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IS POLLY, 'FLAFFIE' OR YOUR BELOVED IKATI WELCOME IN YOUR SECTIONAL TITLE HOME?

By GRETCHEN ENSLIN

The new Community Schemes Ombud Service Act is designed to simplify the resolution of disputes between sectional title scheme body corporates and home owners, including those pesky problems with pets.

For many, 'home is where my cat is' (or dog or parrot). But for others, pets are not part of their everyday lives. So when it comes to moving into a new abode in a sectional title scheme, whether you're a first-time home owner or scaling down, taking your beloved animal companion with you or acquiring one with which to share your new space can become a problematical issue: contentious and charged with emotion. This is understandable, given that it involves people, with and without pets, living in close proximity to one another and having equal rights to shared facilities. So where does current law stand on incorporating pets into life in a sectional title scheme?

One of the principal requirements of a sectional title scheme is the preservation of the physical integrity of the building, together with the maintenance of a pleasant and harmonious living environment for the benefit of all the residents. Harmony is crucial, especially in high-density developments or where the individual units are interlinked. Barking dogs, caterwauling cats and the smells and surprise packages left by lonely, confined, untrained and unloved animals whose humans do not take good care of them or give due consideration to other humans with whom they share limited outdoor space, are no-one's cup of tea.

It is therefore necessary for body corporates and trustees – and sectional title home owners themselves – to acknowledge that some restrictions on ownership rights are unavoidable. Each owner must surrender a certain degree of freedom that he or she might otherwise have enjoyed had they owned property privately and separately. This is especially pertinent to keeping pets.

Given that residents in a sectional title scheme invariably come from diverse backgrounds, especially in a multi-cultural society such as ours, different expectations as to what constitutes a 'pleasant living environment' have to be taken into account. It can therefore be extremely difficult to provide and maintain an environment that pleases all, never more so than when it comes to the presence of our furry and feathered friends.

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A good starting point for animal lovers looking to buying into a sectional title scheme would be to study the existing rules of the scheme. Should pets be expressly forbidden, check whether provision is made for a potential or existing home owner to seek special dispensation upon application to the body corporate or trustees of the scheme. (Note that the word 'pet' is not defined in the legislation. Therefore trustees should take care to define what is meant when allowing or prohibiting pets: cats, dogs and birds are different from 'quieter' pets held in cages such as snakes, hamsters or fish!)

CASE STUDIES

In *Body Corporate of the Laguna Ridge Scheme v Dorse,* a resident of the sectional title scheme took the scheme to court after she was denied permission by the trustees to keep a dog in her apartment. In this case, the rules of the sectional title scheme gave the trustees the discretion to either grant or refuse permission to keep pets in the units or common property of the scheme. The court therefore ruled that each request for permission to keep a pet had to be decided on its own merits and that the trustees' decision had to be based on the facts and circumstances relevant to the particular case at hand.

The facts before the court showed that the dog was small, did not bark and was not allowed by the owner to wander freely around the scheme's common property. It was therefore not being a nuisance, creating a disturbance or posing a threat to fellow residents. The court further established that the trustees' decision to refuse permission for the dog to be kept on the premises was, in fact, dictated by policy considerations, including the fear of creating a precedent, rather than based on the real issue of whether the presence of this particular dog in the resident's apartment would in any way impact negatively on other residents.

The court's finding was that the decision of the trustees to deny permission was grossly unreasonable and that the trustees failed to apply their minds to the matter. As a result, the trustees' decision was ultimately reviewable under common law which allowed for the substitution of their decision with that of the court. The court then ordered that the resident be allowed to keep her dog in her apartment.

In *Buffelsdrift Game Reserve Owners Association v Holkom* the court heard that a number of home owners had been keeping domestic animals on their

properties for several years without the prescribed consent as stipulated in the constitution of the home-owners' association. When some time later, newly appointed trustees of the homeowners' association sought to enforce the rule and ban domestic animals from properties, the residents' refusal to comply forced the association to go to court. The court held that the association, by virtue of its continuous inaction in addressing the contravention of the rules by owners, had waived its right to apply to court for an order prohibiting the owners from keeping the animals on their properties.

THE OMBUD

Both these court cases were decided prior to the enactment of the *Community Schemes Ombud Service Act 9 of 2011*, which came into effect on 7 October 2016. This new legislation provides for a legal structure, known as the Community Schemes Ombud, to monitor and control the administration of private and common areas in all community schemes (which include sectional title schemes and homeowners' association developments). The Community Schemes Ombud is also tasked with dealing with any disputes that might arise in such schemes between various parties, be they owners, occupiers or managers.

A party choosing to approach the Ombud must have first exhausted all internal remedies in terms of the rules of the relevant community scheme. Having received an application, the Ombud will then notify the relevant community scheme and all the parties concerned. Such notice will provide details of where the documentation relating to the application can be inspected and will invite the affected parties to make written submissions. The notice will also confirm whether or not legal representation will be allowed during the adjudication process. The Ombud allows legal representation in certain instances only, notably when the parties consent to legal representation; when the comparative ability of the parties to represent themselves necessitates legal representation; or when the complexity and importance of the dispute requires legal representation.

The first step the Ombud takes in resolving a dispute is to set the matter out for conciliation, should it be deemed that there is a reasonable prospect of a negotiated settlement. Should conciliation be immediately impossible or subsequently unsuccessful, the Ombud will refer the matter to an adjudicator.

An adjudicator has a wide range of investigative powers to enable resolution of the dispute. Enquiries can be made to the applicant, defendant or any person or parties relevant to the matter. Information may be gleaned by way of interviews, affidavits or inspections of private or common records and areas pertinent to the investigation (upon providing parties with reasonable written notice of such actions).

Based on these findings, the adjudicator will either grant or refuse the order sought by the applicant, based on all the relevant facts and on the law (including previous case law). The adjudicator's decision may then be appealed in a High Court, but only in respect of questions of law. The appeal must be lodged within 30 days after the date of the adjudicator's order.

Provision of an Ombud does not mean that an aggrieved party in a sectional title scheme dispute cannot still choose to approach the courts for resolution. But it must be noted that the new Community Schemes Ombud aims to provide effective and affordable dispute resolution services when it comes to community schemes, which includes sectional title schemes. Approaching the courts in a sectional title dispute, such as that arising from allowing/banning pets, is thus advisable when it is clear at the outset that the facts and legal issues involved are of a complex nature.

In summary: If refused permission to keep pets in a unit or common property of a sectional title scheme, inspect the rules of the scheme. Remember, the rules of a body corporate must always be reasonable and have equal application to everyone in the scheme. Check whether keeping pets is expressly forbidden or whether a decision to allow or forbid pets lies within the discretion of the trustees of the body corporate. Be honest about whether your pet might be regarded as a nuisance by any of the co-owners within the scheme. If there is no stated or apparent reason why your pet should not be permitted on the property, be sure always to exhaust all internal remedies (whether or not provided for in the rules or constitution of the body corporate) before making the decision to approach the Ombud or a court.

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