



Nigel Thomas & Belinda Thomas
C/-Block Strata Lawyers
SUITE 73 Jones Bay Wharf
26-32 Pirrama Road
PYRMONT NSW 2009

File No: SCS 15/04827
Quote in all enquiries

**Application to the Tribunal concerning 32 Undercliff Road FRESHWATER NSW 2096
Australia - SP4890**

Enclosed is a copy of the reserved decision from the hearing of this matter on 14-APR-2015.

1 An order pursuant to the provisions of section 181(3) of the Strata Schemes Management Act 1996 (the "SSMA") revoking the order of Adjudicator PR Smith in File No SCS 14/46853 on 22 January 2015 and substituting order 2 as set out below.

2 An order pursuant to the provisions of section 150(4) of the SSMA that the applicants are allowed to keep a male (neutered) Rhodesian Ridgeback dog known as Diesel on Lot 9 and the common property of the strata scheme subject to the following conditions:

(a) The approval is for Diesel for the remainder of his life and not for any replacement dog if Diesel dies or goes missing;

(b) Diesel is to stay within the confines of Lot 9 except when entering and leaving the strata scheme;

(c) When leaving the strata scheme, Diesel is to take the following route: directly across the common property on Level 5 of the strata scheme, through the Fire Stairs door on Level 5, down the Fire Stairs directly to the Fire Stairs exit on the Ground Level (without entering any other level of the strata building), and then immediately across the common property area on the Ground Floor level either to the garage area for Lot 9 or to the outside street;

(d) When entering the strata scheme, Diesel is to take the following route: directly across the common property area on the Ground Level either from the outside street or from the garage area for Lot 9, through the Fire Stairs entry on the Ground Level and directly up the Fire Stairs to the Fire Stairs door on Level 5 (without entering any other level of the building), and then immediately across the common property area of Level 5 to Lot 9;

(e) Diesel is to be on a leash and in the control of a responsible adult at all times when on the common property of the strata scheme;

(f) When on the strata scheme at all times, Diesel is to be clean and free of worms, fleas and other parasites;

(g) The applicants are to ensure that Diesel does not create any nuisance or annoyance so as to interfere with the peaceful enjoyment of other lot owners, occupiers or other persons lawfully using the common property;

(h) The applicants are to ensure that Diesel does not soil on any part of the common property and are to immediately remove and appropriately dispose of any soiling which may occur on the common property or within the confines of Lot 9;

(i) The applicants are to ensure that all waste matter generated by Diesel is disposed of promptly and hygienically so as to ensure that no unpleasant odour or other nuisance is caused thereby;

(j) The applicants will be responsible for any harm or damage caused by Diesel while on Lot 9 or the common property.

3 For the purposes of giving effect to order 2 above, the respondent by its officers and agents is to ensure at all material times that the applicants have ready access (including any door opening device) to the Fire Stairs doors on the Ground Level and on Level 5 of the strata building.

D Charles
Tribunal Member
07/05/15



Civil and Administrative Tribunal New South Wales

Case Name: Nigel & Belinda Thomas v Owners Corporation – Strata Plan 4890

Medium Neutral Citation: [2015] NSWCAT

Hearing Date(s): 14 April 2015

Date of Decision: 7 May 2015

Jurisdiction: Consumer and Commercial Division

Before: D G Charles, General Member

Decision: 1 An order pursuant to the provisions of section 181(3) of the *Strata Schemes Management Act* 1996 (the “SSMA”) revoking the order of Adjudicator PR Smith in File No SCS 14/46853 on 22 January 2015 and substituting order 2 as set out below.

