Doggone Disputes: What is the status of no pets by-laws?

There has recently been much media commentary about pets in strata schemes arising from at least two recent cases where NCAT has decided that "no pets" by-laws are invalid. Where does this leave "no pets" buildings?

Introduction

1. There is no express statutory prohibition within New South Wales against a by-law that prevents pet ownership in strata schemes. However, the new legislation that commenced on 30 November 2016, introduced a provision that "a by-law must not be harsh, unconscionable or oppressive"[1].

2. In February 2018, NCAT handed down its decision in *Yardy v Owners Corporation SP57237 [2018] NSWCATCD19* ("**Yardy**"). In the Yardy case, NCAT held that a by-law banning pets was invalid because it was harsh, unconscionable or oppressive in breach of s139 (1) of the *Strata Schemes Management Act 2015*.

3. Very recently in *Roden v The Owners – Strata Plan No. 55773 [2019] NSWACATCD* ("**Roden**"), another Tribunal member followed Yardy and declared a by-law that was a blanket prohibition on the keeping on animals invalid because it was harsh, unconscionable or oppressive. The Roden decision is under appeal.

4. Where does this leave buildings with by-laws banning pets?

The Yardy Case

5. The Yardy case concerned a residential apartment building in Sydney. The by-law relating to animals had been changed a number of times. Up until 2009, the building was governed by the standard model by-law concerning the keeping of animals which allowed owners and occupiers to keep animals with the consent of the owners corporation which could not be unreasonably withheld.

6. In 2009, the owners corporation changed the by-law to prohibit the keeping of animals. In early 2017, the Yardy's were considering buying an apartment in the building and wanted to keep their dog (a Maltese terrier) with them in the apartment. They inspected the building and observed that the model by-law for keeping of animals (which had been previously changed in 2009) was displayed on the notice board. The Yardy's also obtained a pre-purchase strata inspection report which mistakenly indicated that the model by-law for the keeping of animals applied to the building.

[1] S139 (1) of the *Strata Schemes Management Act 2015*

7. The Yardy's bought their apartment on the understanding that they would be able to keep their dog in the apartment with written approval of the owners corporation. However, the owners corporation informed the Yardy's that the by-law had been changed and they would not be able to keep their dog with them. The Yardy's requested the owners corporation change the keeping of animals of by-law to allow them to keep their dog and that request was rejected.

8. The Yardy's applied to NCAT to invalidate the by-law claiming that it was harsh, unconscionable or oppressive relying on s139 (1) of the *Strata Schemes Management Act 2015*.

9. NCAT held that a by-law is "harsh, unconscionable or oppressive" if:

   (a) it is "a blunt instrument which imposes a complete prohibition upon the keeping of animals as pets, with no exceptions"; [76];

   (b) it "provides no means by which the special circumstances of particular lot owners might be considered"; [76];

   (c) it "is based on the interests of only one side of the issues associated with the keeping of animals as pets"; [76];

   (d) it is "ungentle and unpleasant in its effect for owners who wish to have a pet"; [76]; and

   (e) it "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"; [76].

10. NCAT revoked the "no pets" by-law and revived the model by-law for keeping of animals that had been in place up until 2009 and allowed the Yardy's permission to keep the dog in their apartment.

The Roden case

11. More recently, in Roden another Tribunal member followed Yardy and declared a by-law that was a blanket prohibition on the keeping of animals invalid because it was harsh, unconscionable or oppressive. The Roden decision is under appeal with the appeal scheduled to be heard in December 2019.

What now for buildings with "no pets" by-laws?

12. There are significant doubts that the Yardy and Roden cases were correctly decided, particularly in relation to a "no pets" by-law that was introduced by the developer or by an owners corporation before the commencement of the new legislation on 30 November 2016.

13. Prior to 30 November 2016, the model by-laws that could be adopted by a developer or an owners corporation included a "no pets" by-law. Therefore, it is

difficult to see how the “no pets” by-law could be invalid. The position is less clear in relation to “no pets” by-laws that have been introduced since the commencement of the new legislation because by-laws made under the legislation cannot be harsh, unconscionable or oppressive.

14. The Tribunal in Yardy placed particular emphasis on an apparent right of habitation to live with a pet that it considers is part of contemporary community standards associated with the rights of owners and occupiers of lots in strata schemes, although, it is difficult to discern just where these contemporary community standards or basis habitation rights come from. What about the basic habitation rights of other owners in the building that want to live in a pet free environment?

15. What if the case is that 100% of owners in a building want to live in a pet free environment and have a no pets by-law but a new owner purchases a lot and then decides that they want to keep a pet? Will NCAT invalidate such a by-law on the basis that it is harsh, unconscionable or oppressive? That would seem to be perverse outcome.

16. There is a real question about whether there is anything “unreasonable”, let alone “harsh” or “oppressive” or “unconscionable”, in an owners corporation continuing to adopt a by-law that treats all owners in the scheme equally, by determining that no-one can own a pet, so as to save itself on the time-consuming and arbitrary exercise of assessing, on an ongoing basis, applications from owners as to what animals they can house in the building and on what terms.

Conclusion

17. The law in this area is not yet settled. The Roden case is under appeal with such appeal likely to be decided early in the new year.

18. We have recently been involved in another case acting for an owners corporation of an iconic Sydney building which has a by-law prohibiting the keeping of animals (which has existed since the time of registration of the strata plan 20 years ago) and an owner has requested NCAT declare that by-law invalid on the basis that it is harsh, unconscionable or oppressive. We argued Yardy and Roden were incorrectly decided and should not be followed. We are waiting on NCAT’s decision.

19. If you are an owners corporation with a “no pets” by-law, and have an owner pressuring the owners corporation to change the by-law on the basis that it is invalid (relying on Yardy and Roden), we urge you to seek legal advice before making any decisions about how to proceed.

20. If you require legal advice about these matters, we can certainly assist you.

David Edwards
Accredited Specialist Commercial Litigation | Partner | FACCAL
Email | LinkedIn

7 November 2019

About DEA Lawyers

DEA Lawyers is a specialist firm of experienced strata lawyers with comprehensive knowledge of all matters relating to strata and community title law.

general@dealawyers.com.au
www.dealawyers.com.au

DEA Lawyers

(02) 9223 6344 | general@dealawyers.com.au | www.dealawyers.com.au