



Civil and Administrative Tribunal
New South Wales

Case Name: Feletti v Eales; Eales v Feletti

Medium Neutral Citation: [2018] NSWCATCD 66

Hearing Date(s): 24 August 2018

Date of Orders: 2 November 2018

Decision Date: 2 November 2018

Jurisdiction: Consumer and Commercial Division

Before: D A C Robertson, Senior Member

Decision: Proceedings SC 18/21384
1. Application dismissed.

Proceedings SC 18/34455
1. Application dismissed.

Catchwords: LAND LAW – strata title - by-laws – disturbing the peaceful occupation of another lot – objective test – breach not established – whether landlord under obligation to ensure tenants comply with by-laws – whether Tribunal has jurisdiction to award damages for breach of by-laws – whether Tribunal has jurisdiction to restrain harassment by one lot owner of tenants of another lot owner

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Strata Schemes Management Act 1996
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Felcher v The Owners Strata Plan 2738 [2017] NSWCATAP 219
Gao v Agosti [2009] NSWCTTT 175
Nowak v Pellicciotti [2018] NSWCATAP 245
Nowak v Pellicciotti [2018] NSWCATCD 9
The Owners Strata Plan 50276 v Thoo [2013] NSWCA

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Walsh v The Owners Strata Plan No 10349 [2017]
NSWCATAP 230

Category: Principal judgment

Parties: SC 18/21384 Proceedings:
Marie Feletti (Applicant)
Jonathon Eales, The Owners - Strata Plan No 2223,
Lauren Rohrbeck and Shane Burgess (Respondents)

SC 18/34455 Proceedings:
Jonathon Eales (Applicant)
Marie Feletti (Respondent)

Representation: A Maroya (Counsel) (Ms Feletti)
K Christou (Managing Agent) (Mr Eales)
J Crittenden (Solicitor) (Owners Corporation)

File Number(s): SC 18/21384 and SC 18/34455

Publication Restriction: Nil

REASONS FOR DECISION

- 1 The two applications before me concern Strata Plan 2223, which is a block of apartments in Vacluse.
- 2 By the first application, Ms Feletti, the owner and occupier of a unit in the Strata Plan, sought orders against: Mr Eales, the owner of the unit directly above hers; the Owners Corporation of Strata Plan 2223; and Ms Lauren Rohrbeck and Mr Shane Burgess, who were at the time of commencement of the application tenants of Mr Eales, concerning what Ms Feletti complains is excessive noise transmission from Mr Eales' unit.
- 3 By the time of the hearing, Ms Rohrbeck and Mr Burgess had vacated the premises and, by consent of all parties, they were removed from the proceedings.
- 4 By her application Ms Feletti seeks orders:
 1. An order, pursuant to ss 232 and 241 of the *Strata Schemes Management Act 2015* (NSW), requiring the first respondent [Mr Eales] (and any tenants and/or other occupiers of [Mr Eales' unit]) to keep the floor space of [that 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 [Ms Feletti's unit], in accordance with by-law 14 ('Floor Coverings') and by-law 1 ('Noise');

2. An order, pursuant to ss 232 and 241 of the *Strata Schemes Management Act 2015* (NSW), requiring the second respondent [the Owners Corporation] to ensure that the common property between [Ms Feletti's unit] and [Mr Eales' unit] is repaired or otherwise treated sufficient to prevent the transmission of noise that is likely to disturb the applicant's peaceful enjoyment of [her 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 [Mr Eales] 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 p.m. and 10:30 a.m. that is likely to interfere with the applicant's peaceful enjoyment of [her unit], in accordance with by-law 1 ('Noise');

4. An order pursuant to s 232 of the *Strata Schemes Management Act 2015* (NSW) that the second respondent exercise its function of ensuring compliance with the by-laws of Strata Scheme 2223;

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].

5 By his application, Mr Eales seeks orders:

1. That Marie Feletti ceases all behaviour towards any occupants in [Mr Eales' unit], that threatens or interferes with their quiet peaceful enjoyment of the property;

2. An order that Marie Feletti compensate Jonathon Eales for financial losses caused by her behaviour towards occupants in [his unit]. This total is still growing, but at this stage is \$7,019.90.

The Evidence

6 Each party provided submissions and a bundle of documents.

7 Ms Feletti's evidence included three affidavits sworn by her on 9 July 2018, 21 August 2018 and 23 August 2018, together with annexures, and an expert report from Mr Renzo Tonin, a consulting engineer specialising in acoustics.

