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VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC2934/2019

CATCHWORDS

Owners corporation rules – noise control – rules binding lot owner and lot occupier – applicant moves out of his own apartment because of noise – whether lot owner liable for breach by tenant – no breach by lot owner – breach by lot occupier – damages claimed relate to alternative accommodation – remoteness of damage.

APPLICANT	Wai Tang
FIRST RESPONDENT	Laurent Fossaert
SECOND RESPONDENT	Abdelkrim Belmimoun
WHERE HELD	Melbourne
BEFORE	Senior Member A. Vassie
HEARING TYPE	Hearing
DATE OF HEARING	27 January 2022
DATE OF ORDER	24 March 2022
DATE OF REASONS	24 March 2022
CITATION	Tang v Fossaert (Owners Corporations) [2022] VCAT 323

ORDER

1. The application is amended so that the amount claimed is $46,245.68.

2. The second respondent must pay the applicant $1,801.44 plus disbursements of $254.10, a total of $2,055.54.

A Vassie
Senior Member

APPEARANCES:

For Applicant	Ms C. Naud, estate agent
For Respondents	In person

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REASONS

A PROCEEDING ABOUT NOISE

1 The "Espy" apartments building is situated in Victoria Street St Kilda near the Esplanade Hotel. Owners Corporation Plan No. 524252A affects all lots and common property in the building. The applicant Wai Tang, also known as Wil Tang, owns and occupies apartment 211 shown on the plan of subdivision.

2 Apartment 2C, which corresponds to lot 2C, is directly below Mr Tang's apartment. At all material times the first respondent, Laurent Fossaert was the owner of apartment 2C. He no longer owns it. The second respondent, Abdelkrim Belmimoun, was at all material times until February 2020 the occupier of apartment 2C as Mr Fossaert's tenant. Mr Belmimoun vacated apartment 2C in February 2020.

3 Mr Tang has complained that for about three years, but especially between February 2019 and November 2019, loud music and other noise coming from apartment 2C during the night and early morning interrupted his sleep and caused him other inconvenience. It became so bad, he has said, that he decided to move out of apartment 211 on 16 November 2019 and into rented accommodation under a 12-month tenancy. He obtained tenants for his apartment 211, also for a 12-month tenancy, a term of which entitled the tenants to terminate the tenancy early if they experienced excessive noise. They did terminate the tenancy for that reason and vacated on 1 April 2020.

4 In the meantime Mr Belmimoun had vacated apartment 2C in February 2020, unbeknown to Mr Tang. He obtained new tenants for apartment 211 for a new 12-month period beginning on 1 April 2020 and they took possession. By the time that Mr Tang's tenancy of alternative accommodation ended he was aware that Mr Belmimoun had moved out. By negotiation with the new tenants he ended their tenancy and he moved back into his apartment 211 on 31 October 2020.

5 In this proceeding Mr Tang has claimed compensation from both respondents. He has alleged that each of them breached rules of the owners corporation relating to noise and to other conduct. He has claimed compensation of $46,245.68 from both of them for loss caused by the breaches.

THE HEARING

6 The hearing of the proceeding took place by videoconference. The three parties each gave evidence. So did Catherine Naud, a real estate agent who assisted Mr Tang to find tenants for apartment 211 and to prepare his case.

7 Before the hearing Mr Tang had filed and served a bundle of documents on which he relied. The bundle filed was in an arch-file folder.

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8 On 16 August 2021, Mr Fossaert had filed with VCAT 16 pages of letters that had been sent by email. At the hearing there was doubt about whether Mr Tang and Ms Naud had seen those documents. At the conclusion of the hearing, I directed Mr Fossaert to send a copy of these documents by email and made a further order entitling Mr Tang to make a written request to VCAT by 24 February 2022 for there to be a further hearing about any matter that arose from those documents. Mr Tang did not make any such request.

9 Mr Tang's arch-file folder of documents included a list of recordings which he said he had made on his mobile telephone of noise coming from apartment 2C and of incidents at or near apartment 2C on the same day as his recording of noise. Ms Naud played the recordings during the hearing. During the videoconference hearing I was able to see the images that had been recorded but was not able to hear sound. Mr Fossaert and Mr Belmimoun had been provided with copies of the recordings and had played them. Not having been able to hear sound, I have received only evidence from Ms Naud and from the parties as to what they heard when they played the recordings.

