



Civil and Administrative Tribunal
New South Wales

Case Name: The Owners - Strata Plan No. 58615 v Almin

Medium Neutral Citation: [2022] NSWCATCD 91

Hearing Date(s): 6 June 2022

Date of Orders: 8 June 2022

Decision Date: 8 June 2022

Jurisdiction: Consumer and Commercial Division

Before: G Blake AM SC, Senior Member

Decision: (1) The proceedings are dismissed.

Catchwords: LAND LAW — Strata title — Obligations of owners and occupiers – Whether the respondent has created a nuisance

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Chehelnabi v Gourmet and Leisure Holdings Pty Ltd [2020] NSWCATAP 102
Huang v The Owners Strata Plan 7632 t/as The Owners Strata Plan 7632 [2022] NSWSC 194
The Owners Strata Plan No 2245 v Veney [2020] NSWSC 134; (2020) 19 BPR 39,971
Uren v Bald Hills Wind Farm Pty Ltd [2022] VSC 145
Vickery v The Owners Strata Plan 80412 (2020) 103 NSWLR 352; [2020] NSWCA 284

Texts Cited: Nil

Category: Principal judgment

Parties: The Owners - Strata Plan No. 58615 (Applicant)

Herlina Almin (Respondent)

Representation: D Petkovich (Applicant)

File Number(s): SC 22/04896

Publication Restriction: Nil

REASONS FOR DECISION

Overview

- 1 In these proceedings the applicant, The Owners – Strata Plan No 58615, which is responsible for the management of SP58615, seeks relief against the respondent, Herlina Almin, for breach of s 153 of the *Strata Schemes Management Act 2015* (NSW) (SSM Act).
- 2 I have decided that the proceedings should be dismissed.

The factual background

- 3 SP58615 is a residential complex at Ermington, in which the respondent is the owner of lot 6.
- 4 This dispute has arisen between the parties regarding the creation of an alleged nuisance by the respondent arising from her feeding birds on her lot, and on the common property.

The history of the proceedings

- 5 On 4 February 2022, the applicant commenced proceedings SC 22/04896 against the respondent by filing a strata and community schemes application in which it sought a civil penalty under s 147 of the SSM Act and an order restraining her from feeding wild birds.
- 6 On 2 March 2022, the Tribunal relevantly granted leave for the applicant to be represented by Dennis Petkovich (Mr Petkovich), and made procedural directions for the filing and service of evidence by the parties.
- 7 On 21 April 2022, the applicant filed and served a bundle of documents which relevantly included:
 - (1) the statement of Mr Petkovich dated 20 March 2022 and accompanying photographs (the Petkovich statement);

- (2) the statement of Hugh Dpenha (Mr Dpenha) dated 18 March 2022 and accompanying photographs (the Dpenha statement);
 - (3) the statement of Isaac Hayze (Mr Hayze) dated 20 March 2022 (the Hayze statement);
 - (4) the undated statement of Daniella Lyon (Ms Lyon) and accompanying photographs (the Lyon statement);
 - (5) the report of Shane Lewry (Mr Lewry) of BullAnt Pest Control & Inspection Services dated 3 March 2022 (the Lewry report).
- 8 On 9 May 2022, the Registrar sent a notice of contested hearing in a virtual hearing room on 6 June 2022 at 9.15am to the email addresses held by the Registry of each of the applicant and the respondent (the 9 May 2022 notice).
- 9 On 18 May 2022, the respondent filed and served her statutory declaration made on 13 May 2022 (the Almin declaration).

The hearing

- 10 The hearing took place on 6 June 2022. The applicant was represented by Mr Petkovich. There was no appearance by or on behalf of the respondent.
- 11 At the commencement of the hearing the applicant advised that it was not seeking any relief under s 147 of the SSM Act, and was only seeking an order for breach of s 153 of the SSM Act.
- 12 The applicant relied on the following documents which were admitted into evidence:
- (1) the Petkovich statement (marked as Exhibit A1);
 - (2) the Dpenha statement (marked as Exhibit A2);
 - (3) the Hayze statement (marked as Exhibit A3);
 - (4) the Lyon statement (marked as Exhibit A4);
 - (5) the Lewry report (marked as Exhibit A5).
- 13 To ensure the respondent's position was considered I admitted the Almin declaration into evidence (marked as Exhibit R1).
- 14 There was brief oral evidence given by Mr Petkovich.
- 15 The applicant did not make any submissions.
- 16 At the conclusion of the hearing I reserved my decision.

