Civil and Administrative Tribunal

New South Wales

Case Name:	Andelman v Small
Medium Neutral Citation:	[2020] NSWCATAP 32
Hearing Date(s):	20 January 2020
Date of Orders:	5 March 2020
Decision Date:	5 March 2020
Jurisdiction:	Appeal Panel
Before:	K Rosser, Principal Member G Curtin SC, Senior Member
Decision:	(1) Appeal dismissed.
Catchwords:	LAND LAW – strata title – obligations of owners and occupiers - by-laws – transmission of noise
Legislation Cited:	Strata Schemes Management Act 2015 (NSW), ss 232, 241.
Cases Cited:	Felcher v The Owners – Strata Plan No 2738
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Natalie Andelman (Appellant) Deborah Small (Respondent)
Representation:	Appellant (Self Represented) Respondent (Self Represented)
File Number(s):	AP 19/47821
Publication Restriction:	Nil
Decision under appeal:	

Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	25 September 2019
Before:	L Wilson, Senior Member
File Number(s):	SC 19/34361

REASONS FOR DECISION

1 This is an appeal by one lot owner (the appellant) from a decision of the Tribunal ordering her to ensure all floor space within her lot (with some exceptions) is covered or treated (sound-proofed) to an extent sufficient to prevent the transmission of noise likely to disturb the peaceful enjoyment of the lot below hers, being the lot owned by the respondent.

2 For the reasons that follow the appeal must be dismissed.

Background

3 The appellant and defendant each own a lot in a block of units in the eastern suburbs of Sydney. The appellant's lot is situated immediately above the respondent's lot.

4 The strata scheme of which the parties' lots form part is governed by certain by-laws.

5 By-law 14 provides that the owners of lots in the strata scheme must ensure that all floor space within each lot, other than in kitchens, laundries, lavatories or bathrooms, 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.

6 The respondent brought a number of applications against the appellant asserting that the amount of noise being transmitted from the floor space from the appellant's lot was sufficient to disturb the peaceful enjoyment of the owner or occupier of the respondent's lot.

7 The respondent filed an interim (SC 19/18845) and a substantive (SC 19/18845) application on 24 April 2019.

8 On 17 July 2019 the following orders were made in the substantive proceedings:

(1) The proceedings are finalised in view of the (respondent's) tenants abandoning (the respondent's lot) on 3 July 2019.

(2) The (respondent) is to decide whether to obtain an acoustic report and proceed against the (appellant) for an order to comply with by-law 14 and by-law 1.

(3) The (appellant) undertakes to give the (respondent's) acoustic expert access at 72 hours notice.

9 The appellant commenced the proceedings from which this appeal arises later in July 2019. In these proceedings the respondent sought orders that the appellant was in breach of, and should comply with, by-law 14.

10 Shortly thereafter an acoustic expert retained by the respondent, Mr Colla, attended the appellant's premises by arrangement with the appellant on 9 August 2019.

11 Mr Colla first attended the respondent's lot and made some observations of noise seemingly emanating from the appellant's lot. He then attended the appellant's lot. When Mr Colla arrived the appellant's mother and father were present, but the appellant was not. The appellant's parents admitted Mr Colla but would not permit him to conduct his acoustic tests. Mr Colla then left.

12 After hearing the evidence presented to it the Tribunal was satisfied that the respondent had made good her case. That evidence included testimony (accepted by the Tribunal) from a former tenant of the respondent's lot, Mr Colla and the respondent.

13 The Tribunal therefore granted that application and made the order referred to at [1] above pursuant to the provisions of the *Strata Schemes Management Act 2015* (NSW) and particularly ss 232 and 241.

Grounds

14 The appellant appeals on the following grounds:

(1) The Tribunal erred in allowing evidence from the former tenant.

(2) The Tribunal erred in failing to consider the appellant's evidence (refuting the respondent's evidence of noise).

(3) The Tribunal erred in drawing an inference that, had Mr Colla been permitted to conduct his acoustic tests and report on those tests, that report would not have proved that the appellant makes no noise in her lot which is not transmitted to the respondent's lot.

(4) The Tribunal erred in failing to find that the noise in the appellant's lot was unreasonable or excessive.