2 An order pursuant to the provisions of section 150(4) of the SSMA that the applicants are allowed to keep a male (neutered) Rhodesian Ridgeback dog known as Diesel on Lot 9 and the common property of the strata scheme subject to the following conditions:

(a) The approval is for Diesel for the remainder of his life and not for any replacement dog if Diesel dies or goes missing;

(b) Diesel is to stay within the confines

of Lot 9 except when entering and leaving the strata scheme;

- (c) When leaving the strata scheme, Diesel is to take the following route: directly across the common property on Level 5 of the strata scheme, through the Fire Stairs door on Level 5, down the Fire Stairs directly to the Fire Stairs exit on the Ground Level (without entering any other level of the strata building), and then immediately across the common property area on the Ground Floor level either to the garage area for Lot 9 or to the outside street;
- (d) When entering the strata scheme, Diesel is to take the following route: directly across the common property area on the Ground Level either from the outside street or from the garage area for Lot 9, through the Fire Stairs entry on the Ground Level and directly up the Fire Stairs to the Fire Stairs door on Level 5 (without entering any other level of the building), and then immediately across the common property area of Level 5 to Lot 9;
- (e) Diesel is to be on a leash and in

the control of a responsible adult at all times when on the common property of the strata scheme;

- (f) When on the strata scheme at all times, Diesel is to be clean and free of worms, fleas and other parasites;
- (g) The applicants are to ensure that Diesel does not create any nuisance or annoyance so as to interfere with the peaceful enjoyment of other lot owners, occupiers or other persons lawfully using the common property;
- (h) The applicants are to ensure that Diesel does not soil on any part of the common property and are to immediately remove and appropriately dispose of any soiling which may occur on the common property or within the confines of Lot 9;
- (i) The applicants are to ensure that all waste matter generated by Diesel is disposed of promptly and hygienically so as to ensure that no unpleasant odour or other nuisance is caused thereby;
- (j) The applicants will be responsible

for any harm or damage caused by Diesel while on Lot 9 or the common property.

- 3 For the purposes of giving effect to order 2 above, the respondent by its officers and agents is to ensure at all material times that the applicants have ready access (including any door opening device) to the Fire Stairs doors on the Ground Level and on Level 5 of the strata building.

Catchwords: Whether Adjudicator error – whether Tribunal should make orders in substitution – whether consent unreasonably withheld in respect of permission to keep large dog on a strata property

Legislation Cited: *Strata Schemes Management Act 1996 NSW sections 49(4), 150(4), 151, 177, 178, 181 & 186*

Cases Cited: *Owners Corporation SP 56911 v Stricke [2012] NSWCTTT 392*
Owners Corporation SP 7596 v Risidore [2003] NSWSC 966
Richardson v The Owners Corporation – Strata Plan No 56695 [2008] NSWCTTT 928
Kelly v The Owners Corporation – Strata Plan No 5044 [2012] NSWCTTT 54

Texts Cited: None

Category: Principal judgment

Parties: Nigel & Belinda Thomas (applicants)
Owners Corporation – Strata Plan 4890 (respondent)

Representation: Counsel: A Douglas-Baker (Counsel for Applicants)
Solicitors: J Crittenden (Solicitor for Respondent)

File Number(s): SCS 15/04827

Publication Restriction: Nil

REASONS FOR DECISION

APPLICATION, PROCEDURAL HISTORY & BACKGROUND FACTS

- 1 The applicants are the owners of Lot 9 Strata Plan 4890 in Freshwater NSW (the "strata scheme"). The strata scheme is a seven storey residential home unit building.
- 2 The applicants have two children (a daughter and a son) who live with them. The applicants also include in their family a male (neutered) Rhodesian Ridgeback dog called 'Diesel'.
- 3 Diesel is a large dog, weighing approximately 45 kilograms. He is described in the applicants' evidence (see, for example, the Affidavit of Nigel Thomas sworn 18 September 2014) and also in the applicants' submissions as an amiable, quiet and placid dog. Diesel is said to be a calming and consistent influence on the applicants' family and very good with children. He attends all the rugby games of the applicants' son, often lying down and letting children play with him.
- 4 There are 14 Lots in the strata scheme over seven (7) levels. Apart from Lot 7, all occupants of the units in the building are Lot owners. There is also a ground level with common property area and ten (10) car spaces defined by brick walls, including a car space for Lot 9.
- 5 Lot 9 of the strata scheme is a large three (3) bedroom apartment situated on Level 5 of the strata building. The total area of Lot 9 (including the car space on the ground level) is 172.5 square metres.
- 6 There are two (2) units on each floor of the building and a small (carpeted) foyer. Each unit has a balcony on three (3) sides. No unit in the scheme has a courtyard. There is one small lift (1.3 square metres in area) to service the building. There are also Fire Stairs on all levels of the building including the ground level.

