



Civil and Administrative Tribunal

New South Wales

Case Name: Bell v Butterfield

Medium Neutral Citation: [2020] NSWCATAP 271

Hearing Date(s): 13 October 2020

Date of Orders: 18 December 2020

Decision Date: 18 December 2020

Jurisdiction: Appeal Panel

Before: P Durack, Senior Member
M Gracie, Senior Member

Decision:

1. The appeal is allowed.
2. The order made on 18 June 2020 is set aside.
3. The proceedings are remitted to a differently constituted Tribunal for a new hearing and redetermination of the application in accordance with the evidence already adduced to the Tribunal and such further evidence as the Tribunal may allow.

Catchwords: LAND LAW — Strata title - Strata Schemes Management Act 2015 - use or enjoyment of common property and lot – video cameras installed by lot owner inside lot, not on common property - no finding that interference by appellant was unreasonable under s 153 (1) Strata Schemes Management Act 2015 - question of law - nuisance - absence of reasons.

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Strata Schemes Management Act 2015 (NSW)
Surveillance Devices Act 2007 (NSW)

Cases Cited: Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd [2010] FCAFC 94; (2010) 186 FCR 410
Prendergast v Western Murray Irrigation Ltd [2014]

NSWCATAP 69
The Owners Strata Plan No 2245 v Veney [2020]
NSWSC 134.

Texts Cited: None cited

Category: Principal judgment

Parties: Philip Bell (Appellant)
Valerie Butterfield (Respondent)

Representation: Appellant (Self-Represented)
Respondent (Self-Represented)

File Number(s): AP 20/30136

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 18 June 2020

Before: K Ross, Senior Member

File Number(s): SC 20/14468

REASONS FOR DECISION

Background

- 1 The appellant, Mr Philip Bell, has lodged an appeal from a decision of the Consumer and Commercial Division of the Tribunal ordering him to remove cameras and recording equipment found by the Tribunal to have been installed without the authorisation of the Owners Corporation (OC) of Strata Plan (SP) 22836 and which was found to have been used by the appellant to engage in unauthorised surveillance of the common property of the SP.

- 2 The appellant is the owner of Lot 2 of the SP and represented himself before the Tribunal and on the appeal.
- 3 The respondent, Ms Valerie Butterfield is the Owner of Lot 3 of the SP. Ms Butterfield also represented herself before the Tribunal and on the appeal.
- 4 For the reasons which follow, we have decided to allow the appeal and that the whole of the matter should be remitted to the Tribunal for re-determination after a new hearing based upon the evidence already presented to the Tribunal and such further evidence that the Tribunal may allow.

The Tribunal's Decision

- 5 Importantly, the Tribunal concluded that, whilst the cameras had, originally, been installed on common property, it could not find that any of the cameras were now attached to common property (after the appellant had moved them inside his lot). It found, however, that the appellant had accessed common property to install them.
- 6 The Tribunal found that the cameras had been installed without the consent of the OC and that the appellant had refused two requests by the OC to remove them from the common property and only removed them into his lot when the respondent filed her application in the Tribunal.
- 7 The Tribunal found that two cameras installed by the appellant were "optical surveillance devices" for the purpose of the *Surveillance Devices Act 2007* (NSW) (the SDA). The Tribunal acknowledged that it did not have jurisdiction to enforce the SDA.
- 8 The core conclusion of the Tribunal was as follows:

In all the circumstances the Tribunal is satisfied that the respondent's installation and use of surveillance cameras, even though installed within his lot, to film the common property of the scheme without the consent of the Owners Corporation interferes with the applicant's use and enjoyment of the common property and of her lot.
- 9 The Tribunal made no reference to any by-law that required OC approval for installation of the cameras within a lot.
- 10 Although there was no express reference in the Tribunal's decision to the provision of the *Strata Schemes Management Act 2015* (**SSMA**) that it was

applying, it appears that s 153 of the SSMA was the provision which the Tribunal was considering.

- 11 As will be seen below, having, apparently, found that there was no nuisance to the respondent as the occupier of lot 3 (and with which s 153(1)(a) is concerned), the Tribunal appears to have made its findings having regard to both ss 153(1)(b) and (c). Section 153(1) subparagraph (b) is directed to an owner's use of the common property in a manner or for a purpose that "interferes unreasonably" with another person's use or enjoyment of the common property and sub-paragraph (c) applies the same standard and test but in respect of an occupier's use or enjoyment of their (or another occupier's) lot.
- 12 The Tribunal made reference to two decisions of the Tribunal concerning surveillance cameras, namely *Ghabour v The Owners-Strata Plan No. 53284* [2019] NSWCATCD 18 and *Lai v Community Association DP 270214* [2016] NSWCATCD 58. However, those decisions were concerned with cameras installed on common property and the Tribunal did not explain how it applied those decisions in reaching the conclusions that it did.
- 13 The Tribunal also concluded that it was probable that the original installation of the cameras on common property was done in breach of s8 of the *Surveillance Devices Act* (2007) NSW because it had involved entry onto the common property without the consent of the owners of that property. However, the Tribunal did not explain how such breach was relevant to the conclusions that it reached.