8 Mr Eales relied upon a statement from Ms Christou, his managing agent, dated 6 August 2018, his own statement dated 3 August 2018 and statutory declarations, from Mr Burgess and Ms Rohrbeck, both dated 6 August 2018, and from Mr Loader (a friend of Mr Burgess and Ms Rohrbeck) dated 3 August 2018.

- 9 Mr Eales also tendered a bundle of documents, which, apart from page 45 which referred to matters that occurred during mediation, was received in evidence.
- 10 The Owners Corporation provided submissions and an attached bundle of documents which was received in evidence.
- 11 By order of the Tribunal made on 29 June 2018 leave had been given to all parties to be represented by an Australian legal practitioner on the condition that no represented party may make a costs application in the proceedings.
- 12 Ms Feletti was represented at the hearing by Mr Maroya of counsel. Mr Eales was represented by Ms Christou, his managing agent, and the Owners Corporation was represented by Ms Crittenden, solicitor.
- 13 Neither Ms Feletti nor Mr Eales attended the hearing and no party sought to cross-examine any witness.

Ms Feletti's Application

- 14 Ms Feletti's case is that Mr Eales' tenants have been responsible for noise which disturbed her peaceful occupation of her unit in breach of by-laws 1 and 14 of the Strata Plan, which 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 of any person lawfully using common property.
 - 14 Floor coverings
 - (1) An owner of a lot must ensure that all floor space within the 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.
- 15 In effect, Ms Feletti seeks orders requiring Mr Eales to upgrade the sound insulation of the floor in his unit and to ensure that his tenants comply with the by-laws. Mr Feletti also seeks compensation from Mr Eales. Ms Feletti also seeks orders requiring the Owners Corporation to enforce the by-laws in respect of floor coverings and in respect of the conduct of Mr Eales and his tenants.

- 16 The first question that arises in respect of Ms Felletti's application is whether the Tribunal has jurisdiction to make the orders she seeks.
- 17 Ms Feletti submits that Mr Eales is responsible for his tenants and should be subject to an order requiring him to ensure his tenants comply with the by-laws.
- 18 Mr Maroya submitted that the Tribunal's power to make such an order arose pursuant to ss 232 and 241 of the *Strata Schemes Management Act 2015* (NSW) (SSMA) which relevantly provide:

232 Orders to settle disputes or rectify complaints

(1) Orders relating to complaints and disputes The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following:

- (a) the operation, administration or management of a strata scheme under this Act,
- (b) an agreement authorised or required to be entered into under this Act,
- (c) an agreement appointing a strata managing agent or a building manager,
- (d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee 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.

(2) Failure to exercise a function For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if:

- (a) it decides not to exercise the function, or
- (b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

241 Tribunal may prohibit or direct taking of specific actions

The Tribunal may order any person the subject of an application for an order to do or refrain from doing a specified act in relation to a strata scheme.

- 19 Mr Maroya also submitted that, if the Owners Corporation is not carrying out its function of enforcing the by-laws, it can be directed by the Tribunal to do so. That proposition is not controversial.
- 20 The issue for the Tribunal is whether the Owners Corporation is failing to carry out its function of enforcing the by-laws. In that regard Ms Crittenden submitted

that the Owners Corporation should not be required to take action to enforce the by-laws where the Owners Corporation is not satisfied that a breach has occurred.

21 As I understood Ms Crittenden's submissions, she accepted that the Tribunal could direct the Owners Corporation to take action if the Tribunal was satisfied that a breach had occurred. However she submitted that it would be futile and unnecessary to make such orders where the "offending party" was before the Tribunal and themselves amenable to orders requiring compliance.

22 Section 232 does not in terms empower the Tribunal to make orders directing an owner or occupier to comply with the by-laws.

23 I note that Member Ringrose concluded in the decision at first instance in *Nowak v Pellicciotti* [2018] NSWCATCD 9 at [73] that the Tribunal did have such power, and that that conclusion was not the subject of comment by the Appeal Panel on the appeal from that decision, *Nowak v Pellicciotti* [2018] NSWCATAP 245, as the issue did not arise.

24 The Appeal Panel in *Walsh v The Owners Strata Plan No 10349* [2017] NSWCATAP 230 at [32]-[33] made it clear that the Tribunal does not have jurisdiction at large to make orders in respect of Strata Schemes, or disputes relating to Strata Schemes. It is necessary to identify a specific source of power, such as a specific sub-paragraph in s 232(1) before the Tribunal may make orders to resolve a dispute.