- 7 The outdoor areas of the scheme include a small front garden with a little area of grass and a border of plants, and a cement driveway from the outside street along the side of the strata building to provide access to the ground floor garages at the eastern side of the building.
- 8 The majority of Lot owners of the scheme are over 60 years of age and at least six owners now living in the building are in their 70s and 80s. Some have disabilities that require the use of a walking frame or a walking stick. The owner of Lot 3 is severely sight impaired and is considered to be legally blind.
- 9 There is also a couple with young children who live in Lot 1.
- 10 The applicants moved into Lot 9 on 10 September 2014 with their children but without Diesel. This is because the applicants had previously sought the permission of the Owners Corporation of the strata scheme (the respondent) and this had been refused.
- 11 On 22 September 2014 the applicants lodged applications for orders of an Adjudicator under the *Strata Schemes Management Act 1996* NSW (the "SSMA"). There was an application (File No SCS 14/46853) for substantive orders including an order that the applicants be permitted to keep Diesel on Lot 9 of the strata scheme and for Diesel to be able to enter and exit the strata scheme using the common property. There was also an application for interim orders (File No SCS 14/46854) seeking urgent relief (enabling Diesel to join the applicants and their family in Lot 9) pending a decision in the substantive application.
- 12 Interim orders were made on 25 September 2014 by Adjudicator G Meadows which permitted the applicants to keep Diesel on Lot 9 and to enter and exit the strata scheme by its common property subject to particular conditions.
- 13 The substantive application for orders of an Adjudicator was then determined on 22 January 2015. Adjudicator P R Smith dismissed the application as he

was not satisfied on the material before him that the respondent's decision to refuse consent for the applicants to keep Diesel on the strata scheme was unreasonable: see s 150(4) of the SSMA.

14 By this application lodged on 30 January 2015, the applicants now appeal the order of Adjudicator P R Smith which dismissed their application for permission to keep Diesel on the strata scheme.

15 Diesel, in fact, remains with the applicants and their family on Lot 9. In this application the Tribunal determined on 18 February 2015 that the interim orders (permitting Diesel to stay on the strata scheme, subject to conditions) were extended to the determination of the appeal from Adjudicator P R Smith's decision of 22 January 2015.

JURISDICTION

16 An appeal lies to the Tribunal from a decision of an Adjudicator pursuant to s 177 of the SSMA. It was not disputed by the respondent's legal representative that the appeal had been made in compliance with the provisions of s 178.

17 Accordingly the Tribunal has jurisdiction to hear and determine the appeal.

18 The appellants gave as grounds for their appeal that Adjudicator P R Smith made errors of fact, had given incorrect weight to the evidence and had made assumptions that were not supported by the evidence and had made errors of law.

19 Nevertheless, to uphold the appeal the Tribunal does not have to find an error in the Adjudicator's decision because the appeal is by way of hearing *de novo* (*Owners Corporation SP 56911 v Stricke* [2012] NSWCTTT 392). The Tribunal can and should admit fresh evidence in order to give proper consideration to the issues in dispute: see sections 181 and 186 of the SSMA.

- 20 This does not displace the requirement under s 150 of the SSMA that determination as to whether there was unreasonable refusal must be made with regard to the circumstances at the time of the decision and the material that was available to the Owners Corporation at that time (*Owners Corporation SP 7596 v Risidore* [2003] NSWSC 966).
- 21 It is therefore necessary to have regard to the course of events and the relevant correspondence between the parties which led to the respondent's refusal of permission to keep Diesel on the strata scheme.

