Civil and Administrative Tribunal

New South Wales

Case Name:	Felcher v The Owners – Strata Plan No 2738
Medium Neutral Citation:	[2017] NSWCATAP 219
Hearing Date(s):	31 October 2017
Date of Orders:	29 November 2017
Decision Date:	29 November 2017
Jurisdiction:	Appeal Panel
Before:	R C Titterton, Principal Member J McAteer, Senior Member
Decision:	Leave to appeal is refused The appeal is dismissed.
Catchwords:	Strata Schemes Management Act – Appeal from decision of the Tribunal - Leave to Appeal – no question of principle
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014 Strata Schemes Management Act 2015
Cases Cited:	BHP Billiton Ltd v Dunning [2013] NSWCA Collins v Urban[2014] NSWCATAP 17 Gao v Agosti [2009] NSWCTTT 175 Nakad v Commissioner of Police, NSW Police Force [2014] NSWCATAP 10 Pholi v Wearne [2014] NSWCATAP 78 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Category:	Principal judgment
Parties:	Ferrucio Felcher (Applicant) The Owners – Strata Plan No 2738 (First Respondent) L and D Benner (Second Respondents)

	Strata Choice Associates Pty Ltd (Third Respondent)
Representation:	F Felcher (Appellant in person) D Russell, Solicitor represented the First Respondent
File Number(s):	AP 17/30373
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	12 June 2017
Before:	G Sarginson, Senior Member
File Number(s):	SC 17/04598

REASONS FOR DECISION

1 This is the appeal of the appellant, Mr Ferlucio Felcher, against the decision of the Consumer and Commercial Division of the Tribunal (the Tribunal) of 14 June 2017 (the Decision).

2 For the reasons that follow, we have decided not to grant leave to appellant to appeal, and to otherwise dismiss the appeal.

Background

3 On 30 January 2017, the appellant, the owner of strata premises in Potts Point Sydney, filed an application seeking orders about the noise emanating from Lot 19, which apartment was immediately above his own. The respondents to the application were the owners of Lot 19, Mr and Mrs Brenner, the strata manager of the strata scheme, Strata Choice Associates Pty Ltd (the Strata Manager), and The Owners – Strata Plan No 2738 (the Owners).

4 In his application, the appellant said that had been trying for three years, and to no avail, to resolve the problem noise penetration. He said that the occupants of Lot 19 sounded like "a herd of elephants coming at you" and that there was also a thumping sound. The appellant stated that as an 80 year-old senior and

owner, he should not have to keep applying to the Department of Fair Trading to seek an outcome.

5 The hearing of the appellant's application was held on 12 June 2017. At the hearing, the appellant stated that he sought an order that the Owners and/or Mr and Mrs Brenner, conduct unspecified repairs or modifications to prevent unreasonable noise being transmitted from Lot 19 into his lot. In particular, the appellant complained that he heard the occupant of Lot 19 walking across floating floor. This floating floor had been installed in 2013.

6 In summary, the Tribunal dismissed the application against each respondent. In short, but detailed, reasons for its decision, the Tribunal noted that under s 232 of the *Strata Schemes Management Act 2015*, the Tribunal had power to make orders to resolve disputes in strata schemes involving functions conferred or imposed by that act, or by the bylaws of the strata scheme. The Tribunal found that there was no evidence that installation of the floating floor involve any interference or alteration of common property, or that the work had been performed without the consent of the Owners. The Tribunal found that there was no evidence that the Owners had failed to maintain or repair the common property. The Tribunal found there was no sufficient evidence that Mr and Mrs Brenner allowed their lot to create a nuisance affecting the appellants locked. In short, the Tribunal was not satisfied that the appellant had demonstrated that either the Owners, or Mr and Mrs Brenner, or the Strata Manager had breached any provision of the *Strata Schemes Management Act*.

