Civil and Administrative Tribunal

New South Wales

Case Name:	Feletti v Eales
Medium Neutral Citation:	[2019] NSWCATAP 100
Hearing Date(s):	25 February 2019
Date of Orders:	24 April 2019
Decision Date:	24 April 2019
Jurisdiction:	Appeal Panel
Before:	L Pearson, Principal Member D Fairlie, Senior Member
Decision:	1.The Owners - Strata Plan 2223 is joined as the second respondent. 2.Leave to appeal refused. 3.Appeal dismissed.
Catchwords:	APPEAL – strata scheme – noise transmission - compliance by tenant with by-laws – objective test - whether function conferred or imposed by legislation or by-laws – whether error of law
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014 Strata Schemes Management Act 2015
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 Director of Public Prosecutions v Kilbourne [1973] 1 All ER 440 Felcher v The Owners-Strata Plan 2738 [2017] NSWCATAP 219 Gao v Agostini [2009] NSWCTT 175 Nowak v Pellicciotti [2018] NSWCATCD 9 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Soliman v University of Technology Sydney [2012]

	FCAFC 146 Walsh v The Owners of Strata Plan No 10349 [2017] NSWCATAP 230
Texts Cited:	Cross on Evidence 9th Australian edition
Category:	Principal judgment
Parties:	Marie Feletti (Appellant) John Eales (Respondent)
Representation:	A Maroya (Counsel) (Appellant) K Christou (Managing Agent) (Respondent)
File Number(s):	AP 18/51842
Publication Restriction:	No
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	02 November 2018
Before:	D A C Robertson, Senior Member
File Number(s):	SC 18/21384

REASONS FOR DECISION

1 This is an internal appeal under s 80(2) of the *Civil and Administrative Tribunal Act 2013* (NCAT Act) against a decision made by a Senior Member (the Member) in the Consumer and Commercial Division of the Tribunal on 2 November 2018 (the Decision). For the reasons that follow, we have determined that the appeal be dismissed.

Introduction

2 The appellant is the owner and occupier of a unit in a block of apartments in Vaucluse NSW, Strata Plan 2223. The respondent to the appeal is the owner of the unit above hers. The appellant was the applicant, and the respondent, the first respondent in the Tribunal proceedings below (the Tribunal

proceedings). In the Tribunal proceedings the appellant had sought the following orders against the first respondent:

> 1 An order, pursuant to ss 232 and 241 of the Strata Schemes Management Act 2015 (NSW), requiring the first respondent (and any tenants and/or occupiers of his unit, to keep the floor space of the unit covered or otherwise treated to an extent sufficient to prevent the transmission of noise that is likely to disturb the applicant's peaceful enjoyment of [the applicant's] unit in accordance with by-law 14 ("Floor Coverings") and by-law 1 ("Noise");
>
> 3 An order, pursuant to ss 232 and 241 of the Strata Schemes Management Act 2015 (NSW), requiring the first respondent by himself, his servants, agents and any tenants and/or other occupiers of his unit to cease and desist in and from the creation of noise between the hours of 10:00 pm and 10:30 am that is likely to interfere with the applicant's peaceful enjoyment of her unit.
>
> 5 An order, pursuant to s 29 of the Civil and Administrative Tribunal Act 2013 (NSW), that the first respondent reasonably compensate the applicant for the interference occasioned to her peaceful enjoyment of her unit.

3 By-laws 1 and 14 in Strata Plan 2223 are in the following terms:

> **1 Noise**
>
> An owner or occupier of a lot must not create any noise on the parcel likely to interfere with the peaceful enjoyment of the owner or occupier of another lot or any person lawfully using the common property.
>
> **14 Floor coverings**
>
> (1) An owner of a lot must ensure that all floor space within a lot is covered or otherwise treated to an extent sufficient to prevent the transmission from the floor space of noise likely to disturb the peaceful enjoyment of the owner or occupier of another lot.
>
> (2) This by-law does not apply to floor space comprising a kitchen, laundry, lavatory or bathroom.