Strata Schemes Management Act 2015

14 Section 153 of the SSMA provides:

- (1) Owners, occupiers and other persons not to create nuisance
 - (1) An owner, mortgagee or covenant chargee in possession, tenant or occupier of a lot in a strata scheme must not—
 - (a) use or enjoy the lot, or permit the lot to be used or enjoyed, in a manner or for a purpose that causes a nuisance or hazard to the occupier of any other lot (whether that person is an owner or not), or
 - (b) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of the common property by the occupier of any other lot (whether that person is an

owner or not) or by any other person entitled to the use and enjoyment of the common property, or

(c) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of any other lot by the occupier of the lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the lot.

A right to appeal on a question of law

- 15 An appellant may appeal from a decision of the Tribunal as of right on any question of law or otherwise with the leave of the Appeal Panel: s 80(2)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the **CAT Act**).
- 16 A question of law includes whether the Tribunal had applied the correct legal test (by, for example, asking itself the wrong question) and whether there had been a failure to provide adequate reasons: *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel at [13] and see also *Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd* [2010] FCAFC 94; (2010) 186 FCR 410 at [13].
- 17 As outlined below, we are satisfied that the appeal raises questions of law as to whether the Tribunal directed itself to the terms of s 153 of the SSMA and whether it gave adequate reasons for its decision. Leave to appeal is not required in respect of these matters.

The Parties' Submissions

- 18 At the hearing of the appeal both parties made contentions about the factual circumstances as follows, including in relation to whether, in fact, no cameras were attached to common property (a matter that we explored in some detail with the appellant at the commencement of the hearing of the appeal).
- 19 The appellant contended:
 - (1) he installed three cameras; only two were the subject of dispute before the Tribunal;
 - (2) the three cameras were initially installed on common property;
 - (3) motions at the AGM of the OC on 29 January 2020 to remove the cameras were defeated;
 - (4) he moved the cameras from the common property to inside his lot based on complaints made by the respondent and he did so without being directed by the OC;

- (5) the camera at the rear of his lot is not on common property and only looks into the courtyard which is common property. The camera does not look into the respondent's lot;
- (6) the barrier erected by the respondent at the rear of lot 3 and which the respondent said was to prevent the camera installed at the rear of the appellant's lot looking into her lot, was erected for no purpose than "to justify her [the respondent's] case";
- (7) the 3 cameras only look out onto common property to a maximum field of vision of about 20 metres. Their sole purpose is to protect and secure the appellant's property due to law and order incidents in the neighbourhood since 2016, involving intruders and threats and which are ongoing.
- (8) the owner of Lot 1 of the SP shares the appellant's concerns with respect to security issues. The owner of Lot 1 approached the appellant and also wants to install additional security measures;
- (9) he has removed all three cameras consequent upon the Tribunal's decision because he could not be sure if the intent of the Tribunal's order was to remove all three cameras or just the two cameras mentioned in its decision.

20 The respondent contended:

- (1) the appellant never sought or obtained permission to install the cameras;
- (2) he is the only person in the SP with "law and order" issues;
- (3) the appellant has printed photos from his recording equipment and shown them to others and monitors the "coming and going" of the respondent;
- (4) the installation and use of the cameras is an invasion of her privacy;
- (5) she gets very stressed knowing that the appellant is watching the cameras and recording her movements;
- (6) she described the appellant as being "fixated with the cameras";
- (7) she installed a barrier to prevent the camera at the rear of the appellant's lot 2 being able to see into her lot.

Consideration

21 The Tribunal did not direct itself to an important issue whether the conduct of the appellant, by installing and using the surveillance cameras at the locations in his lot, constituted an *unreasonable* interference of the respondent's use or enjoyment of:

- (1) the common property of the SP, contrary to s 153(1)(b) of the SSMA; and/or

- (2) lot no 3 of which the first respondent is the occupier (and also any other occupied lot), contrary to s 153(1)(c) of the SSMA.
- 22 Furthermore, the Tribunal did not direct itself to the question under each of these sections whether the relevant conduct of the appellant amounted to a use or enjoyment of the common property.
- 23 In our opinion, it was an error of law for it not to do so.
- 24 In our opinion, the Tribunal also erred in law in failing to give adequate reasons for its conclusion that the use of the surveillance cameras did not amount to a nuisance - presumably, a conclusion that there was not a nuisance within the meaning of s153 (1) (a) of the SSMA, nor, as we have already mentioned, did it explain the relevance of its references to the two decisions referred to above.
- 25 In accordance with s 81 (1) (e) of the CAT Act, the application will have to be remitted to a differently constituted Tribunal for a new hearing and redetermination.
- 26 As we understand it, some dispute about the facts remains between the parties, including whether, at least, one of the cameras looks into Lot 3 (not just the common property) and the extent to which there is a reasonable basis for the appellant's concern about security. The latter question appears to be a relevant issue in determining whether there has been an unreasonable interference within the meaning of s 153 (1) (b) and (c) of the SSMA.
- 27 There also appears to be a factual issue concerning the collection and storage of data by the cameras. Whilst we express no final view on the matter, it may be that the legality of such collection and storage is relevant to the question of whether there has been an unlawful interference with the respondent's enjoyment of property for the purpose of determining whether there is a nuisance within the meaning of s153 (1) (a) of the SSMA: see, for example, for the meaning of such a nuisance, the decision in *The Owners Strata Plan No 2245 v Veney* [2020] NSWSC 134.

Orders

- 28 We make the following orders:
- (1) The appeal is allowed.

- (2) The order made on 18 June 2020 is set aside.
- (3) The proceedings are remitted to a differently constituted Tribunal for a new hearing and redetermination of the application in accordance with the evidence already adduced to the Tribunal and such further evidence as the Tribunal may allow.

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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