For Respondent

(1) Affidavit of Susan Ryan dated 13 October 2017

Consideration of the Evidence

- 26 A critical consideration in these proceedings is the evidence of the benefit of pet ownership to humans as a general rule, and how the recognition of this phenomenon has formed part of contemporary community standards.
- 27 The Tribunal accepts that the particular circumstances of the Applicant, his wife and Baxter, are largely irrelevant to the determination of whether By-law 16 is invalid and in breach of section 139(1) of the Act. The Tribunal nevertheless accepts that the evidence relied upon by the Applicant in this respect is compelling and considers that, if the question of whether the withholding of an application to keep Baxter within Unit 26 were assessed under the former regime, with a test of reasonableness, see [11], the application would clearly succeed.
- 28 In an Expert Report Annexure B to the Affidavit of Trudi Thorpe dated 1 October 2017, there are a number of passages which provide guidance as to how the issues involved with keeping of an animal, dogs in particular, within strata premises can be addressed:

2. Suitability of Pets in Strata Premises

2.1 The keeping of animals (be they dogs, cats, fish, birds, reptiles, snails etc) is a normal domestic activity and has been for centuries. Dogs and cats are the main companion animals in Australia. Australia has one of the highest pet ownership levels in the world (62%). Currently 38% of households in Australia have a dog, and there is 1 dog to every 5 people in Australia ("Pet Ownership in Australia" (2016) *Animal Medicines Australia* p.10).

2.2 Traditionally, most pets have been in houses and owners have had to (sic) [the] option to keep the pet and decide if they were to be kept within the building structure or outside.

2.3 The growth of Strata accommodation in Australia's cities has focused on the issues around the keeping of animals (as with many other activities) as to ensure they do not become a nuisance to the enjoyment of others in a complex.

2.4 From my experience in dealing with Dog Training and Behaviour, I have noted that there are a number of issues that dogs may cause when they are living near other parties. It is not confined to Strata Properties, but the regular issues with dogs in the use and enjoyment of a Lot and Common Property are:

(i) **Noise.** Excessive Barking is a recognised issue with dogs and it arises for a number of reasons (attention seeking, wanting something or anxiety) but it can be controlled by training and prevention measures such as behavioural correction, Calm responses, stimuli removal, noise (TV/Music) introduction and regular exercise.

(ii) **Size of an apartment.** Dogs do not need much space to live. They sleep most of the day. If they are regularly exercised, they can generally live in small units without issue.

(iii) **Behaviour.** Some Dogs and cats like to scratch in the dirt and gardens, which may affect gardens and lawns. This can generally be avoided by dogs being kept on the lot and required to be supervised whilst they are traversing common property.

(iv) **Loss of Amenity.** Some people see the presence of pets on premises as a loss of amenity of common property. However, if dogs merely traverse over common property under supervision, it would be of less concern than motor vehicles, children, removalists or other users of the area. Whilst bordering Strata owners / owners may be concerned with animal hair, barking & smells, these can all be managed, like other activities, to reduce any nuisances.

(v) **Defecation.** If a dog is walked regularly and trained to defecate away from Common property area, it generally will, if it is controlled properly.

(vi) **Security & Management.** A common concern is that there would be increased call outs if there are concerns for the welfare of animals on the premises and other animal related complaints. This is generally avoided by having good communication within a strata complex and proper arrangements during absences.

(vii) **Use of Common Property.** Many people value a pet-free common property area. This is also controlled by ensuring responsible traversing of the animal over common property and having the animal kept in the unit.

(viii) **Design of the premises.** The design of a dog's environment and the surrounding does affect the possibility of nuisances occurring. Good noise prevention in building and sight lines can reduce a lot of the noise and behavioural issues with dogs.

2.5 Pets and specifically dogs are (and have been) suitable for living in Strata Premises for many years and with training and effective management, they can be prevented from causing any nuisance or interference to any other lot user or common property.