4 In the Tribunal proceedings the appellant had also joined the Owners -Strata Plan 2223 (the Owners Corporation) as the second respondent, and the first respondent's tenants as the third and fourth respondents. Before the Tribunal proceedings had been heard, the respondent's tenants had been removed from the proceedings with the consent of the other parties. The Owners Corporation remained a party and additional orders were sought against it. The Decision dismissed the appellant's claims against both the first respondent and the Owners Corporation.

Joinder of Owners Corporation to the appeal

5 The Owners Corporation was not named in the Notice of Appeal as a party to the appeal. However, we considered it should be added as a respondent,

although no relief was sought against it by the appellant. Rule 29 of the Civil and Administrative Tribunal Rules 2014 (NCAT Rules) provides that the parties to an internal appeal include:

> (b) any person or body (other than the appellant) who was a party to the proceedings before the Tribunal at first instance.

6 Accordingly we ordered that the Owners Corporation of Strata Plan 2223 be joined as the second respondent to this appeal.In the Tribunal proceedings there was also a cross application by the first respondent against the applicant that she cease harassing the first respondent's tenants. That cross application was also dismissed and has not been appealed by the respondent.

Availability of appeal

7 Internal appeals may be made as of right on a question of law, and otherwise with the leave of the Appeal Panel: s 80(2) of the NCAT Act.

8 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69, the Appeal Panel set out at [13] the following non- exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons;

(2) Whether the Tribunal identified the wrong issue or asked the wrong question;

(3) Whether a wrong principle of law had been applied;

(4) Whether there was a failure to afford procedural fairness;

(5) Whether the Tribunal failed to take into account relevant (mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

(7) Whether there was no evidence to support a finding of fact; and

(8) Whether the decision as so unreasonable that no reasonable decision maker would make it.

9 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. The Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(a) The decision of the Tribunal under appeal was not fair and equitable; or

(b) The decision of the Tribunal under appeal was against the weight of evidence; or

(c) Significant new evidence (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

(i) Even if the appellant has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

10 In *Collins v Urban* [2014] NSWCATAP 17, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

> (a) matters of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) an injustice which is reasonably clear, in the sense of going beyond what is arguable, or an error that is plain and readily apparent and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

Grounds of appeal

11 The appellant's Notice of Appeal received on 30 November 2018 contains four grounds. These are that:

> 1.The Tribunal erred in concluding that enforcing a tenant's compliance with the by-laws is not a duty or function of a lot owner under the Strata Schemes Management Act 2015 (NSW) or the by-laws (Reasons for Decision [28]);
>
> 2.The Tribunal erred in failing to hold that the instances of noise transmission from Unit 15 relied upon by the Applicant constituted a breach of by-law 1(Reasons for Decision [42]);
>
> 3.The Tribunal erred in failing to have regard to paragraphs 25-30 of Dr Renzo Tonin's expert report dated 6 July 2018, and should have held that those considerations supported the Applicant's case;
>
> 4. The Tribunal erred:
>
> (i) in concluding that by-law 14 had not been breached by the Respondent (Reasons for Decision [42]); and, thereby,
>
> (ii) in failing to order that the floor space of Unit 15 be kept adequately covered or treated to an extent sufficient to prevent the transmission of noise that is

> likely to disturb the Applicant's peaceful enjoyment of Unit 14, in accordance with by-law 14 ('Floor Coverings') and by-law 1 ('Noise').

12 The orders sought in the appeal are the same as orders 1 and 3 sought in the Tribunal proceedings. The compensation order was not pressed in the appeal.

13 The first ground in this appeal clearly raises a question of law. The appellant's counsel, Mr Maroya, submitted to us that grounds 2 and 3 involved issues of mixed law and fact, and that as a consequence they also raised questions of law. He submitted that grounds 2 and 3 also supported an application for leave to appeal pursuant to cl 12(1) of Schedule 4. We have considered grounds 2 and 3 on both bases. Mr Maroya conceded that the first ground of appeal concerned only the construction of the *Strata Schemes Management Act 2015* (SSMA), and that it was necessary for the second and/or the third grounds, which relate to the factual issues in dispute, also to be upheld.