(5) The Tribunal erred in failing to comprehend that any order should be based on objective evidence.

Ground 1

15 The appellant contends that the Tribunal erred in allowing evidence from the former tenant on two bases. First, the appellant submits that the orders made on 17 July 2019 (set out at [8] above) had the effect that any new application to be made by the respondent "could only be supported by a noise report". Second, the admission of the former tenant's evidence was procedurally unfair to the appellant because "she had understood that none of this evidence could be relied on" by the respondent.

16 We reject the first submission for two reasons.

17 First, the terms of the orders made on 17 July 2019 plainly do not mean that, absent an acoustic expert's noise report, any fresh application brought by the respondent must fail. The orders contemplate that the respondent may obtain a noise report, but do not say that the obtaining of such a report is a pre-condition to the bringing or success of fresh proceedings.

18 Second, even if the appellant's submission was correct, the Tribunal found that the appellant (through the actions of her parents) prevented the respondent obtaining a noise report. This was an inexcusable breach of her undertaking given to the Tribunal on 17 July 2019. We could not allow the appellant to rely upon the absence of a noise report when that absence was caused by herself, as to do so would be to visit a rank injustice upon the respondent.

19 We reject the appellant's second submission for two reasons.

20 First, because the appellant has not identified anything said or done by the respondent or the Tribunal which could have given rise to such an

understanding. Nor is there anything in the material before us which could have given rise to such an understanding.

21 Second, no objection along these lines was taken at the hearing, and it would not be just to allow the appellant to take this new point for the first time on appeal.

22 We reject Ground 1.

Ground 2

23 The appellant contends that the Tribunal erred in failing to consider the appellant's evidence (refuting the respondent's evidence of noise).

24 The appellant submits that she led evidence of contested AVO proceedings against the former tenant, various police reports, complaints from other residents in the building, "breaches of by-laws that she was not a truthful witness" and that the respondent had made the noise complaints as part of the acrimonious dispute between them. The appellant submits that none of that evidence is referred to in the decision despite it being in the file before the Tribunal.

25 We reject the appellant's submissions for two reasons.

26 First, material being on the Tribunal's file (in this case as result of directions to lodge with the Tribunal and serve on any opposing party the material upon which a party intends to rely) does not mean that that material is automatically considered by the Tribunal at a hearing.

27 To have material considered at a hearing a party must, as is explained to them, identify that material at the hearing and *tender it*. Doing so at the hearing serves the interests of justice because it provides an opposing party the opportunity to object to some or all of that material (if they submit that it should not be considered by the Tribunal), and to identify to any opposing party and the Tribunal the precise material upon which a party intends to rely in attempting to make good the party's case.

28 The appellant has not satisfied us that the material she refers to in her submissions was ever tendered to the Tribunal below. It appears from the Tribunal's careful and detailed reasons that all evidence tendered on behalf of

the appellant was identified and considered. The appellant did not provide a transcript or sound recording of the proceedings below (as she was directed to do if she intended to rely upon it) to demonstrate that the material to which she refers was, indeed, tendered.

29 Second, the appellant has not persuaded us that any of the material she has identified did refute the respondent's evidence of noise, nor that it was put to the respondent in cross-examination. Rather, the material seems to address collateral issues (such as AVO proceedings) rather than the central question in the case namely, whether noise was being transmitted through the floor of the appellant's lot into the respondent's lot and that that noise likely to disturb the peaceful enjoyment of the owner or occupier of the respondent's lot.

30 We reject Ground 2.

Ground 3

31 The appellant contends that the Tribunal erred in drawing an inference that, had Mr Colla been permitted to conduct his acoustic tests and report on those tests, that report would not have proved that the appellant makes no noise in her lot which is not transmitted to the respondent's lot.

32 The appellant submits that the Tribunal made a finding that she was in breach of by-law 14 based on two inferences, neither of which supported the Tribunal's conclusion. The two identified inferences were said to be: the appellant's undertaking to provide access to an acoustic expert; and her failure to abide by that undertaking.