10 When Mr Tang commenced this proceeding his monetary claim was expressed to be $10,000.00. His bundle of documents had included one setting out in detail a claim for $46,245.65 and how that sum was arrived at. At the hearing the respondents indicated that they were well aware of the increased claim and the hearing proceeded on that basis. I did not at the time make any order amending the amount claimed. I shall do so now, although in view of the outcome of the proceeding the amendment is a formality only.

THE LAW

(a) Owners Corporation Rules:

11 The *Owners Corporations Act 2006* ("**the OC Act**") provides that, by special resolution, an owners corporation may make rules with respect to various matters, including noise control.[1] Any such rules must be lodged with the Registrar of Titles and take effect once they are recorded by the Registrar.[2] If the owners corporation does not make any rules, the model rules set out in Schedule 2 of the Owners Corporations Regulations 2018, which came into effect on 2 December 2018,[3] apply to it.[4]

12 The owners corporation affecting land in the "Espy" apartments building has made rules (which I call "**the special rules**") which were lodged on 18 February 2016 with, and recorded by, the Registrar of Titles.

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[1] OC Act s 138(1) and Schedule 1 clause 7.2.
[2] OC Act s 142(1), (4).
[3] Owners Corporation Regulations 2018 reg 4.
[4] OC Act s 139(2).

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13 All lot owners and lot occupiers are bound by an owners corporation's rules[5] and a lot occupier has an obligation under the OC Act to comply with those rules,[6] as does a lot owner.[7]

14 Section 139(3) of the OC Act provides:

> (3) If the model rules provide for a matter and the rules of the owners corporation do not provide for that matter, the model rules relating to that matter are deemed to be included in the rules of the owners corporation.

So a lot owner and a lot occupier must comply with a model rule when one of the special rules does not provide for a matter for which the model rule does provide.

(b) The law affecting the occupier Mr Belmimoun:

15 Model rule 6.2 provides:

> 6.2. Noise and other nuisance control
>
> (1) An owner or occupier of a lot, or guest of an owner or occupier, must not unreasonably create any noise likely to interfere with the peaceful enjoyment of any other person entitled to use the common property.
>
> (2) Subrule (1) does not apply to the making of a noise if the owners corporation has given written permission for the noise to be made.

Mr Tang, being another lot owner and occupier, is entitled to use the common property[8] and so has the benefit of the rule.

16 Special rule 7.2 provides:

> 7.2 Noise and other nuisance control
>
> (a) An owner or occupier of a lot, or a guest of an owner or occupier, must not unreasonably create any noise likely to interfere with the peaceful enjoyment of any other person entitled to use the common property between the hours of Midnight and 8:00am.
>
> (b) Subrule (a) does not apply to the making of a noise if the owners corporation has given written permission for the noise to be made.

17 The special rule is identical to the model rule except that paragraph (a) of the special rule adds the words "between the hours of Midnight and 8:00am". The special rule does not include any provision about noise created outside those hours. The effect of OC Act s 139(3) is that model rule 6.2 is deemed to be included in the rules and applies to noise created outside those hours. Accordingly, Mr Belmimoun was obliged under the rules not unreasonably to create any noise likely to interfere with Mr Tang's quiet enjoyment of his

[5] OC Act s 141.
[6] OC Act s 137.
[7] OC Act s 128.
[8] He being co-owner of common property as tenant in common: *Subdivision Act 1988* s 30(1)(a).

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lot, at whatever hour, although the words of special rule 7.2 imply that noise created between midnight and 8:00am is more likely to be regarded as having been created unreasonably and as having interfered with another's peaceful enjoyment.

18 Model rule 1.1, and special rule 2.1 which is in identical wording, provide:

> A lot owner or occupier must not use the lot, or permit it to be used, so as to cause a hazard to the health, safety and security of an owner, occupier, or user of another lot.

Mr Tang has relied upon this rule, alleging that the noise coming from lot 2C affected his health. He gave that evidence and his folder of documents includes proof of his having consulted a medical practitioner and psychologist in 2019 because of anxiety and ill health resulting from his exposure to noise.

19 In my view that rule does not assist Mr Tang. The rules have to be read as a whole. The rule about hazard to health, etc, is expressed in general terms. There is a specific model rule, 6.2, and a specific special rule 7.2, dealing with noise. Both the model rules and the special rules are pieces of subordinate legislation.[9] It is a principle of statutory construction that where legislation contains two similar prohibitions, one wide and the other applying only to a class of case within the wide prohibition, the wide prohibition is to be treated as not applying to cases within the limited prohibition.[10] So model rule 1.1 and special rule 2.1 should be read as not applying to noise, even though noise might create a hazard to health.