14 The fourth ground of appeal, we were told, involved consequential claims, and need only be considered if grounds 2 and/or 3 were successful.

The Decision under appeal

15 As is apparent from the grounds of appeal, the Tribunal proceedings concerned the alleged transmission of noise from the respondent's apartment to the appellant's apartment immediately below.

16 The Member came to the view at [28] in the Decision that enforcing a tenant's compliance with the relevant by-laws is not a function of a lot owner under the SSMA . He then held at [29] that:

> However it is not necessary to resolve this issue as, for reasons which I will expand upon, I am of the opinion that (the appellant) has not established non-compliance with the by-laws either by (the respondent's) tenants or by the respondent himself, and the application must be dismissed.

Material before the Appeal Panel

17 In deciding the appeal we had regard to the following:

(1) The Notice of Appeal received on 30 November 2018

(2) The Reply to Appeal received on 10 December 2018;

(3) The appellant's original application in the Tribunal proceedings;

(4) An appeal book which included:

(5) The appellant's submissions received on 5 February 2019;

(6) The respondent's submissions received on 18 February 2019;

(7) The Tribunal's reasons for decision dated 2 November 2018;

(8) The appellant's affidavits in the Tribunal proceedings received on 9 July and 21 August 2018; and

(9) A bundle of documents submitted by the first respondent in the Tribunal proceedings.

We were not provided with a transcript of the Tribunal proceedings.

18 We also received oral submissions from Mr Maroya and from Ms Christou, the respondent's managing agent. Ms Christou had appeared for the first respondent in the Tribunal proceedings. Ms Christou opposed each of the appellant's grounds of appeal, though her submissions were directed principally to factual, rather than to legal issues.

The first ground of appeal

19 In coming to his preliminary view that it was not a function of a lot owner under the SSMA to enforce his or her tenant's compliance with the by-laws, the Member considered s 135 and s 232(1) of SSMA. Section 135 provides that:

> (1)The by-laws for a strata scheme bind the owners corporation and the owners of lots in the strata scheme and any mortgagee or covenant chargee in possession, or tenant or occupier of a lot to the same as if the by-laws:
>
> (a) had been signed and sealed by the owners corporation and each owner and each mortgagee, covenant chargee, tenant and occupier; and
>
> (b) contained mutual covenants to observe and perform all the provisions of the by-laws.
>
> (2)There is an implied covenant by the tenant of a lot or common property to comply with the by-laws for the strata scheme.

20 Section 232(1) relevantly provides:

> **232 Orders relating to complaints and disputes**
>
> The Tribunal may, on an application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following:
>
> the operation, administration or management of a strata scheme under this Act,
>
> ...
>
> (d) an agreement between the owners corporation and an owner, mortgagee or covenant charge of a lot in a strata scheme, that relates to the scheme or a matter arising under the scheme,

> (e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,
>
> (f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.

The Member's reasoning

21 The Member referred to *Walsh v The Owners of Strata Plan No 10349* [2017] NSWCATAP 230 at [32]-[33], in which the Appeal Panel held that the Tribunal does not have a general jurisdiction under s 232 of the SSMA to make orders in respect of strata schemes, and it is necessary to identify a specific source of jurisdiction arising from one of the sub-paragraphs in s 232(1). The Member referred to the following definition of "function" in s 4 of the SSMA:

> "function" includes a power, authority or duty and "exercise" a function" includes perform a duty.

22 The Member noted that s 232 does not in terms empower the Tribunal to make orders directing an owner or occupier to comply with the by-laws, though in the recent decision in *Nowak v Pellicciotti* [2018] NSWCATCD 9 at [73], the Tribunal had concluded that it did have this power. He reasoned, at [27], that because s 135 of the SSMA imposes a duty on lot owners to comply with the by-laws, a failure to comply with a by-law is a failure to exercise a function imposed by the SSMA or the by-laws, and the Tribunal is empowered under s 232 to require a lot owner to comply with the by-laws.