RELEVANT EVENTS/CORRESPONDENCE DURING JUNE & JULY 2014

- 22 On 16 June 2014, the applicants sought permission for Diesel to live with them at the strata scheme as they were intending purchasers of Lot 9. This was done by email of Mrs Thomas to the respondent's strata managing agent. The email stated, relevantly:

"We will be owner occupiers of the unit. With this in mind we are writing to request permission to have our family dog Diesel live with us. He is a 4 year old Rhodesian Ridgeback. He has always been an inside dog, and therefore is completely trained for this environment. We walk him religiously 2 - 3 times every day, no matter the conditions (he doesn't particularly like the rain of course). He has been through all possible training courses, puppy preschool, manners class, and Advanced classes, with Positive Puppies of Cremorne. With his extensive training, placid yet timid nature he is a very socially adapted pet. He is a member of our family and our 10 year old sons best friend. He goes to all family events where possible including just hanging out at the coffee shop. He is not as active as most dogs his age and size, due to an unfortunate accident where he was hit by a car when he was 1 year old. This has not in any way affected his amazing personality only his endurance to exercise (basically he is now lazy). I work part time, so that I am home with him for a portion of every day."

- 23 The strata agent sent an email response to Mrs Thomas on 18 June 2014 at 9:21 AM which states;

"The Executive Committee have asked I send you the following response in regards to your application to house a dog:
'As an Executive we are responsible for the well-being and peaceful existence of our residents. Rhodesian Ridgebacks are extremely large dogs that were bred for hunting and can be intimidating. We have some small children as

well as some frail elderly people residing in the building so we cannot support this request as we do not see it in the best interests of the residents'.
Shelly Plunkett
On behalf of Executive Committee SP 4890"

- 24 Mrs Thomas responded by email to the strata agent at 12:47 PM on 18 June 2014 and requested reconsideration of the Executive Committee's decision about Diesel. In the email, Mrs Thomas submitted that Rhodesian Ridgebacks are a "*placid natured*" breed that "*sniff(s) out lions not hunt(s) them down*", that she can provide references from many families with children and from a dog trainer, and that she would like the executive committee to meet with her and Diesel, and allow them "*to observe first hand his nature*".
- 25 By email sent on 23 June 2014 to Mrs Thomas, the strata agent advised that there was no response to the request for a meeting but that she (the agent) had been instructed to inform Mrs Thomas that: "*all but two units voted no to you housing a pet*".
- 26 On 28 June 2015, the applicants exchanged contracts for the purchase of Lot 9 of the strata scheme. The model by-laws at Schedule 1 of the SSMA then applied for the strata scheme. By-law 16 of such model by-laws states:

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.

The Owners Corporation must not unreasonably withhold its approval of the keeping of an animal on a lot or the common property.

- 27 On 30 June 2014 at 11:35 AM, Mrs Thomas sent a further email to the strata agent advising of the applicants' purchase of Lot 9 and requesting a meeting with the executive committee to discuss permission for Diesel to live with the applicants when they move into Lot 9. Relevantly, Mrs Thomas states:

"I cannot stress enough what a placid and quiet dog Diesel is. There have been numerous studies done that larger dogs are more adapt (sic) in apartment living.

They do not 'yap' and do not have the same territorial instincts of much smaller dogs which leads to disturbances for other residents."

28 At 4:58 PM on 30 June 2014 the strata agent replied to Mrs Thomas' earlier email by indicating the Executive Committee would be *"very happy to meet you onsite with Diesel"* and also that the Executive Committee intend to call a meeting on 15 July 2014: *"to discuss change to the current pet by-law and to officially make a decision by all the owners to allow Diesel to stay permanently and have asked me to send you an invitation to attend"*.

29 In fact, two members of the Executive Committee met with Mrs Thomas, her children and Diesel on 5 July 2014. Mrs Thomas confirmed Diesel's amiable and placid nature and his extensive behaviour and obedience training. The members of the Executive Committee also had an opportunity to meet and observe Diesel.

30 On 7 July 2015, Mrs Thomas sent an email to the strata agent which states, relevantly:

"A few things came from the meeting which we would like to address with the committee and all owners in the block. We fully understand their reservations; however, any interaction or even sighting of Diesel, we estimate, would be less than 10 minutes on any given day and most likely less than 2 minutes at any given time. This would be purely when we are going on our family walks, any other family activities and returning. Diesel would never be without my husband or me whilst he is in any common areas and would most likely never be off the lead during these times. The remainder of the time Diesel would be in our unit and would be of no disturbance to anyone. As we have mentioned many times he is a placid and quiet dog.