20 The rules discussed in the preceding five paragraphs are expressed to apply to owners as well as to occupiers, although it would have to be an unusual case for an owner who was not also the occupier to be in breach of those rules.

(c) The law affecting the owner Mr Fossaert:

21 The *Residential Tenancies Act 1997* ("**the RT Act**") empowers a landlord[11] to take action against a tenant when there is an allegation that the tenant is breaching a duty under that Act[12] not to use the rented premises in a manner that causes an interference with the reasonable peace, comfort or privacy of any occupier of neighbouring premises. The landlord may give the tenant a breach of duty notice[13] and if the tenant does not remedy the breach, apply to VCAT for a compliance order requiring the tenant to refrain from committing a similar breach.[14] Then if the tenant fails to comply with the

[9] *Interpretation of legislation Act 1984* s 38 defines "subordinate instrument".
[10] D.C Pearce and R.S. Geddes, *Statutory Interpretation in Australia*, 8th edition (2014) at [4.40], citing *No 20 Cannon St Ltd v Singer & Friedlander Ltd* [1974] Ch 299 at 235.
[11] I use the terminology "landlord" and "tenant" which the RT Act, as it was in 2019, used. It now uses the terminology "residential rental provider" and "renter".
[12] RT Act s 60.
[13] RT Act s 208.
[14] RT Act s 209, s 212.

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compliance order, the landlord may give the tenant a 14-day notice to vacate[15] and then, if the tenant does not vacate in response to the notice, may apply to VCAT for a possession order.[16] The RT Act empowers a landlord to do those things but does not compel the landlord to do any of them.

22 Nor does the common law impose any such obligation upon a landlord or, generally speaking, any liability of the landlord for nuisance created by the tenant:

> [T]he owner is not responsible for any nuisance created by his tenant, unless he let the premises to him for a purpose calculated to cause a nuisance, like using a hall for noisy parties. In the traditional formula, the nuisance must have been either expressly authorised or certain to result from the purposes for which the property is being let. Nothing less than at least a high degree of probability that the tenants would misbehave will suffice; nor will the landlord's mere failure to intercede and terminate the tenancy after becoming aware of the nuisance.[17]

23 Mr Tang relies upon special rule 11.1, paragraphs (a) and (i), which are as follows:

11.1 A Proprietor of a lot must not:

(a) create any noise or behave in a manner likely to interfere with the peaceful enjoyment of the proprietor of another lot or of any person lawfully using common property;

…

(i) use or permit to be used a lot for any purpose which may be illegal or injurious to the reputation of the development

24 Paragraph (a) has no application at all to the present proceeding. There has been no allegation that Mr Fossaert has created any noise or conducted himself in a manner likely to interfere with Mr Tang's quiet enjoyment of his apartment. All that Mr Tang alleges against Mr Fossaert is that he failed to do anything to prevent Mr Belmimoun from continuing to create undue noise: an omission, not any active conduct.

25 Paragraph (i) of special rule 11.1, like the common law to which I referred above, concentrates on the purpose for which the proprietor's lot is used. If that purpose may cause a nuisance or hazard to an occupier of another lot, and if the proprietor permits that use, the proprietor is in breach of the rule. The rule goes no further than the common law goes. The rule does not say that a proprietor must not permit the causing of a nuisance. The prohibition is upon the lot being used for a purpose which may cause a nuisance or other illegality or injurious conduct. Without any evidence of any other purpose, one must infer that the purpose for which Mr Fossaert let his lot 2C to Mr Belmimoun was for its use as a residence. Of itself, a use of the apartment

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[15] RT Act s 91ZE (it was s 248 in 2019).
[16] RT Act s 322(1).
[17] C. Sappideen and P. Vines, *Fleming's The Law of Torts*, 10th edition (2011) at [21.190], p. 513.

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for that purpose would not cause a nuisance or a hazard to anyone. Special rule 11.1 does not assist Mr Tang.

26 Special rule 25.2, however, goes further than special rule 11.1 and the common law go. It provides:

> 25.2 A proprietor of a lot which is the subject of a lease or licence agreement must take all reasonable steps, including any action available under the lease or licence agreement, to ensure that any lessee or licensee of the lot and any invitees of that lessee or licensee comply with these rules.