23 The Member concluded that the Tribunal is able to make orders in the form of the appellant's orders 1 and 3 in the Tribunal proceedings, but only to the extent that they require the respondent himself to comply with the by-laws. However at [28] the Member was not persuaded to take the next step and make an order obliging the respondent not only to personally comply with the relevant by-laws, but that he be required to ensure that his tenants also comply. Although slightly different language is used in each proposed order, this would follow if the Tribunal were to made orders in the form requested by the appellant.

The appellant's submission

24 The appellant's counsel did not cavil with the Member's reasons, save for his ultimate conclusion at [28]. Indeed the Member's reasoning, in counsel's view, should have led him to conclude that it was open for the Tribunal to make an

order requiring the respondent to ensure that his tenants complied with the by-laws.

25 He drew our attention to s 135 of the SSMA which sets out the obligations imposed upon an owners corporation, owners of lots and tenants and occupiers, to comply with the by-laws for a strata scheme. An order requiring a lot owner to ensure that his or her tenants comply with the by-laws, was "properly capable" of being made by the Tribunal, being an order consistent with s 135 and an order which results in the settlement of complaints or disputes of the kind referred to in s 232 of the SSMA.

26 Counsel initially submitted that it was not necessary to refer to a specific sub section within s 232 on which to base such the order, but conceded that, to the extent that *Walsh* required the appellant to identify a specific source of jurisdiction, it would be that arising under sub paragraphs (a), (d), or (e), and specifically that under subsection (e) of s 232, in that the Tribunal would be making an order to settle a dispute concerning an exercise of a function or duty conferred or imposed under the by-laws of a strata scheme.

Our consideration in relation to the first ground of appeal

27 In the usual circumstance (as was the case initially in the Tribunal proceedings), the Tribunal will be asked to make orders requiring compliance with strata scheme by-laws, directly against the party affected, whether that be a lot owner, a tenant or in some instances, an owners corporation itself. The issue is whether the Tribunal make an order for the benefit of a lot owner requiring the tenant of another lot owner to comply with the by–laws.

28 We have come to view that the Member did not err in concluding that the Tribunal does not have power to make an order of this kind. Mr Maroya submitted that there is no provision in the SSMA, and particularly in s 232, expressly prohibiting orders in this form, but we, like the Member, take the view that there would need to be a specific power, either in the SSMA itself, or in the by-laws for a strata scheme, entitling landlords to ensure that their tenants complied with the by-laws. There is no such power that we can identify. We agree with the Member that as, by virtue of s 135 of the SSMA, the by-laws

bind the tenant of their own force, enforcing a tenant's compliance with the by-laws is not a duty or function of a lot owner under the SSMA or the by-laws.

29 The only possible contrary indication in the SSMA is in s 230(1). This section states:

> The Tribunal may make orders to give effect to any agreement or arrangement arising out of a mediation session.

30 An agreement reached at a mediation between lot owners in relation to a noise dispute, might include a term similar to that sought by the appellant in these proceedings – that is, an agreement which seeks to bind third parties. It is arguable that the Tribunal might be asked to make an order in that form pursuant to s 230(1). However, the Tribunal's power to make orders under s 230(1) does not enable us to conclude that s 232 should be construed in a manner which enables the Tribunal to make an order requiring a lot owner to ensure compliance by his or her tenants with the by-laws for a strata corporation.

31 We have therefore, come to the view that the Decision was correct in its interpretation of the SSMA, and that no error of law has been established in relation to this ground of appeal. We now turn to the appellant's further grounds.

The Second Ground of Appeal - Submissions supporting an Error of Law

32 Mr Maroya identified five reasons (Reasons) in the Decision which led the Member to conclude that the appellant's evidence did not establish a breach of the by-laws. The Reasons were:

> (1)That the only specific instances of noise transmission were those set out in [31] of the Reasons;
>
> (2)That the appellant did not attend the hearing, nor was it her evidence subject to cross-examination (Reasons [32]);
>
> (3)That the Appellant did not in her affidavits verify that the allegations set out in the correspondence were accurate (Reasons [33]);
>
> (4)That the Appellant's complaints were not corroborated (Reasons [35]);
>
> (5)That the question as to whether breaches of by-laws 1 and 14 have occurred is required to be assessed on an objective, and not subjective basis (Reasons [38]).

