

## AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

**CITATION:** Todd HEATHER & Desiree HEATHER –v- Michaela Rachel BROWNING & Michael Langdon BARRY [2009] ACTRTT (4)

**RT 884 of 2008**

**Catchwords:** Pet clauses and the need for endorsement.

**Tribunal:** A. Anforth, Member

**Date:** 12 February 2009

**AUSTRALIAN CAPITAL TERRITORY  
RESIDENTIAL TENANCIES TRIBUNAL**

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) **NO: RT 884 of 2008**

**TODD HEATHER and DESIREE HEATHER**  
(Applicant/Tenants)

AND:

**MICHAELA RACHEL BROWNING and MICHAEL LANGDON**  
(Respondent/Landlord)

**DECISION**

1. The special pet clause in the tenancy agreement is valid on its own terms without the need for any endorsement under section 10 of the *Residential Tenancies Act 1997*.
2. Subject to any agreement reached between the parties to the contrary, the tenants are required to immediately remove one of the cats from the premises.

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Alan Anforth, Member  
12<sup>th</sup> February 2009

**AUSTRALIAN CAPITAL TERRITORY  
RESIDENTIAL TENANCIES TRIBUNAL**

**NO: RT 884 of 2008**

**TODD HEATHER and DESIREE HEATHER**  
(Applicant/Tenants)

**MICHAELA RACHEL BROWNING and MICHAEL LANGDON**  
(Respondent/Lessors)

**REASONS FOR DECISION**

1. This matter concerns a residential tenancy at premises in Ainslie in the ACT. The tenancy commenced on 27 March 2007 for an initial fixed term of 12 months at a rent of \$720.00 per week and now continues as a periodic tenancy. A bond of \$2880.00 was lodged with the Office of Rental Bonds.
2. The tenancy agreement contains a special clause pertaining to the presence on the premises of a cat owned by the tenants. That special clause was not endorsed by the Tribunal pursuant to section 10 *Residential Tenancies Act 1997* (the Act) and read as follows:

The tenant agrees to be responsible for any damage caused by the cat (1) during the tenancy and repair any damage to the property caused by the cat (1).
3. The tenants are still in the premises.
4. The original cat that was the subject of the special clause died and the tenants acquired two new kittens. The landlords have taken exception to the presence of a second cat and have issued the tenants with a Notice to Remedy dated 3 November 2008 requiring the removal of one of the kittens from the premises upon threat of eviction for non-compliance.
5. On 11 November 2008 the tenants applied to the Tribunal for an order concerning the validity of the Notice to Remedy. The application was framed as follows:

1. Please identify the Issues In Dispute.

We have recently acquired two cats. Our tenancy agreement contains a pet clause allowing us to have a cat. We have been served with a Notice to Remedy because of there being multiple pets, rather than just one. The Notice to Remedy informs us that if the breach is not rectified the agent may issue a Notice to Vacate. We feel the difference between one cat and two cats is immaterial in terms of risk to the property owner and the pet clause should be amended to allow for two cats.

2. Please state the nature of relief you seek (what sort of order you want the Tribunal to make).

We would like the Tribunal to agree that the presence of a second cat in the property does not present a material difference to the tenancy and that we should be permitted to amend the tenancy agreement pet clause to allow us to have two cats.

3. Please give a brief history of the dispute, (why you are making the application).

We first occupied the property on 27 March 2007. We had an old cat at the time and this was allowed in a pet clause in the tenancy agreement. The clause states that we will pay for any damages caused by the cat and that we will have the property fumigated when we leave. The cat died in early 2008 and after several months we decided to get a new cat.

When looking for a new cat we had the opportunity to buy two kittens from the same litter. We have two daughters (aged 9 and 10) and they each wanted to have "their own" cat. We assumed at the time that the pet clause would still stand, i.e., we would still pay for damage to the property caused by cats and the property will be fumigated, regardless of there being two cats instead of one. We felt there was no material difference.

We brought the cats home on 8 Aug 2008 and they have lived in the house since then. There was a periodic inspection of the property on 29 October 2008. We made no secret about there being two cats. Following the inspection we received a Notice to Remedy - dated 3 Nov, but mailed on the 5<sup>th</sup>. The Notice requires us to get rid of one of the cats by the 17<sup>th</sup> Nov or face a Notice to Vacate. We wrote an email to the owners, asking them to re-consider allowing the second cat, which we sent to the agent for on-forwarding. We have had no acknowledgement of this email.

We feel that the presence of a second cat in the house does not materially affect the owner's property - especially given that the existing pet clause means we have agreed to be responsible for any damage caused and to fumigate the property when we leave.