The rule is not concerned with the purpose for which a lot is used. It is concerned with the steps that the proprietor of a lot takes to ensure that the occupier of the lot (if a lessee or licensee) complies with the owners corporation's rules, including those about noise and nuisance control and with whether those steps were all reasonable steps that could have been taken. If Mr Tang can prove Mr Belmimoun's breach of rules about noise and nuisance control and can prove that Mr Fossaert did not take all reasonable steps to ensure compliance with these rules, he will have proved Mr Fossaert's breach of special rule 25.2.

(d) Compensation and Remoteness of Damage:

27 In determining this dispute concerning alleged breaches by a lot owner and by a lot occupier of an owners corporations rule ("an owners corporation dispute", as defined[18]), VCAT may make an order for the payment of a sum of money by way of damages.[19]

28 In a proceeding based on nuisance, a court or VCAT must consider, first, whether the nuisance was a cause of the loss or damaged alleged to have been sustained, and also whether that loss or damage was reasonably foreseeable by the person causing the nuisance at the time when the nuisance occurred. If it was not reasonably foreseeable the loss or damage is too remote and is not recoverable.[20] These principles should apply equally to a proceeding based upon a breach of statutory duty (imposed by an owners corporation rule) about noise or nuisance. Mr Tang cannot be awarded any claimed compensation for loss that is too remote from any breach of duty that he is able to prove.

THE ALLEGED NOISE

29 There is no dispute that in apartment 2C the only things that Mr Belmimoun possessed that could have been the source of the loud music or loud voices were a television set and a computer. He used the computer to play music and to screen movies. There is a dispute about whether the television set was mounted upon a wall. After Mr Belmimoun vacated lot 2C brackets on a wall were observed. I accept Mr Belmimoun's evidence that the television set was

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[18] OC Act s 162(e).
[19] OC Act s 165(1)(c).
[20] *Haldsbury's Laws of Australia*, Vol 19, [135-670] and [135-675].

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next to a wall for a while but never mounted upon a wall, and that after one complaint from Mr Tang he moved the television set away from the wall and placed cloth material underneath it.

30 The evidence about noise which I received during the hearing was:

(a) The oral evidence of Mr Tang, of Ms Naud and of Mr Belmimoun, and

(b) Documents in Mr Tan's folder of documents, namely

i. Mr Tang's diary of events in 2017 and in 2019;

ii. Reports from a security guard, Gordan Vranbecic of Monjon (Australia) Pty Ltd ("Monjon"), the security company engaged either by the owners corporation or by the building manager;

iii. A police officer's report of two attendances at apartment 2C in the late evening of 23 June 2019; and

iv. Mr Tang's list of his recordings of noise.

31 Mr Tang is employed at the Alfred hospital as an oncology nurse. His working hours are usually from 7:00am to 3:30pm. He gave evidence that on those nights when his sleep has been interrupted by loud music and other loud noise from apartment 2C he often has been able to experience only 2 to 3 hours' sleep. This disturbance to his sleep has affected his ability to carry out his nursing duties with all the care that those duties require. I accept that evidence.

32 He gave evidence that the first occasion on which noise interrupted his sleep occurred between 2:00am and 3:00am on a day in August 2017. Having gone down to the next level of the building to investigate where the noise was coming from, he saw that the door to apartment 2C was open. The television set inside was on, and that the occupier was asleep. Mr Tang turned off the television set after he was unable to wake the occupier. The noise stopped.

33 When there were further occasions of the same loud noise he began to keep a diary and note in it the date and hour of each occasion. He reported the incidents to the building manager and to the security guard.

34 I refer only to the diary entries that Mr Tang made in 2019 because they were of occasions of noise that led up to his decision to move out of his apartment on 16 November 2019.

35 Between 25 February 2019 and 13 June 2019 Mr Tang recorded six occasions on which his sleep was interrupted by noise. On most of these occasions, he told me, the noise was continuous and its volume was as if he were in a cinema listening to a film's soundtrack. On four of those occasions the noise occurred after 2:00am and lasted for at least an hour. During those occasions he called either the police or the security guard, and on one occasion police intervention led to the volume of the noise being reduced.

36 On 23 June 2019, a complaint that Mr Tang made to the police about noise led to police action. There is a record of that action in a report that Mr Tang

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obtained following a request that he made under the *Freedom of Information Act 1982*. The record is of three visits. The first began at 11:07pm. The police could hear music from the street level. They found the door to apartment 2C open but nobody was within. They turned off the music, left a card for the residents regarding noise and told Mr Tang what they had done. Within 10 minutes, however, Mr Tang renewed his complaint. The police attended again. Music was playing. The police spoke to the resident and gave a warning that if they had to attend again about the noise he would be fined. The resident turned the music off. Just before midnight, however, the police attended for a third time, and issued a "P/N" about the loud music. Because the record referred to an infringement reference and an infringement code, I assume that "P/N" meant "penalty notice."