25 I note that, as the Appeal Panel observed in *Walsh*, pursuant to the definitions in s 4 of the SSMA:

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

26 Section 135 of the SSMA provides:

- (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 extent as if the by-laws:
 - (a) had been signed and sealed by the owners corporation and each owner and each such 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.

- 27 If it is accepted that s 135 imposes a duty on lot owners to comply with the by-laws, then it would follow that a failure to comply with a by-law is a failure to exercise a function imposed by the Act or the by-laws, and s 232 does empower the Tribunal to make orders requiring a lot owner to comply with the by-laws.
- 28 However, it does not follow that the Tribunal can make orders requiring a lot owner to ensure his or her tenants comply with the by-laws. Mr Maroya did not identify the basis upon which the Tribunal might have such a power. The SSMA does not impose an obligation on landlords to ensure their tenants comply with the by-laws. By virtue of s 135(2) a tenant impliedly covenants that he or she will comply with the by-laws and the landlord would, accordingly, have capacity to enforce that obligation. However, by virtue of s 135(1), the by-laws also bind the tenant of their own force. It cannot, in my view, be said that enforcing a tenant's compliance with the by-laws is a duty, or function, of a lot owner under the SSMA or the by-laws.
- 29 However, it is not necessary to resolve this issue as, for reasons I will expand upon, I am of the view that Ms Feletti has not established non-compliance with the by-laws, either by Mr Eales' tenants or by Mr Eales himself, and Ms Feletti's application must be dismissed.
- 30 In her affidavits Ms Feletti states that since March 2018 she has experienced frequent and recurrent noise problems late at night and early in the morning. She states that the noises emanate from Mr Eales' unit.
- 31 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 affidavit 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.

- 32 I note that Ms Feletti did not attend the hearing and her evidence was not subject to cross-examination. Nor did I have the opportunity of observing her give evidence. I further note that Ms Feletti did not in her affidavit attest to more than a very few specific incidents. The only detail provided of sustained noise penetration to her unit was contained in the correspondence attached to her affidavit in which her solicitors and counsel communicated her complaints concerning noise.
- 33 Ms Feletti did not in her affidavits verify that the allegations set out in that correspondence were accurate.
- 34 Mr Christou, who appeared for Mr Eales, submitted that, even if the assertions in the letters attached to Ms Felletti'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, Ms Rohrbeck and Mr Burgess 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 Ms Rohrbeck and Mr Burgess had vacated the premises and a third allegation, involving children making noise until late at night, clearly could not have emanated from Mr Eales' unit as Mr Burgess and Ms Rohrbeck had no children and had not had children present in their unit.
- 35 None of Ms Feletti's complaints was the subject of corroboration. Ms Feletti did lead evidence from an acoustics expert, Mr Tonin. Mr Tonin's evidence was that floor impact tests between the relevant units had been conducted on 26 June 2018 and that the test conducted in the living/dining area of Mr Eales' unit revealed that the floor surface had a weighted standardised sound level of 56 L'nT,w, which he described as "three star with two star attribute". Mr Tonin stated that that level of transmission complied with the Building Code of Australia standard for new dwellings, which requires a level less than L'nT,w 62. Mr Tonin expressed the opinion that "a three star rating is a reasonable standard for the majority of apartments in Sydney".
- 36 Mr Tonin concluded:

“Whilst the weighted standardised sound level $L'_{nT,w}$ of the floor surface is acceptable, in order to establish a breach of by-law 14, one would need to establish that the characteristics of the impacts generated in the unit above are unreasonable on the basis of the evidence. This is a matter for the Tribunal”.

- 37 Mr Maroya nevertheless suggested that the evidence demonstrated that both by-laws 1 and 14 had been breached.
- 38 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: *Gao v Agosti* [2009] NSWCTTT 175; *Felcher v The Owners Strata Plan 2738* [2017] NSWCATAP 219; *Nowak v Pellicciotti* [2018] NSWCATAP 245.
- 39 In *Felcher v The Owners Strata Plan 2738* at [31]-[32] the Appeal Panel stated, in respect of an application alleging a breach of by-laws which were in identical terms to the by-laws under consideration in these proceedings:
- 31... 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 of 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.
- 32 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 [been] unnecessary, in this case the Tribunal required probative evidence. We have set out above the forms that evidence may take.
- 40 In this case Ms Feletti has adduced expert evidence, but that evidence does not support her case. Mr Tonin’s conclusion, in my view, directly establishes that by-law 14 has not been breached. Mr Tonin has concluded that the floor space within Mr Eales’ unit is adequately covered or otherwise treated.
- 41 Mr Tonin described the floor between Ms Feletti’s and Mr Eales’ unit as “a 180mm concrete slab with floating timber floorboards on 2mm foam underlay”. Mr Tonin concluded that the floating floorboards and the relevant building

standard provided a reasonable level of sound insulation. In light of that evidence, which was tendered by Ms Feletti, I cannot conclude that Mr Eales is in breach of by-law 14.