We note that the periodic inspection on 29 Oct did not identify any issue with the maintenance of the property or any damage.

We also note that the Tribunal previously changed a pet clause, so we believe there is a precedent for the Tribunal intervening in the revision of tenancy agreements in regard to pet clauses. The following is an extract from *Scorgie v Chew* [2007] ACTRTT 16 (25 June 2007). "The dispute over the presence of the tenant's dog came before a differently constituted Tribunal in matter RTT 881/2004. In that matter the Tribunal made an order on 23 September 2004 amending the lease to delete the pet exclusion clause and to substitute a clause which permitted the tenant to keep her existing dog."

Our daughters are distraught at the prospect of one of them losing their pet. Even in the relatively short period of time the cats have lived with us, the children have become very attached to them.

We believe that there is no risk of loss to the landlord in the tenancy being allowed to continue and ask for the agreement to be amended to allow for 2 cats, instead of one.

6. The landlords filed the following submission in response to the tenants' applications:

The owners of the property contest the application on the following grounds:

The tenants Todd & Desiree Heather have 2 cats at the property. They only have permission for 1 cat (as per attached pet clause).

The tenant/s did not seek the owner's permission for an additional cat (this was discovered on a recent routine inspection of the property) and a Notice to Remedy was served requiring the tenants to remove the additional cat.

The owner/s Michaela Browning & Michael Barry reluctantly leased the property allowing a cat (as Michaela Browning is allergic to cats). The owner/s took into consideration that it was an old cat.

The owner/s do not give permission for 2 cats at the property; whilst they have given permission for 1 cat as on the original tenancy agreement.

It was also discovered that the cats are using the house hold toilets (there is a kitty litter set up over one of the toilets). The owners were horrified at this! Not only is this a hygiene issue but should the kitty litter fall into the toilet it would also cause plumbing issues.

The letter from the tenants requesting permission for 2 cats was forwarded to the owners - they do not give permission for 2 cats.

We have included a ruling made by the Tribunal (RT 2294/06) ordering the tenancy is terminated by way of surrender as the tenant had a dog at the property without permission.

7. The matter was listed before the Tribunal on 4 December 2008. Both tenants appeared in person and Ms Badenock with Ms Chivers, real estate agents, appeared for the landlords.
8. On that occasion the tenants tendered a statutory declaration from Ms Heather and from Christopher Edwards to the effect that on or about 13 November 2008 Ms Heather spoke with Ms Chivers of Badenock Real Estate who offered the tenants a deal to the effect that if the tenants entered a new fixed term lease for 2 years the landlords would consent to the second cat. Ms Chivers denied the allegation. There was no suggestion that the offer was ever given effect to by the parties.
9. The matter was adjourned to 16 January 2009.
10. At the resumed hearing both tenants appeared and Ms Chivers, real estate agent, appeared for the landlords. Ms Chivers tendered a letter from the tenants to Badenock's dated 6 March 2007 in which the tenants sought consent for the original old cat only.
11. On this occasion the Tribunal discussed with the parties the fact that there were inconsistent decisions of the Tribunal on the issue of whether a pet clause of any description could have effect unless it was endorsed under section 10. It was explained:
  - (a) If no endorsement was necessary then the present pet clause was effective on its own terms and the tenants had permission for one cat, and for two cats if the Tribunal accepted that the parties had arrived at any relevant subsequent oral variation of the tenancy agreement:
  - (b) If an endorsement was required then the existing pet clause was void and there was no contractual or statutory impediment to the tenants having two cats.
12. It was agreed that the Tribunal would reserve its decision until after the *A.C.T. Civil and Administrative Tribunal Act 2008* came into force on 2 February 2009 so as to provide both parties with access to the appeal structure provided by that Act should they wish to avail themselves of it.

### **The law:**

13. Notwithstanding the demise of the Residential Tenancies Tribunal on 2 February 2009 following the coming into existence of the A.C.T. Civil and Administrative Tribunal (ACAT), regulation 48 *ACT Civil and Administrative Tribunal (Transitional Provisions) Regulations 2009* provides that the resolution of matters



commenced and heard under the former Residential Tenancies Tribunal are to be finalised by that Tribunal with its former powers.

14. The present matter is a “tenancy dispute” within the meaning of section 71H of the Act as it stood prior to the amendments brought about by the inception of the ACAT.