37 After 23 June 2019 Mr Tang logged in his diary numerous dates and times for noise. On one, 13 October 2019, the noise had started at 4:00am and persisted until 7:40am when he had to leave for work; although he had called the police they had not attended, so he later went to the police station and made a statement. On 27 October 2019 he complained of noise to the security guard. Monjon's records show that the guard attended apartment 2C at 11:30am, on that day, that he had heard music from the street, that he spoke to Mr Belmimoun and asked him to turn the music down, and that he did so. Monjon's records show that on 10 November 2019 (at 00:10am, so the date may have been 11 November 2019, as Mr Tang says it was) the guard attended again, found the door to apartment 2C open, the television set on at excessive volume, and Mr Belmimoun asleep.

38 Following those incidents, Mr Tang decided that for his own health and peace of mind he had to leave his apartment. He did leave on 16 November 2019 and moved into rented accommodation nearby in St Kilda. He signed a 12-month tenancy agreement for the accommodation. Ms Naud was the letting agent. She helped him to find tenants for his apartment 211 in the "Espy" building. Those tenants signed a fixed-term tenancy agreement with a clause in it which entitled them to terminate the agreement early if they experienced excessive noise. Within less than a month they claimed that they did experience excessive noise and, in reliance on the clause, terminated the tenancy agreement early. Shortly afterwards, Mr Belmimoun vacated apartment 2C, but Mr Tang did not move back into apartment 211 until his own 12-month tenancy of his alternative accommodation expired.

39 It is fair to say that Monjon's records of the security guard's involvement indicate that on some occasions the guard thought that Mr Tang had over-reacted and that the noise coming from apartment 2C was not excessive.

40 Ms Naud gave evidence that she had listened to Mr Tang's recordings of noise, and that one of them was of songs which were so loud she could tell that the songs were in the French language.

41 Mr Fossaert had also listened to the recordings. He said that although music was playing he could hearing people talking; that is to say, the music was not

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so loud that it overcame the sound of voices. He also mentioned the closeness of the "Espy" building to the Esplanade hotel and suggested that the noise of which Mr Tang complained may have come from there.

42 Mr Belmimoun gave evidence. He said that the noise of which Mr Tang complained came from his television set; he could play music on his laptop computer but there were no loud speakers for it. In August 2019, he moved the television set away from the wall and put cloth underneath it. He said that none of his neighbours on the same level of the building had complained to him about noise, and that they had signed a document to verify that they had no complaints. When I asked him whether he still had the document, he said that he had not been able to find it after he had moved out of the "Espy" building.

43 Even though I was not able to listen to the recordings that Mr Tang made, I am well satisfied by the evidence I have mentioned above that Mr Belmimoun persistently had his television set on, or played music, at an excessive volume and that his conduct adversely affected Mr Tang's sleep and well-being. Although the majority of instances which Mr Tang noted in his diary took place between 11:00pm and midnight, a substantial minority of them took place after midnight and lasted for more than an hour. Despite having been warned and given an infringement notice by the police on 23 June 2019 Mr Belmimoun's conduct in producing noise at an excessive volume continued. I am satisfied that his conduct breached special rule 7.2 and (to the extent that was operative) model rule 6.2. I am satisfied that his conduct especially the repetition of it after 23 June 2019 virtually drove Mr Tang out of his apartment 211 and forced him to seek alternative accommodation.

"REASONABLE STEPS" BY THE OWNER?

44 Mr Fossaert's obligation under special rule 25.2 was to take all reasonable steps, including "action available" under Mr Belmimoun's tenancy agreement with him, to ensure that Mr Belmimoun complied with the owners corporation's rules about noise. I have found that Mr Belmimoun did not comply with those rules. Mr Tang's claim against Mr Fossaert means that one must consider what steps Mr Fossaert took, and whether there was my other steps he could reasonably have taken, to ensure his tenant's compliance with the rules.

45 Before he had let his apartment 2C to Mr Belmimoun, Mr Fossaert had resided in the building and was acquainted with the building manager, whose given name is Alistair. The owners corporation manager was Stephen Poole.