3. The Benefits of Pet Ownership

There is wide spread acceptance of the belief that responsible pet ownership can have positive and lasting benefits to people. Physical benefits include stress reduction, which may decrease blood pressure and promoting exercise for greater fitness. It is also correlated with fewer doctor visits. The level of

companionship that a dog gives often makes people regard their dog as a member of their family and provides for greater social support.

29 Further the findings and observations of the Adjudicator in *Rhode Island* [2012] QBCC MCmr 2027 (Rhode Island), see [57 to 59], support the proposition that a blanket prohibition against the keeping of animals within strata premises is unnecessary, and at least unreasonable, and that a balanced and considered approach can be adopted which has due regard to the interests all owners and occupiers of lots within the scheme.

30 To the extent that the legislative intention might be relevant to the issues of interpretation it is clear to the Tribunal that the introduction of section 139(1) was directed to by-laws such as By-law 16. The New South Wales Department of Fair Trading's Position Paper 4.7 which formed part of the reform process stated:

(there) was a strong view in the submissions that pet ownership was unreasonably restricted in many schemes. This is a particular problem for pet owners looking to buy or rent a unit. It is thought that by changing the model by-laws, more and more schemes will allow pets to be kept over time.

31 The Second Reading Speech of the 2015 Bill stated:

New model by-laws will be introduced when the Regulations are made to deal with a number of issues that are important to strata residents. These include amending the by-laws relating to pets to make it easier for schemes to become more pet friendly.

32 Finally, the model by-law introduced in the Regulation, see [9], removed the former model by-law which permitted a prohibition against the keeping of animals as pets, and introduced a model by-law, allowing pets after notification to the owners corporation (the default position), or with the consent of the owners corporation.

33 The Tribunal concludes that the evidence establishes that the right to keep an animal as a pet within strata units, under suitable conditions, subject to regulation and control by the owners corporation, which has due regard to the rights of all unit owners is part of contemporary community standards applicable to the assessment of an application by a lot owner to keep an animal as a pet in their lot. It may also be, as the Applicant submits, a part of a lot owner's basic right of habitation.

34 These standards ought also be applied to the assessment of the validity of by-laws regulating the keeping of animals as pets in strata units.

Submissions

35 The Applicant's counsel supplied a comprehensive Outline of Submissions at the commencement of the hearing.

36 The Respondent's counsel provided an Outline of Submissions dated 31 October 2017.

37 The parties' Submissions are summarised as:

For Applicant

- (1) For a by-law to be found to be 'unjust' it must be shown to be **either** harsh, unconscionable **or** oppressive, see *Commissioner of Taxation v Industrial Equity Limited* (98 FCR 573) [19-20] and also *Pileggi v Australian Sports Drugs Agency* (2004) 134 2 FCR 107 [37].
- (2) The words must be given their plain and ordinary meaning, see *Cody v J.H. Nelson Pty Limited* (1947) 74 CLR 629, 647.
- (3) The Macquarie Dictionary defines the words as:

Harsh:	Ungentle and unpleasant in action or effect.
Unconscionable:	Unreasonably excessive.
Oppressive:	Burdensome, unjustly harsh, or tyrannical.

- (4) The approach of adopting Macquarie Dictionary definitions in the interpretation of legislation is consistent with the Tribunal's construction of the word "unreasonable" in s.158(1)(a), see *Olive Grove Investment Holdings Pty Limited v Owners Strata Plan No. 5942* [2015] NSWCATCD 120 [767] and *Owners Corporation Strata Plan 694812 v Want* [2013] NSW CTTT 440.
- (5) There is no decision in New South Wales as to the interpretation to be applied to section 139(1) of the Act. Guidance can be taken from Queensland cases interpreting the Queensland statute, the *Body Corporate and Community Management Act 1997* (Qld) (the Queensland Act) which states that "a by-law must not be oppressive or unreasonable", see *Body Corporate for River City Apartments CTS 31622 v McGarvey* (2012) QCATA 47 [59-61]. See also *Tutton, W & B v Body Corporate for Pivotal Point Residential CTS 33550* [2008]

QCTBCCM 12, *McKenzie V Body Corp for Kings Row Centre CTS 11632* [2010] QCATA57 and *Rhode Island* [2012] QBCCMmr 227.