33 The appellant's counsel submitted that each of the Reasons revealed an error of law, either because they involved an application of a wrong principle of law, or because they took into account irrelevant considerations. It was not submitted that there was simply no evidence to support the Decision - *Soliman v University of Technology, Sydney* [2012] FCAFC 146.

Reason (5)

34 We will consider Reason (5) first, as this ground can readily be disposed of. The Decision at [38], cites with approval the Tribunal's decisions in *Gao v Agostini* [2009] NSWCTT 175 (*Gao*) and *Felcher v The Owners of Strata Plan 2738* [2017] NSWCATAP 219 (*Felcher*), and states:

> The question whether breaches of by-laws 1 and 14 have occurred is required to be assessed on an objective basis and not from the subjective perspective of the affected unit owner.

35 This is, in our view, a correct statement of the standard that the Tribunal should apply when considering allegations of noise transmission. It does not disclose an error of law.

Reasons (2) and (3)

36 We next consider Reasons (2) and (3). Counsel submitted that the absence of any cross-examination of the appellant should not have been a relevant consideration because she was not asked to be available for cross-examination on her affidavits. In relation to verification, her affidavits commenced with the usual averment that the contents set out thereafter were made "on oath", so that there was no requirement that the annexed correspondence, which contained further instances of alleged noise transmission in letters and emails from her solicitor and barrister to the respondent and his tenants, be separately verified.

37 It is arguable that Reasons (2) and (3) are not relevant considerations. We are inclined to accept the submission of the appellant's counsel on this matter. However for the reasons that follow, this is not a sufficient basis to establish this ground of appeal.

Reason (1)

38 Paragraph [38] in the Decision is in the following terms:

> The only direct evidence provided by Ms Feletti of specific instances of noise transmission from Mr Eales' unit involved five instances, on 29 May 2016, 14 April 2018, 23 July 2018, 17 August 2018 and 23 August 2018.Ms Feletti provided indirect evidence of further instances over the period April to June 2018, by attaching to her affidavits letters from her solicitors addressed to the "occupants" of Mr Eales' unit and email correspondence from Mr Maroya to the Strata Manager and Ms Christou. That correspondence set out complaints by Ms Feletti of noise which, it was asserted, had interfered with her peaceful enjoyment of her lot. The appellant's counsel referred us to the other instances of alleged noise transmission referred to in the appellant's affidavits including the correspondence in the annexures to the affidavits from her solicitors and counsel which he said revealed "many detailed instances of asserted noise transmission; not merely the specific instances adverted to at [31]" .

39 This paragraph does not support Mr Maroya's proposition that that the only instances of noise transmission which the Member had regard to, were those specified in the first sentence, and that the Member did not consider the other alleged instances of noise transmission referred to in the affidavits. The paragraph categorises the other instances of noise pollution as being different in their nature to the five specific instances referred to in the first sentence. But there is no suggestion that they were not also taken into consideration. There is nothing in this paragraph which reveals an error of law.

Reason (4)

40 Paragraph [35] in the Decision is in the following terms:

> None of Ms Feletti's complaints was the subject of corroboration.

41 Mr Maroya submitted that the absence of corroboration was not a consideration that should have resulted in the discounting of the probative value of the appellant's own evidence. In support, he referred us to Chapter 8 of the ninth Australian edition of *Cross on Evidence* which commences with the sentence:

> The general rule of the law of evidence is that the court may act upon the uncorroborated testimony of one witness…,

and to the decision of the House of Lords in *Director of Public Prosecutions v Kilbourne* [1973] 1 All ER 440, which held that the word 'corroboration', had no special technical meaning; by itself it meant no more than evidence "tending to confirm other evidence".