46 On 28 February 2019, Mr Fossaert's partner, Miriam Plompen, wrote by email to Mr Poole. She said that she was writing about a string of complaints by Mr Tang about Mr Belmimoun and noise. She continued:

> Just recently Alistair has made me aware that the complaints have once again begun after approximately 1 year of silence……I have received

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> various copies of correspondence from Wil at 211 in relation to these complains. Again I have asked Alistair to investigate and it would appear that we are in the same situation as last time. No foundation for these complaints.
>
> At this state I would like to point out that Karim months ago was involved in a terrible road accident and is still recovering from his injuries. I feel strongly that if Wil feels the need to continue with these

During the hearing it was apparent that Mr Belmimoun was recovering from injuries but there was no reason for me to doubt his "mental capacity".

47 Evidently Ms Plompen had copied the building manager into her email because on 28 February 2019 the building manager sent the following email to Mr Poole:

> Please see email from Miriam below. I have discussed this matter with Gordan (our Monjon guard) and I believe that Wil is overreacting. Karim sleeps with his window open with his television on. There has been no complaints from the apartments either side of Karim. Wil has contact the police several times. Gordan told me that on one occasion they were laughing at the minimal level of noise.

On the same day Mr Roole replied by email copied Mr Plompen into the reply:

> Hi Alistair,
>
> Further to all this communication, I was contacted by the Council as Wil has contacted them regarding the noise. I explained to the Council that the problem of Will complaining has been going on for years and the owners corporation had investigated the claims on a few occasions and deemed the noise being made by Karim was not unreasonable and the OC would not be taking the noise complaints any further.
>
> I do not know what the Councils response will be.

Having heard the evidence, I have come to a very different view about the noise from the views expressed in those messages, but they were the information available to Mr Fossaert as at the end of February 2019.

48 On 26 August 2019, the owners corporation, no doubt at Mr Tang's instigation, sent to Mr Fossaert the first of three notices alleging a breach of duty on his part. Because I was given no other explanation for it, consideration of whether to give the breach of duty notice may have been the reason for the building manager having sent the following email on 15 August 2019:

> **TO WHOM IT MAY CONCERN**
>
> I have no personally witnessed any excessive noise coming from apartment 2C. Our Friday and Saturday night guard, Gordan, has been requested by the plaintiff to intervene on several occasions. On each and every occasion Gordan has not believe the noise coming from 2C's television as excessive.

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> The neighbours either side of 2C, nor any other neighbour (apart from the plaintiff) have lodged a noise complaint with me.

49 The owners corporation gave to Mr Fossaert three successive breach notices,[21] dated 26 August 2019, 10 September 2019 and 11 October 2019. Each notice alleged breaches of special rule 7.02. They did not allege a breach of special rule 25.2. Nevertheless they gave Mr Fossaert greater reason to think about his tenant's conduct than he had reason at the end of February 2019. He told me that as well as speaking to his tenant he also spoke to the building manager and obtained a copy of Monjon's reports; none of them gave him reasons to criticise the conduct.

50 Had he considered giving his tenant a breach of duty notice under the RT Act – there was no evidence that he did consider the matter – the information available to him was this. There was no independent evidence that would have supported a breach of duty notice and a subsequent application to VCAT for a compliance order. None of the owners corporation manager, the building manager or the security guard would have supported them. Mr Fossaert would have had available to him only Mr Tang's evidence, if he had sought it, and Mr Tang was not an independent witness. In my view it would not have been reasonable to expect Mr Fossaert to give a breach of duty notice to his tenant, in August 2019 or at all, or to follow it up with an application for a compliance order.

51 Even the obtaining of a compliance order would not necessarily have achieved anything of value to Mr Tang. There could have been a delay in waiting for compliance and, if there was no compliance, in serving a notice to vacate, making an application for a possession order and having the application heard and determined. The time scale may have gone beyond mid-November 2019 by which time Mr Tang had decided to move out of his apartment.

52 In the end Mr Fossaert did ask Mr Belmimoun to vacate apartment 2C, not because of anything to do with Mr Belmimoun's conduct but because he wanted to sell the apartment, as he eventually did.

53 I do not think it was reasonable for Mr Fossaert to make any other enquiries about the noise complaint than those he made. My conclusion is that he did not breach special rule 25.2; in the circumstances he took all reasonable steps to ensure that his tenant complied with the owners corporation rules. As against Mr Fossaert, Mr Tang's proceeding fails.