33 We reject this submission.

34 First, it is factually wrong. The Tribunal did not limit its reasoning to two inferences. It based its finding on the evidence Mr Colla did give of his observations made when he attended the premises (such as the audibility of the noise he heard whilst in the respondent's lot, such noise coming from the appellant's lot), the respondent's evidence, the former tenant's evidence and the absence of any evidence being given by the appellant.

35 Second, although the inference drawn – that the report would not have assisted the appellant's case – is not of the usual kind of *Jones v Dunkel*

inference known to lawyers (that evidence from a witness a party would be expected to call would not assist that party), we can see no error in the Tribunal drawing an inference that the report would not have assisted the appellant. In any event, the inference is benign.

36 The respondent bore the onus of proving that the level of noise being transmitted through the floor of the appellant's lot into the respondent's lot was likely to disturb the peaceful enjoyment of the owner or occupier of the respondent's lot. The Tribunal held that the respondent had satisfied that onus by reason of the evidence we have referred to at [34] above. Whether or not the report would have assisted the appellant is, to that extent, a moot point.

37 We reject Ground 3.

Ground 4

38 The appellant contends that the Tribunal erred in failing to find that the noise in the appellant's lot was unreasonable or excessive.

39 The appellant submitted that normal living noise emanating from an apartment that is home for a six-year-old and his mother would not be a breach of the by-law. The appellant submits the noise must be excessive to be considered a contravention. The appellant submitted that she had put down carpets in the bedroom and loungeroom, and denied she wore high heels or that a child bounced a ball in the apartment.

40 We reject these submissions.

41 The plain words of the by-law state that the appellant must ensure that all floor space within her lot, other than in the kitchen, laundry, lavatories or bathrooms, 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 the respondent's lot.

42 The test, as the by-law says, is whether the noise being transmitted is "likely to disturb the peaceful enjoyment" of the lot beneath, not whether the noise is "normal living noise", or "excessive" or caused by high heels or bouncing balls.

43 On the evidence provided to the Tribunal, which the Tribunal accepted, there was noise being transmitted which was likely to disturb the peaceful enjoyment

of the respondent's lot. Accordingly, the test posed by the by-law was satisfied. Therefore, the appellant is required to take steps to comply with the by-law.

44 It should be noted that the appellant did not give evidence to the Tribunal, nor did she obtain and tender an acoustic expert's report which may have disproved the respondent's case. But the appellant made a decision not to provide that evidence (assuming it would have assisted her case) and cannot now he heard to complain when the Tribunal accepted the evidence led by the respondent, particularly when it was the appellant who chose to ignore her own undertaking to allow access to the respondent's acoustic expert.

45 We reject Ground 4.

Ground 5

46 The appellant contends that the Tribunal erred in failing to comprehend that any order should be based on objective evidence.

47 The appellant submits that the test whether the by-law is being breached is objective, not subjective.

48 We accept the appellant's submissions that the test is objective but reject the appellant's submissions that the Tribunal below did not apply this objective test. A fair reading of the Tribunal's reasons indicates that the Tribunal did apply the objective test.

49 But that does not mean that subjective evidence may not be given to the Tribunal, as it was in this case, just that the Tribunal must then assess that evidence to determine whether, objectively, the by-law has been breached.

50 The appellant cited *Felcher v The Owners – Strata Plan No 2738* at [31]. In that paragraph the Appeal Panel said:

> "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."

51 The paragraph cited from *Felcher* does not cite a principle that must be followed. It simply says that in that case the uncorroborated evidence of Mr Felcher was not sufficient to prove his case. What will be sufficient evidence will vary from case to case as each case will involve different circumstances.

52 In any event, in the present case the respondent's evidence was corroborated by the evidence of Mr Colla and the former tenant. Mr Colla's observations of noise were not as weighty as perhaps a report from him following tests using his equipment and expertise, but his observations of noise were from a person with expertise in the area and so his observations were perhaps more weighty than those of the lay witnesses.

53 Of course, the paragraph from *Felcher* relied upon by the appellant speaks of an acoustic expert's report, but the absence of such evidence in this case is the result of the appellant's breach of her undertaking, and she, rather than the respondent, must bear the consequences of that action.

54 We reject Ground 5.

Orders

(1) We order that the appeal be 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

Amendments

05 March 2020 - Typographical Error