42 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:

- (a) I cannot conclude that any tenant of Mr Eales consistently or persistently caused noise in breach of the by-law;
- (b) I cannot conclude that any of the specific noises identified in Ms Feletti's solicitors' letters or in Mr Maroya's emails emanated from Mr Eales' unit; and
- (c) I cannot conclude that any of the specific noises identified either by Ms Feletti in her affidavits, by her solicitors in their letters, or in Mr Maroya's emails, constituted a breach of by-law 1.

43 Accordingly I find there is no basis to make any order against Mr Eales or the Owners Corporation.

44 It is not in these circumstances necessary to address Ms Feletti's claim for compensation. However, I note that it is not immediately apparent on what basis the Tribunal is said to have power to make such an order. Such a power is not explicitly conferred upon the Tribunal by ss 232 or 241 of the SSMA.

45 Ms Maroya submitted that the power to make an order for compensation arises from s 29 of the Civil and Administrative Tribunal Act which provides:

29 General jurisdiction

(1) The Tribunal has general jurisdiction over a matter if:

- (a) legislation (other than this Act or the procedural rules) enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter, and
- (b) the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal.

[Note omitted]

(2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its general jurisdiction:

- (a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings,
- (b) the jurisdiction to exercise such other functions as are conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of such proceedings.
- (3) A general decision of the Tribunal is a decision of the Tribunal determining a matter over which it has general jurisdiction.
- (4) A general application is an application made to the Tribunal for a general decision.
- (5) Nothing in this section permits general jurisdiction to be conferred on the Tribunal by a statutory rule unless the conferral of jurisdiction by such means is expressly authorised by another Act.

- 46 There is nothing in that section which might, even arguably, confer upon the Tribunal jurisdiction to award compensation to a lot owner in a Strata Scheme for a breach by another lot owner of a by-law of the Strata Scheme.
- 47 The decision of the Court of Appeal in *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270 would tend to suggest that no action for damages is available in respect of a breach of a by-law, even in a court of general jurisdiction. The Court of Appeal in that case determined at [222] that a breach of s 26 of the *Strata Schemes Management Act 1996* (NSW) (which required an owners corporation to maintain common property) did not give rise to an action for damages for breach of statutory duty.
- 48 That specific conclusion has been reversed by virtue of s 106(5) of the SSMA, but the reasoning of the Court would suggest that, in the absence of specific provision, a breach of a by-law will not give rise to an action for damages for breach of statutory duty.
- 49 In any event, any such action would need to be brought in a court of general jurisdiction. The Tribunal has no jurisdiction to hear or determine such an action.
- 50 I also note that Ms Feletti claimed the cost of accommodation at the Hydro Majestic Hotel and two other venues in the Blue Mountains, at Barrenjoey House at Palm Beach, and at Crown Plaza, Terrigal.
- 51 The booking of accommodation at tourist destinations is not necessarily inconsistent with that accommodation being for respite from noisy conditions at home but I am not persuaded that Ms Feletti did not take the opportunity to

enjoy a holiday or that the amount expended by Ms Feletti on the “alternative” accommodation was reasonable. Ms Feletti provided no evidence to suggest that she could not find cheaper alternative accommodation.

Mr Eales’ Application

52 I turn to deal with Mr Eales’ application.

53 Mr Eales’ claim was effectively that Ms Feletti had committed a nuisance by harassing Mr Eales’ tenants. The Tribunal has no jurisdiction over such a claim. It cannot be said that the conduct alleged by Mr Eales against Ms Feletti, calling the Police and making complaints, itself constitutes a breach of any by-law. There is no other basis upon which it could be said that the Tribunal has jurisdiction.

54 Accordingly both applications will be dismissed.

55 I note that as both parties were granted leave to be legally represented on condition that neither party make an application for costs, I need not be concerned with any application for costs.

Orders

Proceedings SC 18/21384

(1) Application dismissed.

Proceedings 18/34455

(2) Application dismissed.

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

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