15. Section 8 of the Act relevantly provides that the prescribed terms of the Schedule to the Act are taken to form the terms of the tenancy agreement:

8(1) A residential tenancy agreement—

(a) must contain, and is taken to contain, terms to the effect of the standard residential tenancy terms mentioned in schedule 1; and

(b) if the lessor and tenant agree—may contain a fair clause for posted people; and

(c) may contain any other term—

(i) that is consistent with the standard residential tenancy terms; or

(ii) that is inconsistent with a standard residential tenancy term if the term has been endorsed by the tribunal under section 10.

16. Section 9 of the Act provides that any term in a tenancy agreement that is inconsistent with the prescribed terms is void to the extent of the inconsistency:

9(1) A term of a residential tenancy agreement is void if—

(a) it is inconsistent with a standard residential tenancy term; and

(b) it has not been endorsed by the tribunal under section 10.

(2) A term of a residential tenancy agreement is void if it is inconsistent with this Act (other than a standard residential tenancy term).

17. Section 10 provides for the endorsement by the Tribunal of terms in an tenancy agreement that would otherwise be void by reason of sections 8 and 9:

10(1) The parties to a residential tenancy agreement may apply in writing to the tribunal for endorsement of a term of the agreement (the *inconsistent term*) that is inconsistent with a standard residential tenancy term.

(2) If the parties apply for endorsement of the inconsistent term, the tribunal must do 1 of the following:

(a) endorse the inconsistent term;

(b) substitute the equivalent standard residential tenancy term for the inconsistent term.

(3) In making a decision under subsection (2), the tribunal must consider—

(a) the criteria determined under subsection (6); and

(b) whether the inclusion of the inconsistent term in the residential tenancy agreement was obtained by fraud or undue influence.

(4) The tribunal must not endorse a term that is inconsistent with this Act (other than a standard residential tenancy term).

(5) The tribunal must not endorse a term mentioned in section 15(5) in relation to a tenant unless satisfied that the tenant owes an amount to the commissioner for housing.

(6) The Minister may determine criteria for subsection (3) (a).

(7) A determination is a disallowable instrument.

18. As far as the Tribunal is aware there are no criteria determined by the Minister under section 10(6).
19. Prescribed terms 52 and 53 of the Schedule to the Act, which form the standard terms of the tenancy agreement, are the provision traditionally relied upon to justify the position that a tenant is entitled to keep such pets as they wish unless an anti-pet clause is endorsed by the Tribunal:
52. The lessor shall not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises.
53. Unless otherwise agreed in writing, the tenant shall have exclusive possession of the premises, as described in the Agreement, from the date of commencement of the Tenancy Agreement provided for in the Agreement.
20. In *Scorgie v Chew* [2007] ACTRTT 1 the presently constituted Tribunal made the following observations about pet clauses:
37. This issue raises for consideration whether a residential tenancy agreement can preclude pets from the premises or whether a special endorsement is required for such clauses. Further there is the issue of the effect of the order of the previously constituted Tribunal which allowed only the existing dog.
38. The argument in favour of the right to have pets proceeds from the general right of a tenant to the exclusive right of occupancy of the premise pursuant to prescribed term 53 of the Act and the right to quiet enjoyment of the premises pursuant to prescribed term 52 of the Act. It is said that these provisions confer on the tenant the right to use the premises as a home and that the right to have a dog is an incident of the right to treat the premises as a home. Prescribed terms 52 and 53 read...
39. But prescribed term 53 does not provide an unqualified right to exclusive possession of the premises. The right is subject to any qualification to that right agreed by the parties and recorded in writing. Prescribed term 52 then only guarantees a tenants uninterrupted right to such use of the premises as the tenancy agreement confers. Prima facie it is not obvious why the right of possession and use of the premises by the tenant could not be expressly qualified in a residential tenancy agreement to preclude pets.
40. Section 10 only requires endorsement of terms of a residential tenancy agreement which are inconsistent with a prescribed term. But if prescribed term 53 permits the pet exclusion clause then such a clause is not inconsistent with a prescribed term and no endorsement is required pursuant to section 10.
41. Damage done by pets is a common cause of complaint in residential tenancy matters. If it becomes necessary to replace carpets and lawns and the like due to pet damage, the damage is likely to exceed any bond lodged by the tenant. For this reason the presently constituted Tribunal cannot see why as a matter of law or public policy a landlord should not be able to impose a pet exclusion clause as a condition of accepting any particular tenant.
42. Nevertheless the fact is that the previously constituted Tribunal did amend the pet clause in the lease and specifically purported to do so as an endorsement pursuant to section 10. That decision was not the subject of any appeal and is thus an operative decision.
43. The substituted pet clause, fairly read, did not permit anything more than the existing dog to remain at the premises. The necessary implication of the manner in which that order is framed is that the tenant did not have the right to bring other dogs to the premises. This proposition has been directly and strongly put by the landlord in their submissions and the tenant has not mounted any significant defence to this allegation.