- (6) It is conceded that By-law 16 [15] is within power within the section 136 power to make by-laws; however, it is submitted that it is invalid by reason of sections 139(1) and (5). In an alternative submission the Applicant suggested that By-law 16 was beyond power under section 136 of the Act.
- (7) The relevant by-law is oppressive, harsh or unconscionable on its face without reference to substantive circumstances in this case, or to Baxter specifically.
- (8) A prohibition on all pet ownership provides no facility for assessment of the circumstances of a particular applicant or particular pets.
- (9) The emotional health benefits of animals (particularly dogs) has been acknowledged by the Tribunal in *Trustees of Catholic Aged Care Sydney v Murphy* (2017) NSWCATCD 46 and *Murphy v Trustees of Catholic Aged Care Sydney* (2017) NSWCATAP 183. The Applicant's evidence by Ms Trudi Thorpe highlights the significance of pet ownership and the benefit which it provides.
- (10) Community standards as to pet ownership could not possibly conform with the by-law, as the Tribunal has accepted, see *Park Regis CTC Pty Limited v the Owners Strata Plan 3397* (2007) NSWCATCD 66 and see the Court of Appeal in *Perpetual Trustee Company Limited v Albert & Rose Khoshaba* [2006] NSW CA 41:

[64] When Parliament adopts so general, and inherently variable, a standard as that of 'justness' Parliament intends the courts to apply contemporary community standards about what is just. Such standards may vary over time, particularly over the period of two decades.
- (11) The by-law is contrary to lot owners' basic habitation rights and their right to the use and enjoyment of their lots.

For Respondent

- (1) The Respondent disputed the alternative submission by the Applicant that the by-law is beyond the power provided by s136 of the Act. This issue was addressed in *Rhode Island* [2012] QBCCMmr 227. This decision is not persuasive because s169 of the Queensland Act is worded differently from section 136 of the Act, and the latter would in any event permit a total ban on an activity in a lot or common property.
- (2) In support of the last submission, Option A of Model By-law 9 of the Regulation provides for a total ban on smoking on the common property.
- (3) A Fact Sheet on the Department of Fair Trading website suggests that a ban for all animals, other than assistance animals, was possible and a refusal to permit an animal must not be unreasonably withheld.

- (4) The Respondent also challenged the Applicant's submissions that the by-law was "totally contrary to Parliament's intention". Section 139 of the Act only includes the following specific restrictions:
- the devolution of a lot (s139(2)) prohibition or restrictions on persons under 18 years of age (s139(4)). prohibition or restriction on assistance animals (s139(5))
- (5) If Parliament had intended that a by-law could not ban animals then it would have specifically imposed a restriction in section 139 of the Act.
- (6) Reference was made to *Engelman v Owners Corporation (Strata & Community Schemes)* [2003] NSWCTTT 778.

Consideration – Invalidity

38 The Tribunal addresses the issues by first considering whether By-law 16 is invalid by reason of it being beyond the power of the Respondent under the Act. The second consideration concerns the legislative intention of including the words at the commencement of section 139(1) of the Act, "By-law cannot be unjust", and how the question of interpretation should have regard to this expression. The third aspect of this decision is the question of whether By-law 16 is invalid because it is "harsh, unconscionable or oppressive" and thus in breach of section 139(1) of the Act. The last issue addressed is the form of the relief which the Tribunal should order.

Invalidity as being beyond power.

39 This issue is whether a by-law which imposes an absolute prohibition of the keeping of animals within a lot or on the common property involves a valid exercise of the power under section 136 of the Act.

40 Section 136(1) of the Act provides that by-laws may be made:

.. in relation to the management, administration, control, use or enjoyment of the lots and the common property....

41 In Queensland this issue was considered in *Body Corporate for River City Apartments CTS 31622 v McGarvey* [2012] QCATA 47 ("McGarvey").