7 The Tribunal noted that bylaw 1 provided that a lot owner must not create any noise on the parcel likely to interfere with the peaceful enjoyment of another lot owner, or a person lawfully using the common property. The Tribunal further noted that Lot 14 stipulates that the lot owner must ensure that floor space (other than the kitchen laundry lavatory or bathroom) is covered or treated to an extent sufficient to prevent noise to disturb the peaceful enjoyment of another lot owner or occupier.

8 The Tribunal said that the test of whether or not bylaw 1 or 14 had been breached is an objective one (referring to *Gao v Agosti* [2009] NSWCTTT 175), and not assessed from the subjective perspective of the lot owner.

9 The Tribunal noted that the noise complained of by the appellant involved normal daily activities, including walking on the floor. The Tribunal found that the appellant had provided no excluded evidence to demonstrate that the floating floor was allowing unreasonable amount of noise to generate into his lot. The Tribunal noted that there were no reports from an acoustic engineer, nor from the builder. The Tribunal said that, although the appellant genuinely believed that the floating floor was excessively noisy, he had not provided any expert evidence to prove that it was. The Tribunal said that the appellant's evidence that he had "spoken to" builders was insufficient.

Notice of Appeal

10 The appellant filed his Notice of Appeal on 10 July 2017. He says that the dismissal of his application was "totally unjust and unfair". He thinks the decision was wrong, as he made himself very clear as to what needed to be done about the noise. He states that he disagrees with every aspect of the outcome of the dismissal. He says that the secretary of the Owners, the Strata Manager and Mr and Mrs Brenner all lied under oath. He resents his intelligence being insulted, and says that he was intimidated by the legal representatives of the respondents. He says he is not going to involve builders who gave him their professional opinion "gratis". He says that to bring expert reports to the appeal hearing is "ridiculous", as he did not install the floors and the Owners is the person at fault, giving the go-ahead without considering the building itself. He says that he is the one who lives in the building, and that the underlay is insufficient.

11 The appellant states that he is not asking for leave to appeal, but nevertheless has completed that part of the Notice of Appeal that states that he is asking for leave because the Decision was not fair and equitable, and because it was against the weight of evidence. In relation to the decision being against the weight of the evidence, he asks "what more evidence cannot possibly give that having to repeat I'm living right underneath unit 19. I own my unit. I should have the right to live without having to listen to thumping sounds". He asks the Appeal Panel to make the appropriate orders to have the matter rectified. He notes that the bylaws state that there must be no noise penetration onto another lot and that flooring must be covered with rugs of a certain thickness.

12 In addition to his Notice of Appeal, the appellant filed a submission on 17 September 2017. There Mr Felcher explains that he had sought legal advice, and spoken to an acoustic engineer. Mr Felcher states that:

> The outcome in his opinion because (the bylaw of Strata Plan #2738) does not stipulate any numbers that he must have to go by To be able to carry out a test , as he pointed out, every building is different as to numbers of noise levels that can be allowed. He told me, I can't waste your money for nothing as its very costly (costs are $1,500). He puts the blame fair + square on the Owners Corporation of SP 2738 for not consulting the situation before giving the go-ahead to put down any flooring. As they are not experts in anything.

13 The submissions conclude with the following statement:

> As you've pointed out, I needed more evidence, that's what I have, + may I also point out to the (thick-headed Owners [Corporation] , + owners of unit 19, I repeat again, I live right under-neath of that ("thunder dome") of which is (#1) (that's my biggest evidence).

Consideration

14 Appeals from a decision of the Consumer and Commercial Division of the Tribunal can be brought on two bases. The first is on a question of law. An appeal on a question of law may be brought as of right, that is without the leave of the Appeal Panel. For appeals on any other ground, a grant of leave is required: see s 80(2) of the *Civil and Administrative Tribunal Act 2013*.