The issues

- 17 The following issues arise for decision:
- (1) whether the Tribunal has jurisdiction to determine the proceedings;
 - (2) whether the proceedings should be heard in the absence of the respondent;
 - (3) whether the respondent has created a nuisance to other lot owners in SP58615, and if so any relief should be granted to the applicant.
- 18 Before considering these issues, it is appropriate to set out the applicable statutory provisions and legal principles, and summarise the evidence of the parties.

The applicable statutory provisions

SSM Act

- 19 Part 1 (ss 1-7) contains provisions dealing with preliminary matters. Section 4 contains definitions, and relevantly provides:

4 Definitions

(1) In this Act—

...

interested person—see section 226.

...

- 20 Part 8 Division 1 (ss 151-153) contains provisions dealing with obligations of owners, occupiers and others relating to lots. Section 153 deals with the obligation of owners, occupiers and other persons not to create a nuisance, and relevantly provides:

153 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.

...

- 21 Part 12 Division 3 (ss 226-228) contains provisions dealing with procedures for applications to the Tribunal. Section 226 which specifies the categories of persons who are interested persons, and relevantly provides:

226 Interested persons

(1) The following persons are interested persons for the purpose of making an application to the Tribunal under this Act—

(a) the owners corporation,

...

- 22 Part 12 Division 4 (ss 229-238) contains provisions dealing with orders that may be made by the Tribunal. Section 232 deals with orders which may be made by the Tribunal to settle disputes or rectify complaints, and relevantly provides:

232 Orders to settle disputes or rectify complaints

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

(a) the operation, administration or management of a strata scheme under this Act,

...

- 23 Part 12 Division 5 (ss 239-248) contains general provisions relating to the Tribunal's powers and orders. Section 241 deals with the Tribunal's powers to prohibit or direct taking of specific actions, and provides:

241 Tribunal may prohibit or direct taking of specific actions

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

NCAT Act

- 24 Part 3 (ss 28-34) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) contains provisions dealing with the jurisdiction of the Tribunal. Section 28 deals with the jurisdiction of the Tribunal generally, and relevantly provides:

28 Jurisdiction of Tribunal generally

(1) The Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation.

(2) In particular, the jurisdiction of the Tribunal consists of the following kinds of jurisdiction—

(a) the general jurisdiction of the Tribunal,

...

- 25 Section 29 deals with the general jurisdiction of the Tribunal, and relevantly provides:

29 General jurisdiction

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

(a) legislation (other than this Act or the procedural rules) enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter, and

(b) the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal.

...

- 26 Schedule 4 contains provisions dealing with the Consumer and Commercial Division of the Tribunal (the CC Division). Clause 3 deals with the functions allocated to the CC Division, and relevantly provides:

3 Functions allocated to Division

(1) The functions of the Tribunal in relation to the following legislation are allocated to the Division—

...

Strata Schemes Management Act 2015

...

The applicable legal principles

Jurisdiction of the Tribunal under s 232 of the SSM Act

- 27 In *Vickery v The Owners Strata Plan 80412* (2020) 103 NSWLR 352; [2020] NSWCA 284 (*Vickery*) at [28] Basten JA made the following observations with respect to the scope of s 232 of the SSM Act:

“[28] ... The statutory scheme must be read as a whole. The terminology adopted in s 232 should be understood to cover claims and disputes with respect to any of the matters identified in subs (1), which are themselves in terms clearly intended to cover the full range of an owners corporation’s functions in operating, administering and managing the strata scheme, and exercising or failing to exercise any function under the Act, or the by-laws of the strata scheme.”