DAMAGES: THE ITEMS CLAIMED

54 In his list of "expenses" totalling $46,245.68 Mr Tang has included application fees to VCAT and fees paid to Victorian Police for his freedom-of-information request. Those fees are in the nature of costs – disbursements

[21] Part 10 of the OC Act entitled an owners corporation, after receiving a complaint about an alleged breach by a lot owner or lot occupier of the owners corporation's rules, to give notice requiring the person to rectify the alleged breach.

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incurred for the prosecution of this proceedings – and not in the nature of damages. I will deal with them separately below.

55 ***Moving out and back in***. Mr Tang claimed the following amounts that relate to his moving out of apartment 211 to alternative accommodation, to having tenants move into apartment 211, and to moving out of that alternative accommodation back into apartment 211 where he was able to do so and once Mr Belmimoun was no longer occupying apartment 2C. Documents in his arch-file folder evidence the amounts.

Removalist out of unit 211	$ 400.00
Cleaning: tenants moving in	$ 420.00
Removalist out of unit 8/23[22]	$ 400.00
Cleaners for unit 8/23 upon vacating	$ 230.00
Additional entrance fob for tenants	$ 27.50
Additional remote control for tenants	$ 84.73
Total:	$1,562.20

56 In my view it was foreseeable that a persistent creation of noise about which Mr Tang was complaining continually would lead Mr Tang to decide to move out of his apartment and to let it to tenants. In my view it was also foreseeable that the incurring of costs related to the moving out and back in, and the letting to tenants, would follow Mr Tang's decision. I allow the claims for $1,562.20.

57 "***Second tenants***". The tenants who moved into apartment 211 once Mr Tang had moved out of it took advantage of the clause in their tenancy agreement about excessive noise and terminated the tenancy early. Mr Tang did not know whether Mr Belmimoun still occupied apartment 2C. He was still bound to a fixed term in his tenancy of alternative accommodation. He obtained "second tenants" to move into his apartment. He did not move back into apartment 211 until his own fixed-term tenancy expired and he managed to negotiate the second tenants' early departure. He has claimed the following amounts:

Cleaning, second tenants	$275.00
Electrician; TV arial repair	$ 99.00
Total:	$374.00

In my view it was not foreseeable that the first tenants would terminate their tenancy agreement early and that Mr Tang would let out his apartment again. I do not allow the claims for $374.00.

[22] The alternative accommodation was at 8/23 Park Street St Kilda.

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58 ***Monjon call-out fee***. On 19 September 2019, Monjon charged Mr Tang $207.24 for the security guard having been called out to investigate Mr Tang's noise complaint. I was not told why only one fee was charged although the security guard had been called out on several occasions. Nevertheless, the charging of the fee was a foreseeable consequence of a noise complaint. I allow the claim for $207.24.

59 ***"Gum Tree" for advertising***. Before he engaged an estate agent to find a tenant for his apartment and to manage the tenancy, Mr Tang spent $32.00 on trying to find a tenant himself by advertising on the "Gum Tree" website. That he might try to do that was foreseeable. I allow the claim for $32.00.

60 ***Compensation to tenants***. When his tenants of apartment 211 complained to him of excessive noise and terminated their tenancy early, Mr Tang allowed them a credit of $1,000.00 on rent that they owed. He has claimed that $1,000 as damages in this proceeding. I cannot allow the claim. It is one thing to say, as I have done, that it was foreseeable that Mr Tang because of noise from an apartment below should move out of his apartment and let it to tenants. It is quite another thing to say, as I do not, that it was foreseeable that the tenancy agreement would allow for an early termination in the event of excessive noise. It is even more of a stretch to say, as I do not, that it was foreseeable that Mr Tang would volunteer a payment to the tenants for their inconvenience.

61 I regret that I cannot allow this claim. Mr Tang proved to me that he himself suffered considerable inconvenience from the noise. His claim for $46,245.68 did not include any claim for compensation for his personal inconvenience. Had he made such a claim, it might well have been worth at least $1,000.00 in compensation. I cannot, however, award compensation for a claim which was not made and about which the respondents had no notice and no opportunity to call evidence on the matter or to cross-examine. Mr Tang about it.

62 ***Management fees***. Mr Tang has claimed from the respondents $3,207.70 being fees that he paid to his real estate agent for managing the tenancies of apartment 211. While the first of those tenancies was a foreseeable consequence of Mr Tang's experience of noise his engagement of a managing agent was not. It was probably a sound commercial decision but not one that he can lay at the door of Mr Belmimoun. The loss claimed is too remote. I do not allow it.