As Diesel is a member of our family the responsibility of others feeling comfortable around him is completely ours.

To this we have attended all possible training with him and would make every reasonable attempt to avoid close contact with anyone displaying any signs of concern."

31 Also on 7 July 2015, the applicants received a copy of a Notice of Extraordinary General Meeting of the strata scheme. The agenda of the meeting (scheduled for 15 July 2014 at 9:30 AM) included motions to approve a by-law restricting the keeping of large animals in the scheme and a motion for the Owners Corporation *"to approve an application from the new owners of Unit 9 to house a 4 year old Rhodesian Ridgeback within the lot"*.

- 32 Upon receipt of the Notice of Meeting the applicants put in the letterboxes of all residents, an open letter seeking their support of the motion for approval of Diesel. The letter reiterated the matters put in the previous correspondence to the strata agent as referred to above. The letter also enclosed references from the veterinarian attending Diesel (Greencross Vets) and from a local café (Deli in the Park, East Lindfield). Such references attest to these matters: that Diesel is suitable for living in strata titled property, that Diesel is obedience trained and is a polite and well-socialised dog, that Diesel's owners are committed and attentive to Diesel's needs, that Diesel is regularly approached by café customers whom he interacts with in a calm and relaxed way, and that Diesel never barks or shows any signs of aggression when at the café.
- 33 On 11 July 2014, an additional open letter was delivered to residents' letterboxes by the applicants. The letter attached a reference from Diesel's trainer (Barbara Wright of Positive Puppies Pty Ltd). The reference attests to these matters: that Diesel's owners are committed to training and ensuring Diesel is well-socialised, that the applicants make every effort to keep Diesel appropriately exercised, groomed and happy, that Diesel has been trained to walk on a head halter and on a loose lead in the control of responsible adults, that Ms Wright has cared for Diesel in her own home when the applicants and their family are on holidays, that Ms Wright has observed Diesel's behaviour and training at its "*optimum level*", that Ms Wright has observed Diesel socialising well with other dogs and her children in her home, that Ms Wright has not experienced Diesel barking or whining when in her care, and that Diesel is relaxed and happy in a confined environment (including a crate) and is otherwise suitable for strata living.
- 34 At the Extraordinary General Meeting on 15 July 2014, two relevant decisions were made. The Owners Corporation resolved (by eight votes to two) that consent for the keeping of Diesel in Lot 9 is refused. The other decision (by nine votes to one) was to amend By-law 16 as to Keeping of Animals as follows:

(1) Subject to section 49(4) of the Act, an owner or occupier of a lot must not, without the prior written approval of the owners corporation, keep any animal (except a fish kept in a secure aquarium on the lot) on the lot or the common property.

(2) (a) The Owner's Corporation must not unreasonably withhold its approval of keeping a 40cm and below animal on a lot or the common property.

(b) Any animal over 40cm in height can be refused after the application is reviewed by the Executive Committee.

(3) If an owner or occupier of a lot keeps any animal on the lot then the owner or occupier must:

(a) notify the owners corporation that the animal is being kept on the lot, and

b) keep the animal within the lot, and

(c) animals must be on a leash or carried when they are on the common property, and

(d) take such action as may be necessary to clean all areas of the lot or the common property that are soiled by the animal.

(e) Must never allow the animal to disturb the peaceful enjoyment of any occupier of any lot".

- 35 The special resolution to amend the by-law as to the Keeping of Animals was registered on 6 August 2014. Therefore the decision to withhold consent for the applicants to keep Diesel on the strata scheme was made under By-law 16 prior to its amendment. The parties agree that the issue for the Tribunal's determination is whether the Owners Corporation unreasonably withheld consent within By Law 16(2) as it then applied.

EVIDENCE & SUBMISSIONS IN THE RESPONDENT'S CASE

- 36 The Owners Corporation submitted that its decision to withhold consent was informed and guided by sound judgment and out of consideration for the safety and well-being of all owners and occupiers of the scheme and their visitors.