- 28 In *Huang v The Owners Strata Plan 7632 t/as The Owners Strata Plan 7632* [2022] NSWSC 194 (*Huang*) at [29]-[30] Rothman J made the following observations with respect to the scope of s 232 of the SSM Act in the context of the obligation of the owners corporation to maintain common property:

“[29] ... Over and above the foregoing, the Tribunal has the jurisdiction, on application by an interested person, which plainly would include lot owners and the owners corporation, to make orders to settle a complaint or dispute about the operation, administration or management of the strata scheme; the exercise or failure to exercise a function conferred or imposed under the Strata Schemes Management Act; and, the exercise of, or the failure to exercise, a function conferred or imposed on an owners corporation.

[30] This provision gives the Tribunal a very wide jurisdiction relating to any dispute or complaint about the specified matters. Given the obligations on the owners corporation to maintain common property, an issue relating to waterproofing that is affecting other lots in a strata scheme, and about which there has been a complaint, would invariably invoke the jurisdiction of the Tribunal with respect to the exercise or failure to exercise a function conferred or imposed on the owners corporation or on the lot owner.” (footnote omitted)

Nuisance

- 29 In *The Owners Strata Plan No 2245 v Veney* [2020] NSWSC 134; (2020) 19 BPR 39,971 at [45]-[47] Darke J accepted that nuisance within the meaning of s 153(1)(a) of the SSM Act should be interpreted in accordance with the common law meaning of an actionable nuisance.
- 30 In *Chehelnabi v Gourmet and Leisure Holdings Pty Ltd* [2020] NSWCATAP 102 at [54]-[60], [73]-[75] the Appeal Panel further considered the meaning of nuisance in s 153(1)(a) of the SSM Act:

“[54] In broad terms, the Court in *Veney* found that an actionable nuisance may be described as an unlawful interference with a person’s use or enjoyment of land, or of some right over or in connection with the land. Liability is founded upon a state of affairs created, adopted or continued by a person, otherwise than in the “reasonable and convenient use” of their own land, which, to a substantial degree, harms another owner or occupier of land in the enjoyment of that person’s land, citing *Hargrave v Goldman* (1963) 110 CLR 40 at [59]-[62].

[55] The Court also referred with approval, at [45] to the comments of Lord Wright in *Sedleigh-Denfield v O’Callaghan* [1940] AC 880 at 903, where his Lordship said:

A balance has to be maintained between the right of the occupier to do what he likes with his own [land], and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.

[56] That statement is consistent with the submissions of the parties here and so we will, with respect, adopt that meaning. We are satisfied that there is no need to hear further from the parties prior to doing so.

[57] The parties also referred us to *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248, where Ward J framed the question for determination in relation to a claim for nuisance as:

...whether there has been a substantial and unreasonable interference by the defendants with the rights of Mr and Mrs Quick in relation to or in connection with the use of their land.

[58] Ward J considered the principles relating to establishing whether a defendant has created or maintained a nuisance. Her Honour quoted from the judgment of Preston CJ in *Robson v Leischke* [2008] NSWLEC 152, from [47], relevantly as follows:

Where the defendant created the nuisance, the fault element varies depending on the nature of the defendant's conduct and his or her state of knowledge. Clerk & Lindsell on Torts identify three situations where the defendant has created the nuisance:

(a) "if the defendant deliberately or recklessly uses his land in a way which he knows will cause harm to his neighbour, and that harm is considered by a judge to be an unreasonable infringement of his neighbour's interest in his property, and therefore an unreasonable use by the defendant of his property, the defendant is liable for the foreseeable consequences. This proposition covers all those cases of obvious or "patent" nuisances, and they are peculiarly the cases which call for prevention or prohibition by injunction. It is no defence that the defendant believed he was entitled to do as he did or that he took all possible steps to prevent his action amounting to a nuisance": Clerk & Lindsell on Torts, 19th ed, Sweet & Maxwell, London, 2006, [20-39], p 1184;

(b) "if the defendant knew or ought to have known that in consequence of his conduct harm to his neighbour was reasonably foreseeable, he is under a duty of care to prevent such consequences as are reasonably foreseeable. In such case the defendant is liable because he is considered negligent in relation to his neighbour, and here nuisance and negligence coincide": Clerk & Lindsell on Torts, 19th ed, Sweet & Maxwell, London, 2006, [20-40], p 1185; and

...