42 In his written submissions counsel made the point that:

> …given the particular nature of the sound transmission complained about by the appellant, it is doubtful that other occupants would have been in a position themselves to hear the noise complained about by the appellant, or to corroborate it, and the tribunal must first assess whether corroboration was possible or feasible in the circumstances and what it would have tended to demonstrate.

Our consideration in relation to Reason (4)

43 There are two limbs to this submission. The first is the general proposition that evidence need not be corroborated to be accepted. That is undoubtedly correct. The second limb is that when deciding whether to accept evidence that is uncorroborated, the court or tribunal should consider whether the evidence was capable of being corroborated. Again we accept that as a correct statement of the law.

44 However, the appellant's argument then proceeds on a misunderstanding of paragraph [35] in the Decision. Although we do not have the benefit of a transcript, the reference to the lack of corroboration, in our view, refers to the absence of any evidence from other persons in the appellant's unit, and not to evidence of what may have been heard by other occupants in their units in the apartment block (which, we agree, may have had marginal probative value).

45 Was Ms Feletti's evidence capable of being corroborated? Her affidavits disclose numerous instances of alleged noise transmission in 2016, in 2017 and between March and August in 2018. Whilst most instances were reported to have occurred late at night or in the early morning, there were some instances earlier in the evening. It seems feasible, given that the noise transmission continued over a three year period, that an occasion or occasions could have arisen for the appellant to have invited other persons, including occupants of other units, into her unit to test whether they too heard noise from unit 15 above.

46 One instance when such corroboration may have been achievable, was on the night of 26 June 2018 when the appellant deposed that "a persistent tapping sound (like an electrical appliance) from above continued for 30 minutes", and which resulted in her calling the police.

47 As we have already noted, the Member had referred in the Decision at [38], to the decision in *Gao,* confirming that the standards imposed by the by-laws are

to be interpreted objectively, and not from the subjective perspective of an affected unit holder.

48 Also at [39] the Member set out the following paragraph from *Felcher* :

> [31] Regrettably for Mr Felcher, he relied on only his uncorroborated personal account of the noise. As the Tribunal noted, the appellant provided no expert evidence to demonstrate that the floating floor allowed an unreasonable amount of noise to penetrate his Lot, and no reports from an acoustic engineer or from a builder. The Tribunal noted that while the appellant may genuinely believe that the floating floor was excessively noisy, he had not provided any expert evidence to prove so. Whilst the reference to expert evidence may have been unnecessary, in this case the Tribunal required probative evidence.

49 49 Mr Maroya submits that we should treat this paragraph from *Felcher* with caution. However, it seems to us that the Member included this paragraph in the Decision to support the general proposition that where the standard is an objective one, corroborative evidence, where available, can be of assistance. We have come to the conclusion that Reason (4) also does not reveal an error of law.

Our consideration in relation to the second ground of appeal generally

50 Two of the Reasons raised by the appellant's counsel arguably involved irrelevant considerations. Overall, however, the Members' Reasons were relevant to the issue before him and did not reveal the application of a wrong principle of law. The appellant would need to convince us that all, or at least the substantial majority of the Reasons which led the Member not to accept the appellant's evidence, involved errors of law. This is not the case, and we reject this ground of appeal.

The third Ground of Appeal - Submissions supporting an Error of Law

The appellant's submission

51 51 This ground was based on the argument that the Member failed to have regard to paragraphs 25-30 of the report from the appellant's expert noise consultant, Dr Renzo Tonin, dated 6 July 2018. Dr Tonin's report was annexed to the appellant's written submissions. In paragraph 24 of his report he had concluded:

> The floor surface therefore complies with the BCA Standard. In my opinion, a 3 star rating is a reasonable standard for the majority of apartments in Sydney.