42 The equivalent provision to section 136(1) of the Act under the *Body Corporate and Community Management Act 1997* (the Queensland Act) is section 169(1) which relevantly provides that by-laws may provide for:

- (a) the administration, management and control of common property and body corporate assets;
- (b) regulation of, including conditions applying to, the use and enjoyment of:

- (i) lots included in the scheme; and
- (ii) common property

43 Under the Queensland Act, the equivalent provision to section 139(1) of the Act, is section 169(7) which provides:

(7) A by-law must not be oppressive or unreasonable, having regard to the interests of all owners and occupiers of lots included in the scheme and the use of the common property for the scheme.

44 The by-law challenged in McGarvey provided:

13 Keeping of animals

An owner or occupier of a lot must not keep an animal upon their Lot or the common property.

45 In McGarvey, the issues were first whether the by-law was invalid because it went beyond power under section 169(1)(b)(i) of the Queensland Act, which permitted by-laws which regulated “the use and enjoyment of lots”, and second, whether the by-law was invalid because it was “oppressive or unreasonable” in breach of section 180(7) of the Queensland Act.

46 The adjudicator at first instance held that the by-law was within power, however it was in breach of section 180(7). In reaching the latter finding, reliance was placed upon the decisions in *Tutton v Body Corporate for Pivotal Point Residential CTS 33550* [2008] QCCT BCCM 12 (Tutton) and *McKenzie v Body Corporate for Kings Row Centre CTS* [2010] QCATA 57 (McKenzie). Each of these decisions involved by-laws which, in different ways, imposed restrictions upon the keeping of animals as pets, and which were found to be “oppressive or unreasonable” in breach of section 180(7).

47 The Tribunal in McGarvey, in the finding at [49] as to the issue of whether the by-law was beyond power:

In my view, a by-law that prohibits the keeping of pets in lots is not a by-law regulating the use or enjoyment of lots, but purports to prohibit a particular use and type of enjoyment altogether. It therefore goes beyond the scope of a by-law permitted by section 169 and is invalid.

48 The finding in McGarvey as to invalidity of the by-law because it was beyond power, is based squarely on an interpretation of section 169(1)(b) insofar as it permits by-laws which **regulate** the use and enjoyment of lots and common property. The reasoning of the Tribunal in McGarvey is that a prohibition of

some aspect of the use and enjoyment of lots goes beyond regulation of that activity.

49 In contrast the provisions of section 136(1) of the Act do not separate the activities, or tasks, which apply in relation to “use and enjoyment of the lots”.

50 A by-law which deals with the keeping of animals as pets might arguably be accepted as falling within by-laws for the “management or control of the lots” and, as such, arguably be within power.

51 The Applicant also submits that By-law 16 is in breach of section 139(5) of the Act which provides that a by-law has no force and effect:

to the extent that it purports to prohibit or restrict the keeping of an assistance animal (as referred to in section 9 of the *Disability Discrimination Act 1992* Cth).

52 By-law 16, under clause 16.5, imposes a complete prohibition upon the keeping of animals in the lots, see [15]. The reference to section 49(4), see [10], means that the prohibition upon the keeping of animals does not extend to the keeping of a guide dog or a hearing dog. However, on its face, the by-law purports to preclude the keeping of an assistance animal. Further, under subclause 16.7, the by-law purports to limit the keeping of assistance animals to Existing Animals under the by-law.

53 Accordingly the by-law in two ways purports to “prohibit or restrict the keeping of an assistance animal”. The consequence is that By-law 16 “has no force or effect” to the extent that it does so. This does not mean that the by-law is invalid. It simply means that it cannot preclude the keeping of guide dogs or hearing dogs. This does not have the effect of making the by-law invalid. The consequence of section 139(5) is merely that the by-law is ineffective in prohibiting the keeping of assistance animals. If Baxter were able to qualify, or be registered, as an assistance animal, the by-law could not prevent the Applicant and his wife from keeping Baxter in Unit 26.

54 The Applicant has not submitted that Baxter is, or could be, an assistance animal. Accordingly the limited unenforceability of the by-law is irrelevant to this application.

