Challenging unfair by-laws – Recent cases give some guidance

The commencement of the Strata Schemes Management Act 2015 ("SSMA") on 30 November 2016 changed the rules concerning strata by-laws. In particular, Section 139(1) provides that a by-law must not be "harsh, unconscionable or oppressive" and Section 150 gives the NSW Civil & Administrative Tribunal ("NCAT") power to make orders invalidating such a by-law on application by "a person entitled to vote on a motion making a by-law".

The first cases involving Section 150 applications are being decided. These include:

- A case concerning pet ownership, where a by-law outright prohibiting pet ownership was revoked. *Yardy v Owners Corporation SP 57237 [2018] NSWCATCD 19*

- A case where, although finding against the applicant on the basis of other issues, the Member determined that a by-law prohibiting flooring other than carpet was harsh, unconscionable or oppressive, because it failed to include a mechanism for considering minor renovations, which under Section 110, an owner may conduct with approval of the OC. *Gurram v Owners Corporation SP36589 [2017] NSWCAT*

In these cases, the Members spent some time considering what the terms "harsh, unconscionable or oppressive" mean, so they should be considered when making by-laws or considering challenging them under Section 150.

The key findings seem to be:

- Establishing that a by-law is "harsh, unconscionable or oppressive" requires more than demonstrating that the by-law is unreasonable.

- A pets by-law may be "harsh unconscionable or oppressive" if:

    - it is "a blunt instrument which imposes a complete prohibition upon the keeping of animals as pets, with no exceptions" and "provides no means by which the special circumstances of particular lot owners might be considered".

    - 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".

BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

Liability limited by a scheme approved under Professional Standards Legislation

© Copyright Bannermans Lawyers 2018.

- it “is based on the interests of only one side of the issues associated with the keeping of animals as pets”.

- A by-law dealing with flooring or other renovations issues may be “harsh unconscionable or oppressive” if it fails to provide for consideration of works which constitute “minor renovations”.

- Any by-law regulating activity within a strata scheme may be vulnerable to challenge if it:

    - Imposes a complete prohibition on some activity and provides no means by which the special circumstances of particular lot owners might be considered.

    - Unreasonably and unnecessarily precludes some incident of domestic life consistent with contemporary community standards associated with the rights of owners and occupiers of lots in strata schemes.

We have considerable experience with these issues and can assist if you are having difficulties with them.

Key takeaways

- By-laws must not be harsh, unconscionable or oppressive according to the SSMA.
- Recent cases illustrate that a complete prohibition on pet ownership can be challenged.
- By-laws that do not allow for consideration of special circumstances may be deemed oppressive.
- The Tribunal considers contemporary community standards when evaluating by-laws.
- A by-law that imposes a complete prohibition without exceptions is vulnerable to challenge.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

Prepared by Bannermans Lawyers
20 September 2018

BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

Liability limited by a scheme approved under Professional Standards Legislation

© Copyright Bannermans Lawyers 2018.