63 ***Loss of rent on the second tenancy***. The first tenants who took possession of Mr Tang's apartment 211 agreed to pay rent of $570.00 per week. Ms Naud told me that in order to attract other tenants after the first tenants terminated their tenancy early Mr Tang had to reduce the asking rent to $450.00 per week so he lost rent of $120.00 per week for 30.50 weeks until the second tenants vacated and Mr Tang moved back in. He has claimed $4,422.50 as compensation for that reason. The correct arithmetic results in a figure of $3,660.00. Whatever the reasons may have been for reducing the asked-for

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rent, they had nothing to do with Mr Belmimoun's conduct. The loss claimed is far too remote. I do not allow it.

64 ***Cost of testing***. Mr Tang had audiometric and acoustic testing done for the purpose of establishing that there was nothing defective about the building's sound proofing that may have amplified the noise from apartment 2C and establishing that it was possible for noise to carry from one apartment to the other. He paid $2,585.00 for the testing. Ms Naud told me that something was said during a directions hearing in the proceeding that prompted Mr Tang to have the testing done. But I was not given evidence of any allegation, formally or informally, by either respondent that the reason for excessive noise was to be found in the building's lack of soundproofing or in any other characteristic of the building. Mr Tang seems to have anticipated a defence that was never raised. There was no need for the testing as part of the proof of his case. I do not allow the claim.

65 ***Rent paid by Mr Tang***. For his alternative accommodation at 8/23 Park Street St Kilda Mr Tang paid rent totalling $24,855.00. He has claimed that amount in this proceeding. I cannot allow the claim or any part of it. At the time that he was paying the rent he was receiving, or was entitled to receive, income from tenants of apartment 211. At best the claim could have been the difference, whatever it was, between rent paid and rent received. Even then, he would have needed to show that he could not have obtained alternative accommodation that was any cheaper than the rent he was paying. There was no such evidence.

66 ***Conclusion***. The amounts that I have allowed, and the total which Mr Belmimoun will be ordered to pay are:

Money costs, etc	$1,562.20
Monjon call-out fee	$ 207.24
"Gum tree" advertising	$ 32.00
Total:	$1,801.44

COSTS AND DISBURSEMENTS

67 Although the general rule in VCAT proceedings is that the parties should bear their own costs,[23] a person who substantially succeeds in a proceeding like the present one is usually entitled to an order that the opposite party pay the person an amount that represents the fee paid by the person to VCAT in the proceeding.[24]

68 When Mr Tang filed this proceeding, he paid a fee of $217.70 for an application claiming an amount which was then $10,000.00. He paid as a fee a further $269.30 when he sought to increase his claim to an amount

[23] *Victorian Civil and Administrative Tribunal Act 1998* ("**VCAT Act**") s 109(1).
[24] VCAT Act ss115B, 115C.

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exceeding $10,000.00. In his list of expenses totalling $46,245.68 he has claimed two amounts of $217.70 each and two amounts of $65.30 each. I understand one amount of $217.70 but the other figures were not explained and are not reconcilable with VCAT's records.

69 Because Mr Tang has succeeded in establishing Mr Belmimoun's liability for breach of owners corporation rules, I regard him as having substantially succeeded in the proceeding. The amount awarded is less than $10,000, however. I make an order for the payment of the initial filing fee of $217.70.

70 Mr Tang paid amounts of $36.40 to Victoria Police for his freedom-of-information application. As he achieved from that application important evidence in support of his case that he would not have been able to obtain otherwise, I think it is fair to depart from the general rule about costs in VCAT proceedings by awarding him $36.40 as an additional disbursement. He also claimed $37.80 for seven registered post expenses of $5.40 each. He did not explain why payment for one registered post item, let alone seven, was made. I do not allow the item.

71 Finally he has claimed $8,000.00 for "VCAT file preparation and hearing". Although Ms Naud represented him during the hearing, she is not a lawyer and so he virtually was self-represented. A self-represented litigant cannot be compensated for his own time in preparing and conducting the case.[25] I cannot allow the claim.

CONCLUSION

72 For the above reason, there will be an order that Mr Belmimoun pay Mr Tang $1,801.44 plus disbursements of $254.10 (including $217.70 as reimbursements of a filing fee), a total of $2,055.54.

A Vassie
Senior Member

[25] *Cachia v Hanes* (1994) 179 CLR 403.

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