- 55 The ineffective statutory prohibitions under By-law 16 against the keeping of guide dogs, hearing dogs or assistance animals, does not, in the opinion of the Tribunal, require that the description of the effect of By-law 16 be other than a blanket prohibition against the keeping of animals as pets.
- 56 The only issue as to invalidity of the by-law on the basis that the by-law is beyond power which has any relevance in these proceedings is whether the finding in McGarvey should be followed. The Tribunal concludes, for the reasons at [47-49] that the decision in McGarvey, on the first issue of invalidity is distinguishable, and that By-law 16 is within the power conferred by section 136 of the Act.
- 57 Another decision under the Queensland Act which is of some note is *Rhode Island* [2012] QBCCMCmr (Rhode). A by-law which precluded any owner or occupier from keeping an animal was held to be unreasonable. While owners had genuine concerns regarding the potential detriment animals might cause to their own use and enjoyment of their lot and the common property, the adjudicator held, at [19], that this did not “form a reasonable basis to preclude the keeping of all animals”.
- 58 The adjudicator, at [19], considered that “there are circumstances in which some animals could be kept in the scheme without causing these types of inconveniences to other residents”, and that conditions might be imposed “to minimise the risk of an animal creating a nuisance or interfering with other residents’ use and enjoyment of a lot or common property”.
- 59 Further at [20], “if a pet is permitted to reside in a lot and does create a nuisance, the body corporate may take steps to seek its removal pursuant to the nuisance provisions”.
- 60 The Tribunal, notwithstanding the conclusion at [55], considers that the decisions in McGarvey, Tutton, McKenziy and Rhode, insofar as they address the issue as to validity of the particular by-laws, on the basis that they were “oppressive or unreasonable”, do provide guidance as to the interpretation of the words “harsh, unconscionable or oppressive”, in section 139(1) of the Act when considering the validity of By-law 16 in these proceedings.

Justness

- 61 The use of the word “unjust” at the commencement of section 139(1) as describing the character intended to apply by the preclusion of by-laws which are “harsh, unconscionable or oppressive” is the first aspect which needs to be addressed.
- 62 The Applicant submits that the adoption of the expression invokes an intention, on the part of the legislature, that courts apply contemporary community standards about what is just. Reference was made to the decision of the Tribunal in *Park Regis CTC Pty Ltd v the Owners SO 3397* [2017] NSWCATCD 66, in which a declaration was sought that an amendment to an exclusive use by-law for the use of a lift was unjust. The Tribunal in this case noted, at [66], that the Court of Appeal in *Perpetual Trustee Company Limited v Albert and Rose Khoshaba* [2006] NSWCA 41 held that:
- When Parliament adopts general standards such as ‘justness’, Parliament intends courts to apply contemporary community standards about what is just. Such standards may vary over time
- 63 The Applicant submitted that, judged by contemporary community standards, the consequence of By-law 16, in completely preventing an owner from keeping any animal as a pet, is contrary to lot owners’ basic habitation rights, and their use and enjoyment of their respective lots. The Tribunal accepts this submission, and when the totality of the reforms under the Act and the Regulation, see [5 to 9], is considered, they disclose a recognition of contemporary community standards concerning the benefits to humans of appropriate and thoughtful pet ownership.
- 64 In the sense that By-law 16, on its face, precludes the keeping of a goldfish or an axolotl, particularly when there is no possible discretion, or capacity, to consider the particular needs and desires of individual lot owners, it does not, in the opinion of the Tribunal, reflect the notion of justness.
- 65 It is worthy to note that section 180(7) of the Queensland Act requires that the assessment of whether a by-law is “oppressive or unreasonable” is to have “regard to the interest of all owners and occupiers of lots included in the scheme”. This expression is also included in section 149(2) of the Act. In the opinion of the Tribunal this expression represents part of the contemporary

community standards to apply when determining whether an animal may be kept as a pet in a strata unit.