52 52 Dr Tonin then said at paragraph 25:

> However that does not mean that the Applicant's contention should therefore be dismissed. The contention is that there is a breach of By- Law 14,

and, at paragraphs 29 and 30:

> 29. Therefore in the case of this matter, in order to establish a breach of By-Law 14, one would need to establish that the characteristics of the impacts generated in unit 15 are unreasonable on the basis of the evidence. This is a matter for the Tribunal.
>
> 30. For example, one of the Applicant's contentions is that furniture is being scraped across the floor (and other heavy objects dragged across it), causing audible noise in her Unit. Notwithstanding the compliance of the floating timber floor boards with the BCA Standard, this noise would be audible in her Unit. Providing that this noise does not occur too often (as would probably be the case in normal living), then it may be acceptable. However, if the noise occurs frequently or if it occurs at sensitive times of the day, such as late at night when the ambient noise is at its lowest, or in the early hours of the morning when it might cause the occupant to awaken, then the noise may not be reasonable or acceptable.

53 Earlier in his report Dr Tonin had said that the respondent's floor was adequately covered or otherwise treated. In relation to the timber flooring, his firm's acoustical testing resulted in sound levels described as a 3 star rating and with 2 star attributes. A 2 star rating is the lowest given on the rating guideline devised by the Association of Australasian Acoustical Consultants for apartments and town houses, but nevertheless is compliant with the Building Code of Australia Standard, and as he concluded in paragraph 24, a 3 star rating is a reasonable standard.

Our consideration

54 Paragraph [42] in the Decision addresses paragraph 30 in Dr Tonin's report. It says:

> I accept that Mr Tonin's conclusion does not mean that by-law 1 could not be breached by persistent and unnecessary noise, for example by the repeated bouncing of a basketball on a wooden floor or by very loud music, but in the absence of any objective evidence of the extent of noise penetration between Mr Eales' and Ms Feletti's units… I cannot conclude that any tenant of Mr Eales consistently or persistently cause noise in breach of the by-law.

55 We can see nothing in the Member's consideration of Dr Tonin's report which comes near to constituting an error of law. At its highest, the appellant's submission on this ground could only support an argument that the Member did not give due weight to the entirety of Mr Tobin's report. We will consider this argument below in relation to the appellant's alternative ground that she be granted leave to appeal. This ground of appeal is also rejected.

The fourth ground of appeal – Submissions supporting an Error of Law

56 56 The fourth ground of appeal was said to be consequential upon either or both of appeal grounds 2 or 3 succeeding. Having found that neither of these grounds involves an error of law, this ground must also fail.

The Second Ground of Appeal – Submissions supporting Leave to Appeal

The appellant's submission

57 The appellant's counsel drew our attention to three aspects of the evidence in the Tribunal proceedings to support the submission that the Decision was against the weight of evidence or that the decision was not fair and equitable. The first was that the residential tenancy agreement entered into between the respondent and his tenants contained the following special condition:

> Flooring – due to sound transference to downstairs, the tenants and their guests should not wear any soled shoes within the apartment, and should ensure that large and effective rugs are in place.

58 This condition, it was submitted, should be treated as a "clear recognition" of the problems which the appellant had been complaining about for several years, and should have been accepted by the Tribunal as a "powerful extrinsic factor" in support of the appellant's case.

59 Next the appellant pointed to the lack of evidence from the respondent on the measures taken to cover or treat the floors in unit 15 in compliance with this special condition.

60 Last it was submitted that the respondent did not put forward evidence of any written responses to the appellant's correspondence to him and to his tenants about incidents of noise transmission.

The respondent's submission

61 In relation to the special condition, the respondent said that there was evidence that this additional wording was included in the tenancy agreement at the suggestion of the managing agent when noise complaints were being received on an almost daily basis. It was included "because it became obvious that the [appellant] was very sensitive in nature as a way to appease these complaints and do our bit to nurture the sensitivity of the appellant". It should not be

treated as an admission that the respondent had failed to comply with the relevant by-laws.

62 In relation to covering or treating the floor, the respondent pointed to Dr Tobin's report, which noted that the flooring had underlay which met BCA standards, and also to the evidence of the property inspections carried out by the managing agent which confirmed that rugs had been placed on the timber flooring.