15 We shall deal with each in turn.

Question of Law

16 Where the appellants are not legally represented, it is appropriate for the Appeal Panel to consider the grounds of appeal raise a question of law: Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69. In *Prendergast*, the Appeal Panel set out a non-exhaustive list of questions of law that might arise from Tribunal decisions. In summary, the questions of law identified are whether there has been a failure to provide proper reasons; whether the Tribunal identified the wrong issue or asked the wrong question; whether a wrong principle of law had been applied; whether there was a failure to afford procedural fairness; whether the Tribunal failed to take into account relevant (that is mandatory) considerations; whether the Tribunal took into account an irrelevant consideration; and whether there was no evidence to

support a finding of fact; and whether the decision is so unreasonable that no reasonable decision-maker would make it.

17 The appellant has not identified any arguable error of law. We have examined the grounds of appeal and the attachments. We have not identified any arguable error of law. Accordingly, in our view, the appellant requires leave to appeal in respect of any other claimed error.

Appeals on other grounds

18 Clause 12 of Sch 4 of the Act provides that, in appeals from the Consumer and Commercial Division of the Tribunal, an Appeal Panel may grant leave only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:

(1) The decision of the Tribunal under appeal was not fair and equitable, or

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

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

19 The principles to be applied by an Appeal Panel in determining whether or not leave to appeal should be granted are well settled. In Collins v Urban[2014] NSWCATAP 17 an Appeal Panel of the Tribunal conducted a review of the relevant cases at [65]-[79] and concluded at [84] that:

(1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact: BHP Billiton Ltd v Dunning [2013] NSWCA 421 at [19] and the authorities cited there, Nakad v Commissioner of Police, NSW Police Force [2014] NSWCATAP 10 at [45];

(2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:

(a) issues of principle;

(b) questions of public importance or matters of administration or policy which might have general application;

(c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision 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.

20 Finally, we note that, as was explained in *Pholi v Wearne* [2014] NSWCATAP 78 at [32]:

> Even if the appellant establishes that [they] may have suffered a substantial miscarriage of justice in the sense explained above, the Appeal Panel then retains the discretion whether to grant leave under s 80(2) of the Act (see *Collins v Urban,* supra at [80]-[84]). [The appellant] must demonstrate something more than that the Tribunal was arguably wrong. Leave is ordinarily granted only where the matter involves an issue of principle, questions of public importance, where the injustice is reasonably clear or where the Tribunal has gone about its fact finding process in such an unorthodox manner that it is likely to have produced an unfair result.

21 The appellant says that the Decision was not fair and equitable, and was against the weight of the evidence. We shall consider each submission in turn.

22 In the Notice of Appeal, the appellant was asked to describe in detail why the Decision was not fair and equitable. He stated:

> Because, In my view That The Owners of Unit 19 were not questioned on why they didn't get the [company] that put the floating floors down while on warranty to check the underlay when were already been to mediation. In 2015, the unit was empty for nearly 1 year as the 1st tenant was overseas + paid all rent all the while I was told, they were not questioned enough why they don't have floor-boards lifted on the corner, + have the underlay checked, + why it was not considered.

23 In substance, we understand this complaint as being that the Tribunal did not undertake sufficient steps during the course of the hearing to establish the circumstances surrounding the installation of the floating floor and the failure of the Lot owners to ensure that there was adequate underlay.

24 We do not accept this submission. The role of the Tribunal in conducting hearings before it is not inquisitorial, that is, it is not the Tribunal's role to take the lead in the investigation of the facts. Rather, the Tribunal's role is adversarial, it will make a decision on the basis of the evidence presented to it, and the usual practise is for the parties to have the management of their respective cases. The appellant, as the applicant in the proceedings before the Tribunal bore the onus (or burden) of proving his case (that is persuading the

Tribunal that he is entitled to the relief he seeks) on the civil standard of proof, being the balance of probabilities.