Harsh, unconscionable or oppressive

- 66 Prior to the introduction of the Act and the Regulation there were limited restrictions upon the matters by-laws could address. There was no restriction as to the form the by-laws could take. As to the keeping of animals there was no specific provision in the Act, however Clause 16 of Schedule 1 to the Act, see [11], required that an owner or occupier could make an application to keep an animal, which application was not to be **unreasonably** withheld by the owners corporation.
- 67 An owner or occupier could 'appeal' from the refusal on the basis that the refusal was unreasonable. There were many cases determining such appeals, including decisions by adjudicators and appeals to the Tribunal and its predecessor. The decision in *Engelman v Owners Corporation (Strata & Community Schemes)* [2003] NSWCTT 778, referred to by the Respondent in submissions, was but one example. This decision also involved consideration of a separate "Residents Code of Conduct" which was not included in the by-laws, and expressly excluded the keeping of animals, including a prohibition against feeding of birds on balconies.
- 68 The standard for consideration of the validity of a by-law under the Act, see [5 to 8] and the Regulation [9] is markedly different from that which applied under the former legislation. There was no restriction upon prejudice, or a requirement for fairness or any definition of the discretion which the owners corporation had to apply when deciding to introduce, or to amend, a by-law.
- 69 The elevation in New South Wales and Queensland of the definition of the standard for validity of by-laws under strata schemes, although in different terms, both reflect the change in community attitudes to the keeping of animals as pets by owners or occupiers of strata units.
- 70 A general analysis of the difference in the language between the requirement in Queensland that a by-law not be "oppressive or unreasonable" and that in New South Wales that a by-law must not be unjust in the sense that is "harsh, unconscionable or oppressive" suggests that the requirement in New South

Wales sets a higher standard than that in Queensland. The use of definitions from the Macquarie Dictionary is appropriate in the exercise.

- 71 The coincidence of the prohibition against “oppressive” by-laws in the legislation in both States and the difference in the plain and ordinary meaning of a by-law that is also “unreasonable” as opposed to a by-law that is unjust because it is also “harsh or unconscionable” confirms the difference in the standard.
- 72 “Harsh” means ungentle and unpleasant in action or effect.
- 73 “Unconscionable” means unreasonably excessive.
- 74 The meaning of both words are clearly beyond the meaning of “unreasonable” which means “not based on or in accordance with reason or sound judgement”.
- 75 The Tribunal considers that the Queensland decisions in Tutton, McKenzie, McGarvey and Rhode Island, insofar as they address the validity of by-laws which prohibit the keeping of any animal as a pet are persuasive and that a similar conclusion could be made in this matter, in reliance upon those decisions.
- 76 The reasons that By-law 16 is “harsh” are first that it is a blunt instrument which imposes a complete prohibition upon the keeping of animals as pets, with no exceptions, and secondly it provides no means by which the special circumstances of particular lot owners might be considered. It is based on the interests of only one side of the issues associated with the keeping of animals as pets. It is clearly ungentle and unpleasant in its effect for owners who wish to have a pet.
- 77 The reasons that By-law 16 is unconscionable are first, that it quite unreasonably and unnecessarily precludes the exercise of a right of habitation which the Tribunal considers is part of contemporary community standards associated with the rights of owners and occupiers of lots in strata schemes. Secondly, it provides no opportunity for consideration to be given to the rights and needs of individual lot owners. A possibly irrelevant consideration in this matter, which involves a degree of unconscionability, is the fact that the Respondent displayed only the superseded by-laws and that the Strata Report

also identified the former provision as to the keeping of animals as being in place. The by-law is unreasonably excessive in that it is unbalanced and operates only in the interests of those who are opposed to the keeping of animals as pets.

- 78 The reasons that By-law 16 is oppressive are that it does not involve or permit a balanced consideration of the interests and needs of **all** lot owners or occupiers and operates only in the interests of lot owners who are opposed to pet ownership. The by-law provides no process by which a lot owner could be able to keep an animal as a pet and thus operates only in the interests of those opposed to the keeping of animals as pets.
- 79 The Tribunal concludes that By-law 16 introduced by the Respondent in 2009 is invalid in that it is “harsh, unconscionable and oppressive”.
- 80 The Tribunal, pursuant to section 150(1) of the Act, will make an order declaring that By-law 16 passed by a resolution of the Respondent on 31 August 2009 is invalid because the by-law is harsh, unconscionable and oppressive in breach of section 139(1) of the Act.