63 In relation to the lack of written responses, the respondent said that the evidence disclosed that he had responded to many of the specific allegations of noise transmission, but there had been so much correspondence from the appellant that he could not respond to every instance.

64 In support of the argument that the decision was not against the weight of the evidence, we were also referred to paragraph [34] in the Decision which said:

> Mr (sic) Christou, who appeared for Mr Eales, submitted that, even if the assertions in the letters attached to Ms Feletti's affidavit, concerning noise experienced in Ms Feletti's unit are accepted, there were at least three occasions when the noise could not have emanated from Mr Eales' unit. In respect of one allegation, [the Tenants] produced an Uber receipt which suggested that, on the morning in question, they had left the unit to travel to New Zealand by the time the noise is alleged to have occurred. Another alleged incident occurred after [the tenants] had vacated the premises and a third involving children late at night, clearly could not have emanated from Mr Eales' unit as [the tenants] had no children and had not had children present in their unit.

The Third Ground of Appeal - Submissions supporting Leave to Appeal

The appellant's submission

65 Mr Maroya again put the argument that paragraphs 25-30 of Dr Tonin's report should have been given more weight, so that:

> The Tribunal failed to have regard to that opinion, which was of great significance for the Appellant's case. The bulk of her noise complaints concerned noises alleged to have been made late at night or in the early morning; to quote Dr Tonin, at "sensitive times of the day, such as late at night when other ambient noise is at its lowest or in the early hours of the morning". No other expert evidence was put before the Tribunal, and there was nothing adduced by the Respondent to gainsay Dr Tonin's opinion in that regard. The Tribunal should have accepted Dr Tonin's conclusions in that regard, and approached the Appellant's application for orders in the light of his opinion. It erred in failing to do so.

The respondent's submission

66 The respondent referred to Dr Tonin's primary conclusion that the floor of unit 15 complied with BCA Standards and that his 3 star rating after testing, was a reasonable standard.

Our consideration in relation to whether Grounds 2 and 3 support granting leave to appeal

67 In relation to each of the evidentiary issues raised by the appellant, that is, the circumstances in which the special condition was included in the lease, compliance with that special condition, and the adequacy of the respondent's responses to the appellant's complaints, we agree with the respondent's submission, that there was evidence to the contrary which supported the respondent's position and that the Member was entitled to take that evidence into account in coming to his ultimate conclusion.

68 In relation to the first incident of noise transmission referred to at paragraph [34] in the Decision, Mr Maroya suggested that this complaint in fact referred to alleged noise on the day before and not on the actual day that the respondent's tenants departed for New Zealand. However, in relation to the other two instances of complaints by the appellant of alleged noise transmission referred to by the Member at [34], we did not understand that Mr Maroya challenged the conclusion that the noise could not have emanated from the respondent's unit. Further, in our view, the Member, in this paragraph, was doing no more than noting Ms Christou's submissions to him that neither the respondent not his tenants could have been the source of the noise which provoked these three complaints from the appellant. It does not appear to us that the Member was necessarily adopting these submissions.

69 The Member also gave careful attention, in our view, to all aspects of Dr Tonin's report, and in particular to Dr Tonin's comments at paragraphs 29 and 30 of the report, which he considered directly in paragraph [42].

70 We are satisfied that the Member was entitled to find that the appellant's evidence did not establish that the respondent or his tenants had failed to comply with by-law 1 or 14. The Decision was not against the weight of

evidence and was fair and equitable and there was no substantial miscarriage of justice.

The Fourth Ground of Appeal – Submissions supporting Leave to Appeal

71 Again, having found that neither the second nor the third ground of appeal supports granting leave to appeal, we do not need to consider further the fourth ground.

72 Thus, no entitlement for leave to appeal under cl 12 (1) of Schedule 4 of the NCAT Act, has been made out.

Orders

73 The orders of the Appeal Panel are:

(1) The Owners-Strata Plan 2223 is joined as the second respondent.

(2) Leave to appeal refused.

(3) Appeal dismissed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar