Civil and Administrative Tribunal

New South Wales

Case Name:	Strata Committee of Owners Corporation SP 75226 v Ison
Medium Neutral Citation:	[2018] NSWCATAP 2
Hearing Date(s):	12 October 2017
Date of Orders:	3 January 2018
Decision Date:	3 January 2018
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member J Currie, Senior Member
Decision:	Appeal dismissed.
Catchwords:	APPEAL - Strata scheme management - keeping of animals - consent - consent unreasonably withheld - no issue of principle
Legislation Cited:	Civil and Administrative Tribunal Act 2013 No 2 (NSW), s 80(2)(b) Strata Schemes Management Act 1996 (NSW), s 49(4) Strata Schemes Management Act 2015 (NSW), s 157
Cases Cited:	Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; HCA 33 Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430 Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390; HCA 32 Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Qushair v Raffoul [2009] NSWCA 329 Stoker v Adecco Gemuale Constructions Pty Ltd [2004] NSWCA 449

	The Australian Gas Light Company v Valuer-General (1940) 40 SR (NSW) 126 Wesiak v D & R Constructions (Aust) Pty Ltd [2016] NSWCA 353 Whisprun Pty Ltd v Dixon (2003) 77 ALJR 1598; HCA 48
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Strata Committee of Owners Corporation SP 75226 (Appellant) Michael Ison (First Respondent) Maureen Ison (Second Respondent)
Representation:	Gerry Solomon (Appellant) In Person (Respondent)
File Number(s):	AP 17/31290
Publication Restriction:	Unrestricted
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	14 June 2017
Before:	K Ross, Senior Member
File Number(s):	SC 17/04873

REASONS FOR DECISION

1 This is an appeal from a decision of the Tribunal which ordered that the respondents may keep two particular dogs on their strata title lot subject to certain conditions.

2 For the reasons that follow we are of the opinion that the appeal should be dismissed.

Background

3 The appellant is the body corporate of a strata scheme in Forster, New South Wales consisting of 22 lots.

4 The respondents own one lot in that strata scheme.

5 Some of the lots are owner occupied, some are owned by investors who do not reside at the property. Some of those owner occupiers are elderly, some have disabilities, some are both elderly and have disabilities.

6 The strata scheme by-laws provided:

> **16. Keeping of animals**
>
> (1) Subject to section 49(4), an owner of a lot must not, without the prior written approval of the owners corporation keep any animal (except fish kept in a secure aquarium on the lot) on the lot or the common property.
>
> (2) The owners corporation must not unreasonably withhold its approval of the keeping of an animal on a lot or common property

7 The reference to s 49(4) in clause 16(1) of the by-laws is a reference to s 49(4) of the *Strata Schemes Management Act 1996* (NSW). That sub-section provided:

> **By-law cannot prevent keeping of guide dog**
>
> A by-law has no force or effect to the extent to which it purports to prohibit or restrict the keeping on a lot of a dog used as a guide or hearing dog by an owner or occupier of the lot or the use of a dog as a guide or hearing dog on a lot or common property.

8 The Strata Schemes Management Act 1996 was repealed by s 275 (a) of the Strata Schemes Management Act 2015 (NSW) ("SSMA") with effect from 30 November 2016.

9 The strata scheme by-laws continue to bind the strata scheme notwithstanding the change in the statute, albeit the reference to s 49(4) in clause 16 of the by-laws may now be disregarded.

10 The respondents used their lot for holiday rentals for about 20 weeks per year, and visited and occupied it for periods during the balance of the year. They planned to retire and spend more time at their lot.

11 In September 2015, they acquired two young Cavoodle dogs. Cavoodles are a small statured breed. Thereafter, the respondents took their dogs to their Forster lot from time to time.

12 In February 2016, when the respondents were at their Forster lot with their dogs, a complaint was made that the dogs had been yapping intermittently over a period of a few days, and culminated in what the appellant described as a "full-on continuous bark-fest" lasting about 1½ hrs from 9 – 10.30 pm one night. This noise disturbed a number of occupiers of the strata scheme.

13 A complaint was made in writing to the respondents. They were informed that they did not have permission from the appellant to keep their dogs on their lot, and were in breach of clause 16 of the by-laws. They were requested to remove their dogs.

14 Nothing then then occurred until November 2016 when the strata scheme's managing agent wrote to the respondents to say that they had been notified that the respondents had taken the dogs to the property again, no approval had been granted by the appellant to do so, and that they should request permission from the appellant should they wish to take the dogs to their lot.

15 On 9 November 2016, the respondents, in writing, sought consent from the appellant to keep their dogs at their lot.

16 On 30 November 2016, the strata scheme's managing agent wrote to the respondents and said that all members of the owners corporation had been invited to advise the appellant in writing of their wishes in relation to the sought-after consent. It was said that 10 votes were against the granting of consent, three were in favour, and therefore the consent sought by the respondents was refused.

17 On 27 January 2017, the respondents commenced proceedings in the Tribunal having been unsuccessful in mediating their dispute with the appellant earlier that month.

18 The respondents sought orders under s 157 of the SSMA. That section provided:

> **Order permitting keeping of animal**

> (1) The Tribunal may, on application by the owner or occupier (with the consent of the owner) of a lot in a strata scheme, make an order declaring that the applicant may keep an animal on the lot or common property.
>
> (2) The Tribunal must not make the order unless it is satisfied that:
>
> (a) the by-laws permit the keeping of an animal with the approval of the owners corporation and provide that the owners corporation cannot unreasonably withhold consent to the keeping of an animal, and
>
> (b) the owners corporation has unreasonably withheld its approval to the keeping of the animal on the lot or common property.

19 Clause 16 of the by-laws, set out at [6] above, satisfied s 157(2)(a) because it permitted the keeping of an animal with the approval of the appellant, and provided that consent could not be unreasonably withheld.

20 Therefore, the Tribunal had jurisdiction to make an order under subs (1) provided the respondents proved that the consent had been unreasonably withheld per subs (2)(b).

21 Thus, there were two issues before the Tribunal. The first was whether the appellant had unreasonably withheld its consent. If the Tribunal found that consent had been unreasonably withheld, the second issue arose as to whether an order under subs (1) should be made.

22 Those two issues, although legally distinct, were factually related because both involved, amongst other things, the dogs' behaviour insofar as that behaviour may or may not have affected other lot owners.

23 On 28 March 2017, and prior to the hearing of the respondents' application, a meeting of the owners corporation was held to consider a motion to change the by-laws to adopt a no-pet by-law. That motion was defeated.

24 The Tribunal heard the proceedings and found in favour of the respondents in a written decision dated 14 June 2017.

25 In that hearing, the appellant argued that the majority of lot owners did not want pets in the building, and that 67% of the lot owners who resided full-time in the strata scheme had disabilities or age-related conditions which might be affected by the presence of pets in the building. The appellant said that a number of lot owners bought into the strata scheme because of its no-pet

policy. The appellant also said that it was concerned that if approval was given a precedent would be set and the strata scheme would lose its no-pet status.

26 At the hearing, there was evidence that the owner of another lot had been granted permission by the appellant to keep a dog in her lot for not more than a week at a time in school holidays and on certain conditions.

The Tribunal's Reasons

27 The Tribunal noted the respondents' evidence that the two dogs lived without complaint in the respondents' townhouse in Sydney, and that the respondents were confident that the dogs would not cause any interference or nuisance to other lot owners or occupiers. The Tribunal recorded that the respondents were prepared to agree to conditions similar to those imposed on the other owner (who had been granted permission to keep her dog on her lot for certain periods) together with two further conditions, namely:

(1) the dogs would not be on common property except to travel from the basement car park to the respondents' lot; and

(2) whilst on common property the dogs would be kept on a short leash.

28 Although not stated expressly, it is apparent that the Tribunal accepted the respondents' evidence that the two dogs lived without complaint in the townhouse in Sydney.

29 The Tribunal was satisfied that the reasons given by the appellant for refusing consent were unreasonable. The Tribunal dismissed the contention that some lot owners had bought into the strata scheme because of its no-pet policy because there was, in fact, no by-law to that effect. To the contrary, clause 16 of the by-laws did allow for pets as long as the appellant granted its consent (such consent not to be unreasonably withheld). The Tribunal said therefore, that to the extent that the owners corporation operated on the basis there was a no-pet policy, its refusal of consent was unreasonable.

30 The Tribunal said that the appellant had also refused consent on the basis that approval would place other residents at risk of falls, either by entanglement in the dogs' leashes, or slippage in wet patches left on common property, and were at risk of allergic reactions to the dogs' dander (material shed from the body, similar to dandruff).

31 The Tribunal said that if the dogs were restrained to travelling directly from the car park to the respondents' lot, it was hard to see that there would be any real risk of entanglement, and if the respondents were required to clean up immediately if the dogs soiled any common property, that risk would be effectively mitigated.

32 The Tribunal said that if the dogs were kept within the respondents' lot the risk to other lot owners' health from dander would be minimal. The Tribunal noted there was no evidence of any adverse reactions arising from the other owner's dog, nor was there any evidence that any of the other issues raised by the appellant (such as the risk of entanglement or slippage in wet patches) arising from the keeping of that other dog on a lot in the strata scheme from time to time.

33 The Tribunal said that, taking all of those matters into account, it was satisfied that the appellant's refusal of consent was unreasonable.

34 The Tribunal did not, at least expressly, separately address the two issues before it, namely, whether the refusal of consent was unreasonable, and if so, whether the Tribunal should then make an order allowing the respondents to keep their dogs on their lot.

35 However, a fair reading of the Tribunal's reasons reveals that it did consider both issues, albeit perhaps simultaneously. It is apparent the Tribunal considered that an order should be made allowing the respondents to keep their dogs on their lot, subject to conditions, because the Tribunal was not satisfied there was any real risk of injury or disturbance to owners or occupiers of the strata scheme.

Grounds of Appeal

36 The grounds of appeal as they appear in the Notice of Appeal were:

(1) The Tribunal accepts Applicant's (respondent's) (sic) alleged evidence that the dogs live without complaint in a Sydney Townhouse BUT appears to ignore contrary evidence that the dogs have already caused nuisance through barking which caused Strata Management to order their removal from (the respondents' lot).

(2) Real Health and Safety threats are minimised in the face of strong documentary evidence of their importance.

(3) Undemocratic treatment of Resident concerns in favour of absentee investor wants.

37 Those three grounds were repeated, in the Notice of Appeal, as reasons why the Appeal Panel should grant leave to appeal from the Tribunal's decision.

38 In the section of the Notice of Appeal dealing with an application for leave to appeal on grounds other than questions of law, the appellant said that the decision below was not fair or equitable. Particulars of this allegation were contained in Attachment 3 to the appellant's written submissions. We shall discuss Attachment 3 in relation to Ground 3 below.

39 The appellant also said that the decision below was against the weight of evidence. The appellant said the Tribunal should have given more weight to the history of bad behaviour of the dogs, and the "strong documentary evidence" of health and safety issues potentially detrimentally affecting residents.

40 This documentary evidence consisted of a number of newspaper and other articles and publications adverting to health risks arising from pet dander (which may cause allergic reactions in some people) and the possibility of people (and particularly elderly or disabled people) tripping over dogs, dog-leashes or dog excreta, and thus potentially sustaining serious injuries.

Ground 1

41 The first ground of appeal raises for our consideration two questions of law:

(1) whether the Tribunal's reasons were adequate;[1] and

(2) a contention that there was no evidence to support a primary fact, being that there was no evidence that the two dogs lived without complaint in a Sydney townhouse.[2]

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[1] A failure to provide proper reasons is a question of law: Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 citing Stoker v Adecco Gemuale Constructions Pty Ltd [2004] NSWCA 449 per Santow JA at [41]; Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430 at 444 per Meagher JA; Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110 at [56] per McColl JA (Ipp JA and Bryson AJA agreeing); Qushair v Raffoul [2009] NSWCA 329 at [52] ff, per Sackville AJA (Campbell JA and Bergin CJ in Eq agreeing).

[2] Whether there was no evidence to support primary facts, or inferences upon which an ultimate finding of fact was based, is a question of law - Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390; HCA 32 at [91]; Wesiak v D & R Constructions (Aust) Pty Ltd [2016] NSWCA 353 at [62]; Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 355-6; HCA 33, The Australian Gas Light Company v Valuer-General (1940) 40 SR (NSW) 126 at 13.

42 In substance, the appellant says that the Tribunal erred in that it did not refer to significant evidence, that being the evidence that the dogs had caused a noise disturbance in February 2016. The appellant also says that the respondents' evidence that the two dogs lived without complaint in a townhouse in Sydney was "unsupported by any submissions". We take it that the appellant means unsupported by any evidence, or at least unsupported by any independent, corroborative evidence.

43 Dealing with the first question of law, in Whisprun Pty Ltd v Dixon (2003) 77 ALJR 1598; HCA 48 the majority (Gleeson CJ, McHugh and Gummow JJ) said at [62]:

> "A judge's reasons are not required to mention **every fact** or argument relied on by the losing party as relevant to an issue. Judgments of trial judges would soon become longer than they already are if a judge's failure to mention such facts and arguments would be evidence that he or she had not properly considered the losing party's case."
>
> [Our emphasis]

44 This statement was further explained in *Baker v David* [2015] NSWCA 235 by Meagher JA, with whom McColl JA and Sackville AJA agreed at [24]. His Honour said

> "In Whisprun Pty Ltd v Dixon [2003] HCA 48; 77 ALJR 1598 at [62] - [63] Gleeson CJ, McHugh and Gummow JJ described the trial judge's obligation properly to consider a party's case as a "paramount judicial duty". That does not mean that the judge has to deal with every argument and issue that might arise in the course of a case. However, "where an argument is substantial or an issue is significant, it is necessary to refer to and assign reasons for the rejection of the argument or the resolution of the issue": per Nettle JA (Batt and Vincent JJA agreeing) in Hunter v Transport Accident Commission [2005] VSCA 1; 43 MVR 130 at [21]."

45 What Meagher JA said in the quote above in relation to substantial or significant arguments and issues applies equally to evidence, as *Whisprun* included facts (and thus evidence of facts) in its analysis. So much is clear from the judgment of Santow JA, with whom Mason P and Sheller JA agreed, in *Stoker v Adecco Gemvale Constructions P/L and Anor* [2004] NSWCA 449 at [41]. In that passage, his Honour said:

> "Without adequate reasons, justice has not been seen to be done, so that failure to give adequate reasons may be an error of law: Pettit v Dunkley [1971] 1 NSWLR 376; Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247 at 278–9 per McHugh JA, Mifsud v Campbell (1991) 21

> NSWLR 725; Beale v Government Insurance Office of New South Wales (1997) 48 NSWLR 430. But the duty does not require the trial judge to spell out in minute detail every step in the reasoning process or refer to every single piece of evidence. It is sufficient if the reasons adequately reveal the basis of the decision, expressing the specific findings that are critical to the determination of the proceedings.
>
> [Our emphasis]

46 This ground of appeal should only be accepted where the record of the hearing or other evidence persuasively suggests the Tribunal did not properly consider the appellant's case. In *Whisprun* at [63] the majority said

> "To suggest that a trial judge has not properly considered a party's case is a serious charge. Such a suggestion should be accepted only when the record of the trial or other evidence persuasively suggests that the judge failed to discharge that paramount judicial duty."

47 We are not persuaded the Tribunal did not properly consider the appellant's case in relation to the evidence of the noise disturbance in February 2016.

48 True it is that the evidence of that earlier noise disturbance is not expressly referred to in the Tribunal's reasons. But that evidence was not, in context, of great significance. It was not "strong conflicting evidence" as the appellant described it.

49 That is because the disturbance happened on one occasion (in February 2016). There was, as Mr Solomon acknowledged, no evidence of any further disturbances by the dogs – in relation to noise or otherwise - between that occasion and the refusal of consent (in November 2016), nor before the hearing in the Tribunal in June 2017.

50 In other words, insofar as the appellant was concerned about noise, between February 2016 and June 2017, a period of some 16 months, there had been no further complaints about the respondents' dogs making any disturbing noise.

51 This is consistent with the Tribunal's express reference to the dogs living without complaint in a Sydney townhouse, the Tribunal's acceptance of that evidence.

52 Therefore, in our opinion, the Tribunal's reasons adequately revealed the basis of its decision.

53 As for the second question of law, there *was* evidence before the Tribunal that the two dogs lived without complaint in a Sydney townhouse. That was the oral evidence given by the respondents. It is apparent that that evidence was accepted by the Tribunal as being both honest and accurate.

54 No independent corroborative evidence was necessary, especially in light of the fact that there was no evidence to the contrary.

55 We reject Ground 1.

Ground 2

56 Ground 2 says that the Tribunal minimised real health and safety threats in the face of strong documentary evidence of their importance.

57 This ground does not raise a question of law, and the appellant would need leave to appeal on this ground because of the terms of s 80(2)(b) of the *Civil and Administrative Tribunal Act 2013 No 2* (NSW) which says:

> **80 Making on internal appeals**
>
> (2) Any internal appeal may be made:
>
> (a) ...
>
> (b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance — as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

58 This is an appeal from a Commercial and Consumer Division decision of the Tribunal. Accordingly, any application for leave to appeal is governed by clause 12 of Schedule 4 of the NCAT Act. Clause 12 says:

> **12 Limitations on internal appeals against Division decisions**
>
> (1) An Appeal Panel may grant leave under section 80 (2) (b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:
>
> (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 has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).
>
> [Our emphasis]

59 In this case we are not persuaded that the appellant may have suffered a substantial miscarriage of justice.

60 That is because the Tribunal did not, as the appellant says, *minimise* the health and safety risks, nor did the Tribunal consider them unimportant. What the Tribunal found was that the *likelihood* of those risks eventuating was not significant.

61 At least impliedly, the Tribunal accepted such risks existed. But the Tribunal pointed out that there was no evidence that any occupier had suffered allergic reactions to the other owner's dog, nor indeed was there any evidence that dander from the respondents' dogs, confined to their owners' lot except for brief transits through the common areas, had caused a single instance of an allergic reaction.

62 Similarly in relation to falls. There was no evidence of a single fall resulting from entanglement of leashes or slippage on wet patches. That is not to say that there was not, and is not, some risk of such falls occurring, just that the Tribunal considered the likelihood of that risk eventuating, in circumstances of the conditions imposed on the respondents, and in light of the evidence, to be minimal.

63 The appellant did not submit that there was any error in the Tribunal's finding that the *likelihood* of entanglement was "hard to see" and the likelihood of allergic reactions was "minimal". Therefore, there is no challenge to those findings on this appeal.

64 Accordingly, we refuse leave to appeal on Ground 2.

Ground 3

65 Ground 3 says that Tribunal erred in its undemocratic treatment of resident concerns in favour of absentee investor wants.

66 That ground is further explained in Attachment 3 of the appellant's submissions, where the appellant refers to an owners corporation meeting of 28 March 2017 at which a motion to pass a by-law to introduce a no-pets policy was defeated. The appellant submits that even though the votes at that meeting were such that the motion was defeated, a significant proportion of

votes against the motion came from investor owners and not owner occupiers, and one owner occupied who voted against the motion had their lot listed for sale. It was submitted that this decision was therefore “not democratic”.

67 This ground does not raise a question of law, not any other ground of appeal.

68 It is true that the Tribunal referred to this meeting and its outcome in its reasons, but that was simply part of the history of the dispute between the parties. The Tribunal did not rely upon the outcome of this meeting in its reasoning. Nor would that meeting, or its outcome, have been relevant to the two issues the Tribunal had to determine (which we have set out at [21] above).

69 As Ground 3 does not raise any ground of appeal, we reject it.

Orders

70 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