Consideration – Ancillary Orders

- 81 The application submitted to the Respondent by the Applicant, dated 2 May 2017, and refused by the Respondent, on 27 June 2017, sought to change By-law 16, and reintroduce the former model by-law which applied up until 31 August 2009.
- 82 The Tribunal considers that it is appropriate to make ancillary orders, pursuant to section 229(a) of the Act and as permitted by section 148(1) of the Act, to the effect that By-Law 16 should be revoked and reinstated in the terms of the former by-law, see [11].

Consideration – Particular Circumstances of Baxter

- 83 The Applicant seeks a declaration under section 157 of the Act, that he and his wife be permitted to keep Baxter in Unit 26. The provisions of section 157 are set out at [8]. These include a requirement that the Tribunal must not make such an order unless it is satisfied that the by-laws permit the keeping of an

animal with the approval of the owners corporation and that the owners corporation cannot reasonably withhold consent.

- 84 The Tribunal accepts that until the orders to be made, as the Tribunal has concluded at [80] and [82] should be made, and the recording of those orders under section 246 of the Act is complete, the prerequisite that a by-law as required under section 157(2) is in place, a final order under on the section is not possible. The Tribunal will first consider whether the evidence supports the making of such an order and will then consider whether an interim order should be made pursuant to section 231 of the Act.
- 85 The Applicant and his wife gave evidence about the emotional and mental distress that being apart from their dog is causing them. They also referred to how well Baxter has been able to share their former home. They also listed the steps which they would take to ensure that the occupation of Unit 26 by Baxter would not cause interruption to their neighbours
- 86 Trudi Thorpe, a dog behavioural and training expert, in her Expert Report, see [28], gave evidence about the behaviour of Baxter and his ability to live without concern or issue within the building and concluded:
- ...can be keep (sic) kept [sic] easily in the [Building] without creating a nuisance based on his behaviour in other strata premises, prior training, the increased suitability of the new premises, as well as current training and proposed management procedures.
- 87 The evidence as to the capacity of Baxter to be accommodated within Unit 26 and the evidence as to the Applicant's arrangements to ensure that he does not cause a nuisance to other resident's is compelling and unchallenged.
- 88 The Tribunal has no doubt that Baxter will be able to be keep by the Applicant and his wife in Unit 26 without disruption or inconvenience to other occupants of the building.
- 89 The Tribunal concludes that an order pursuant to section 157(1) should be made.
- 90 The Tribunal further considers that to the extent necessary, an Interim Order should be made to permit the occupation by Baxter immediately notwithstanding that the orders as to the revocation of By-law 16 and

reinstatement of the former by-law will take some weeks to be recorded in accordance with the Act.

Orders

- (1) Pursuant to section 150(1) of the *Strata Schemes Management Act 2015* (the Act) By-law 16 introduced by the Respondent in 2009, is invalid because it is harsh, unconscionable and oppressive in breach of section 139(1) of the Act.
- (2) Pursuant to section 229 of the Act, as provided for under section 148(1) of the Act, By-law 16 introduced by the Respondent in 2009 be revoked and the terms of By-law 16 as in place prior to 2009 be revived.
- (3) Pursuant to section 157(1) of the Act, declare that the Applicant may keep a small Maltese Cross terrier, called Baxter, in Unit 26 of the building and on the common property of Strata Plan 57237.
- (4) Pursuant to section 231 of the Act, to the extent necessary by law, the Applicant may immediately commence to keep Baxter in Unit 26 of the building and on the common property of Strata Plan 57237.
- (5) Any application for costs of the proceedings is the filed in the Tribunal within 14 days of the delivery of this decision along with any evidence and written submissions.
- (6) Any response to the application for costs along with any evidence and written submissions are to be filed in the Tribunal within 14 days of receipt of the application and submissions.
- (7) The costs application shall be determined on the papers.

Ian Bailey AM SC

Senior Member

Civil and Administrative Tribunal of NSW

16 February 2018

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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