44. The Tribunal has sympathy with the landlords position. The tenant did not disclose the existing dog when she entered a lease with the pet exclusion clause as a special condition. After then having the benefit of decision of the Tribunal to allow her to keep her existing dog, the tenant then deliberately obtained two further dogs and brought them to the premises without any consultation with the landlords.

45. The Tribunal takes the view that this conduct on the tenant's part was a breach of the amended term of the lease and otherwise reflects poorly on her attitude.

46. But the presence of the dogs at the premises does not of itself give rise to any claim for damage from the landlord (other than possible nominal damages). It is still necessary to show that the dogs actually caused damage to the carpets, yard and sprinklers as alleged by the landlords. Each of these issues are addressed below.

21. The essential rationale in *Scorgie* was that the extent of use of the premises conferred by the tenancy agreement is primarily governed by prescribed term 53, which is expressly said to be subject to any agreement in writing between the parties. The special pet clause in the present tenancy agreement is such an agreement in writing. On this assumption, the special pet clause cannot be inconsistent with prescribed term 53 and so cannot offend sections 8-9 and thereby require endorsement under section 10.
22. Prescribed term 52 only protects the tenants against interferences with their such use of the premises as they have by reason of prescribed term 53. Prescribed term 52 is not a separate source of rights concerning the scope of use of the premises by the tenants.
23. The presently constituted Tribunal cannot see why, as a matter of simple statutory construction, the special pet clause does not have force and effect according to its own terms under prescribed term 53 without the need for endorsement. Nevertheless it is the case that differently constituted Tribunals have differed in their view on this issue, and it is the present practice of the Tribunal to endorse all pet clauses. In fact the Tribunal receives and endorses dozens of such clause each week at considerable cost to the Tribunal's administration, and no doubt at considerable cost to the time of real estate agents and the well being of trees.
24. In *Scorgie* the presently constituted Tribunal touched upon the rationale for allowing landlords to prohibit pets without the need for endorsements. It was pointed out that pets can, and in fact often do, cause considerable damage both inside houses and in the yards. This damage can go well beyond any bond lodged by the tenant and thus leave the landlord exposed to the vicissitudes of debt recovery against recalcitrant tenants in these circumstances.
25. In the experience of the presently constituted Tribunal of some 13 years of hearing these disputes in NSW and the ACT, it is simply not the case that all pet owners are responsible in the manner in which they control their pet's propensity to cause damage. It is however unfortunately common that vacating tenants take umbrage at the suggestion by the landlord that the smells in the carpets and curtains, the stains and fleas in the carpets, the scratches on the woodwork and gauzes, the chewed irrigation tubes, the holes in the lawns and the faeces and often adorns the yard should be attended to by the tenant at their own cost, which can be quite large and sometimes beyond the economic capacity of the tenant to pay.



26. It is entirely understandable to the present Tribunal why a landlord would choose not to expose themselves to this scenario, more often than not with an unsatisfactory outcome.
27. The problem in the present case however arises from the fact of an inconsistent position adopted within the Tribunal. Hitherto the resolution of this inconsistency lay with the Supreme Court but the cost of any party appealing to the Supreme Court on the point was prohibitive and so the inconsistency issue remained unresolved. Under the ACAT structure that took effect on 2 February 2009 there is now an internal appellate structure in which this matter can hopefully be resolved.
28. But for the existence of the new internal and hopefully accessible appellate structure in the ACAT the present Tribunal would probably have applied the comity principle and adopted the prevailing norm of the Tribunal of requiring all pet clauses to be endorsed. But given the existence of the internal and accessible appellate structure within ACAT the present Tribunal proposes to adopt its own view of the matter as per *Scorgie* and leave the parties to exercise whatever appellate rights they so choose.
29. Accordingly the Tribunal is of the view that the special pet clause is valid without the need for endorsement and the tenants are limited to one cat under that clause.
30. The Tribunal notes the assertion by the tenants they were offered a deal by the landlord's agent that they could keep two cats if they entered a further two year fixed term lease. The landlords agent denied this. The Tribunal has not seen any evidence that the tenants have in fact acted any such offer and entered a further two year lease, and given the consistent opposition by the landlord to the presence of the two cats, it seems unlikely that any such offer was made.

A. Anforth  
12 February 2009