- 37 The owner of Lot 10 and a member of the Executive Committee, Michelle Plunkett, gave evidence (see Statement dated 2 April 2015 with annexures) in support of the Owners Corporation's decision to withhold consent for Diesel to live in Lot 9. Ms Plunkett refers to these matters: the size and breed of Diesel, the age and infirmity (including lack of mobility) of some of the building's residents, the regular presence in the building of young children (whether the young children who live in Lot 1 or the grandchildren of other owners who are visiting their elders), and the relatively small size of the one

lift which services the building. She expresses concerns that the applicants' dog could knock over a child or one of the elderly or disabled residents. She is aware of at least one owner who has been attacked and bitten by a dog in the past and has been wary of dogs since that attack.

- 38 Moreover, Ms Plunkett states that since Diesel has lived in the building (thereby entering and exiting the scheme at least four to six times a day for his regular walks), an unpleasant smell of 'wet dog' permeates through the lift and the common property of the scheme during rainy weather periods. In her opinion, it is also inappropriate for a large sized dog such as Diesel to be kept in a home unit which does not have a courtyard or outdoor area.
- 39 Further, Ms Plunkett canvassed the opinions of other owners whom she says by 'overwhelming majority' did not want large dogs kept in the building. In this respect, she gives evidence in her statement of the notices with attachments she circulated (by letterbox drop) on or about 22 June 2014 to other owners seeking their views as to whether the applicants (then prospective purchasers of Lot 9) should be allowed to bring their 4 year old male Rhodesian Ridgeback with them to live at the scheme. The notices to the owners were in a form which indicated: *"If you don't want to write a comment a simple yes or no will be sufficient"*. In fact, nine notices were put in letterboxes by Ms Plunkett and she received seven responses which were all negative.
- 40 The respondent further submits that it was the unmistakable intention of an overwhelming majority of owners that the Owners Corporation could refuse permission for the keeping of anything other than small animals. In circumstances where (on 15 July 2014) nine out of ten owners voted to amend By-law 16, to allow the Owners Corporation to refuse to keep dogs of more than 40cm in height, it is the respondent's case that the interests of the owners about whether large animals should be permitted in the building are now tolerably clear.
- 41 In response to the applicants' attestations to the fact that their dog is well trained, has a placid nature and interacts well with children, the respondent's

representative (referring to media reports and Council Reports on Dog Attacks in NSW) submits that it is not uncommon for dogs of particular breeds, including Rhodesian Ridgebacks, to be obedient and placid for extended periods of time, before attacking a person.

- 42 Further, the respondent's representative points out that the applicants were well aware of the genuine concerns of owners and occupiers of the strata scheme before the applicants purchased the property on 28 June 2014. This was a consideration which weighed heavily in the Adjudicator decision on 22 January 2015.
- 43 There are further witness statements from Valerie Young (Lot 3 owner) and Jennifer Lawson (Lot 13 owner). Ms Young has limited vision and expresses her concern about sharing a lift with a large sized dog. Ms Lawson says she has previously had bad experiences with dogs and does not feel safe with a large sized dog such as a Rhodesian Ridgeback. She and her husband feel agitated every time they use the lift and prefer not to be confronted by a large dog such as Diesel when they are using the common property.

EVIDENCE & SUBMISSIONS IN THE APPLICANTS' CASE

- 44 The applicants relied on the Affidavit of Mr Thomas sworn 18 September 2014 (provided with the materials for the Adjudicator) and a Witness Statement of Mr Thomas dated 12 March 2015 with three annexures including a memorandum from the owner of Lot 14 (Mr Lindsay Davis) which notes that Mr Davis has no objection to Diesel remaining on the strata scheme. Mr Davis says that on the occasions Mr Davis and his family (including two small grandchildren) have seen the applicants' dog, Diesel has been gentle and calm and very well behaved. There is also an email annexed from the owners of Lot 5 (Mr & Mrs Hogan) who have no objection to Diesel living in the strata building. Mr & Mrs Hogan have never heard Diesel barking. They have observed him on a lead in the common property and well behaved. The other annexure is a memorandum dated 9 March 2015 from a Daycare and Grooming Centre which Diesel attends on a weekly basis. The owner of the

Centre states that: *“Diesel is a pleasant, sociable and well-mannered boy who always presents in a clean, flea free condition and is a pleasure to look after in daycare”.*

- 45 Additionally, the applicants rely upon Witness Statements of Martin Barnes (owner/occupant of Lot 1) and Ian Gibson Harvison (occupant of Lot 7) dated 1 and 12 March 2015, respectively. Mr Barnes states that Diesel is never noisy or threatening towards anybody, that he is comfortable with his children being around Diesel and that Diesel is the best behaved dog he has ever encountered. Mr Barnes observes that in the several months Diesel has been living in the building the applicants have been extremely respectful of other residents when entering and exiting the building with their dog, that Diesel is always kept on a tight leash when on the common property, and that the applicants do not enter the lift with Diesel if other people are present. Mr Harvison (who lives in the Lot directly beneath the applicants' Lot) states that he has never heard Diesel when in his unit and that he has observed Diesel as being well behaved, placid and restrained while in the common areas of the strata scheme.
- 46 The applicants submit that the decision to withhold consent for the applicants to keep Diesel on the strata scheme was made by the respondent at the meeting on 15 July 2014 (i.e. after the applicants purchased Lot 9). Further, to the extent the applicants were aware of the opposition of some owners prior to their acquisition of the property the applicants' representative submitted that such circumstance is not material to the issue of whether consent was reasonably withheld within the meaning of By-law 16(2) and s 150(4) of the SSMA.
- 47 Although the parties accept that the new by-law (registered on 6 August 2014) has no application to the issues in dispute between them, the applicants submit that the circumstance of the meeting of 15 July 2015 resolving to approve the new by-law, is relevant to determine the reasonableness of the other decision made at the same meeting (i.e. the applicants' request for permission to keep Diesel on the strata scheme). In the applicants'

submission it denotes a preoccupation at the meeting with the size of the dog, to the exclusion of other relevant considerations such as that Diesel was well behaved and well trained, was well looked after and well exercised by the applicants and was not a danger to anybody.

- 48 In essence, the applicants' case is that proper consideration was not given to the merits of the applicants' request for the approval of the Owners Corporation to keep Diesel on the strata scheme. It was put by the applicants' representative that the particulars (supported by references) of the dog, Diesel, were not considered adequately, or at all, and that the respondent's decision to withhold consent was affected by considerations bearing upon the size of the dog and its breed (which was said to be apt for violent attack on humans). It was also submitted that there was advertence by the respondent to considerations such as not wishing 'to set a precedent', as well as the residents' fears of meeting the dog in (the confined space of) the strata building's lift or of being knocked over by an animal not always obedient and well-mannered. Such advertence, in the applicants' submission, meant that the respondent did not canvass consent for the applicants to keep Diesel on the strata scheme subject to strict conditions as a means of accommodating legitimate concerns for the safety and well-being of other owner/occupiers and their visitors.

RELEVANT LAW

- 49 Section 150(4) of the SSMA relevantly provides:

(4) An Adjudicator may, by order, declare that the applicant for the order may keep an animal on a lot or common property in such manner as is specified in the order if the Adjudicator is satisfied that:

- (a) subclause (2) of by-law 16 in Schedule 1 (or a provision to the like effect in any by-laws) is in force in relation to the strata scheme, and
- (b) the application is made with the consent of the owner of the applicant's lot (if the applicant is not the owner), and
- (c) the owners corporation has unreasonably withheld its consent to the keeping by the applicant of the animal on the lot or the common property.

- 50 Whether a withholding of consent within By-law 16(2) and s 150(4)(c) of the SSMA is reasonable, is an objective test, requiring the existence of facts and

circumstances, which are sufficient to induce that state of mind in a reasonable person: *Richardson v The Owners Corporation – Strata Plan No 56695* [2008] NSWCTTT 928.