25 As to whether the Decision was against the weight of the evidence, the appellant asks in the Notice of Appeal, "What more evidence can I possibly give than having to repeat, I'm living right underneath Unit 19?". He says that as he owns his own unit, he should have the right to live without having to listen to "thumping sounds". He submits that the Tribunal "much more weight" should have given by the Tribunal to his "plight". He notes that the owners of Unit 19 are "only" investors, that they do not live in the unit, "so they don't care".

26 This question to the question "What more evidence can I possibly give?" was answered by the Tribunal when it referred in its reasons to the appellant not providing expert evidence from, for example, a builder or an acoustic engineer. The question was also answered by the appellant himself in his Notice of Appeal, where he states that he was not going to involve builders that he had spoken to, and that it was "ridiculous" to ask them to prepare reports.

27 We note that the appellant presented additional independent evidence prior to the hearing. This was an undated email from "Gerald" to the appellant's partner attached to the Notice of Appeal. The email states:

> Please find following a proposal for timber floor installation:
>
> 1. "Vibramat" 5 mm Acoustic Mat glued to Concrete (similar to Regupol).
> 2. Parquetry Timber floor glued to Acoustic mat (Polyurethane adhesive).
> 3. Sanded and sealed.
>
> Please note that this is the Specification by an Acoustic Engineer for the timber floor installation at . . . that we discussed recently.
>
> It is a common Acoustic Timber floor installation in unit situations but of course each unit has it's own characteristics and construction and should be considered individually.
>
> It is recommended that the installation be referred to the body corporate.

28 It is difficult to understand the relevance of this email as the appellant has added a handwritten note to the email, stating that this installation:

> is a hollow, + empty sound. These terrible floating floors are a disaster, It gives off a booming sound, Like a herd of elephants coming down at you. As I keep repeating over + over since # 2013 I'm living underneath a thunderdome in my own home, They can give all the excuses they want, it won't change the situation till they get the problem rectified, As they are in breach of the Bi Laws Sect (1) + (#14).

Conclusion

29 We have carefully considered what Mr Felcher has stated in his Notice of Appeal, in his submissions and what he told us during the appeal hearing. We accept that he is very upset about what he considered to be the noise which he says emanates from Unit 19. However, we do not accept, on the basis of the evidence before the Tribunal, and applying the relevant principles we have set out above, that leave should be granted because the Decision was against the weight of the evidence. In our view, the decision to dismiss the application was correct given the lack of probative evidence before the Tribunal.

30 On appeal the appellant reiterated matters he had raised before the Tribunal. His application to the Tribunal failed for lack of probative (that is persuasive) evidence. A court or tribunal is informed and persuaded only by the presentation of evidence. Evidence is material which tends to persuade the court or tribunal of the truth or probability of the facts being alleged. Evidence may be photography, documentary or testimonial. But it will only succeed in persuading the Tribunal if it appears as being truthful, reliable and cogent. In civil cases, the standard or proof depends on the balance (or preponderance) of probabilities. This simply means that a party must prove that their case is more likely than not to be true. If the scales tip in favour of the party, however slight, they have proved their case. But if the probabilities are equal, they have failed to prove their case.

31 Regrettably for Mr Felcher, he relied only on 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 unnecessary, in this case the Tribunal required probative evidence. We have set out above the forms that evidence may take.

32 As we noted above, an appellant must demonstrate something more than that the Tribunal was arguably wrong. Leave is ordinarily granted only where the matter involves an issue of principle, questions of public importance, where the injustice is reasonably clear or where the Tribunal has gone about its fact finding process in such an unorthodox manner that it is likely to have produced an unfair result. In our view, Mr Felcher has not established that the Tribunal's is wrong. Nor has he established that an issue or principle or any other reason as warranting the grant of leave.

33 In our view, the Tribunal was correct to dismiss Mr Felcher's application. We would refuse Mr Felcher a grant of leave, and otherwise dismiss the appeal.

Orders

34 The Appeal Panel orders that:

(1) Leave to appeal be refused.

(2) The appeal is 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