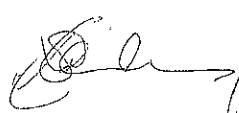
- 51 The concept of 'reasonableness' within the meaning of s 150(4) of the SSMA is: "*sound judgment or good sense ... this means that the decision cannot be made on purely emotive or capricious grounds. Those required to make the decision must consider the factual situation before them*": *Kelly v The Owners Corporation – Strata Plan No 5044* [2012] NSWCTTT 54 at [30].
- 52 The applicants bear the onus on the balance of probabilities of making out a case for an order under s 150(4) of the SSMA.

DECISION

- 53 The evidence provided by the applicants indicates that Diesel is a reasonably behaved dog. There is no persuasive evidence to suggest that he is particularly noisy or that he would disturb others by barking. The evidence does not suggest that Diesel is aggressive, in fact, the references attest to the contrary (i.e. that he is a very well-behaved and well-socialised dog, placid of nature and restrained). Nor does the evidence suggest that Diesel presents a danger to other residents or to wildlife. The evidence before the Tribunal further establishes that the applicants are committed to appropriately training and managing the dog.
- 54 The Tribunal is of the view that it is within the applicants' power to keep Diesel quiet and clean and to ensure that the dog does not damage the strata building through faecal droppings or in any other way, does not harm or disturb other residents and does not harm the local wildlife. Furthermore, if the dog causes a nuisance or unreasonably interferes with the use or enjoyment of another lot or common property by another owner or occupier, it is open to the Owners Corporation to take action under s 151 of the SSMA.
- 55 There is nothing about Diesel *per se* to which the Tribunal has been referred that precludes him from strata living.

- 56 The Tribunal is also satisfied that the concerns relating to hygiene, odour and the cleanliness of common property are reasonable concerns for the respondent to hold but that such concerns can be met by the imposition of conditions.
- 57 The Tribunal has had regard to the objections set forth in the respondent's evidence and submissions, particularly the objections of Ms Young and Mr & Mrs Lawson. The Tribunal accepts that such residents have a genuine fear of being in close proximity to Diesel and that this may occur if Diesel is allowed on common property areas other than Level 5 and in the small sized lift which services the building.
- 58 There is no doubt that the respondent must act in the interests of all Lot-owners and residents of the strata scheme. Yet it seems to the Tribunal that most, if not all, of the objections (however reasonably held) could have been dealt with by imposing conditions on any granting of approval and/or seeking further information from the applicants before making a decision. The residents' concerns are not sufficient, in the Tribunal's view to deny the applicants the pleasure, comfort and support their family is accustomed to in having Diesel live with them.
- 59 The Tribunal finds that the reasonable concerns of other residents may be addressed by the imposition of conditions on the consent, including a condition that Diesel must enter and exit the building via the Fire Stairs. The Tribunal appreciates that the imposition of such a condition might place a burden on Diesel and his family, given that Diesel was adversely affected as a 1 year old puppy by a car collision. However, it is a matter of balancing the concerns and expectations of all parties.
- 60 The Tribunal finds that the respondent Owners Corporation unreasonably refused to give its consent to the keeping of an animal and that Adjudicator P R Smith's decision of 22 January 2015 must be set aside.

- 61 The number of other Lot owners (an 'overwhelming majority' in the respondent's submission) who opposed the approval of Diesel was, and is, of itself, irrelevant. The Tribunal is not satisfied on all of the evidence that a significant proportion of Lot owners had valid, rational reasons for opposing Diesel's approval or that their decision (by eight votes to two) was based on reasonable grounds. In the Tribunal's opinion, some of the matters raised in the respondent's evidence and submissions (as supporting the reasonableness of the decision made at the meeting on 15 July 2014) have a strong flavour of *ex post facto* justification of a decision made, not on the basis of a careful consideration of the requirements of the By-law and the merits of the applicants' request for consent to keep Diesel on the strata scheme, but on the basis of the personal views of some lot owners as to the large size of the dog and as to the breed of Rhodesian Ridgebacks.
- 62 The respondent's legitimate concerns as to the safety and well-being of other owners and occupiers and their visitors are accommodated by the imposition of the conditions as reflected in the orders.
- 63 Orders are made accordingly.



D G Charles
General Member
Civil and Administrative Tribunal of New South Wales

7 May 2015