Where the defendant continues or adopts a nuisance, different conduct is required before liability will be imposed on the defendant. An occupier of land "continues" a nuisance or a potential nuisance if, with actual or constructive knowledge of its existence, he or she fails, within a reasonable period of time, to take reasonable measures to bring it to an end: *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 894, 904-905, 913; *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637 at 657-658; *Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986) 62 ALJ 282 at 284, (1986) 62 LGRA 46 at 50; *City of Richmond v Scantelbury* [1991] 2 VR 38 at 41, 42; *Proprietors of Strata Plan No 14198 v Cowell* (1989)

24 NSWLR 478 at 484; *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321 at 332 [29].

[59] Ward J, at [158], said that unreasonable interference required a determination of whether the events in question interfered with the comfortable and convenient enjoyment by the plaintiffs of their land, and that "this turns on whether there has been an excessive use by the defendants of their land resulting in what is considered to be an unreasonable interference with the enjoyment by the plaintiff of his land, having regard to the ordinary usages of humankind living in a particular society; (Robson, at [84])."

[60] In considering this question, her Honour went on to refer to the decision of the Full Court of the Supreme Court of New South Wales in *Bayliss v Lea* [1961] NSWLR1002 ('*Bayliss*') in which the Court approved the following statement from Fleming on Torts 2nd ed, Clarendon Press, 1961 at 400-1:

The paramount problem in the law of nuisance is, therefore, to strike a tolerable balance between conflicting claims of landowners each of whom is claiming the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other. Reconciliation has to be achieved by compromise, and the basis for that adjustment is reasonable use. Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, considering the prevailing standard of comfort of the time and place. Reasonableness in this context is a two-sided affair. It is viewed not only from the standpoint of the Defendant's convenience, but must equally take into account the interest of the surrounding occupiers. It is not enough to ask: Is the Defendant using his property in what would be a reasonable manner if he had no neighbour? The question is: Is he using it reasonably, having regard to the fact that he has a neighbour?"

"[73] As can be seen from the cases referred to above, for an actionable nuisance in respect of noise to be established, there are two primary elements which need to be satisfied.

[74] The first is that there must be some noise that can be heard by the complainant (here the appellants) in the use of their lot which emanates from the respondents' lot, allegedly causing damage or interference. This may readily be established by the subjective evidence of the appellants as to what they hear or experience.

[75] The second element, though, is that there must be evidence to establish to the satisfaction of the Tribunal that the noise is caused by a use of the respondents' land which is excessive or unreasonable and "causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, considering the prevailing standard of comfort of the time and place" (*Bayliss*), or that what is experienced by the appellants is not "reasonable according to the ordinary usages of mankind living in ... [our] society": *Sedleigh-Denfield v O'Callaghan* *ibid*. This is an objective test: *Marsh v Baxter* [2015] WASCA 169 at [247], referred to with approval in *Weber v Greater Hume Shire Council* [2018] NSWSC 667 at [427]."

- 31 Recently in *Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145 at [15]-[17] Richards J summarised the principles applicable to nuisance:

“[15] A person commits a private nuisance if that person interferes with another person’s use or enjoyment of their land in a way that is both substantial and unreasonable. In *Hargrave v Goldman*, Windeyer J described the basis of liability for nuisance in this way:

In nuisance liability is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land.

[16] Whether an interference is substantial is a question of fact. A substantial interference may involve property damage, personal injury, or harm to an occupier’s use or enjoyment of land; for example, by air pollution, vibration, noise or dust. While it does not extend to a trivial interference, or protect those of ‘delicate or fastidious’ habits, it does include an interference that disturbs an occupier’s sleep.

[17] Whether an interference is unreasonable is an objective question, to be answered by ‘weighing the respective rights of the parties in the use of their land to make a value judgment as to whether the interference is unreasonable’. The authorities direct attention to a range of considerations that may be relevant to the question of reasonableness. These were summarised by the Court of Appeal of Western Australia in *Southern Properties (WA) Pty Ltd v Executive Director of the Dept of Conservation and Land Management*:

To constitute a nuisance, the interference must be unreasonable. In making that judgment, regard is had to a variety of factors including: the nature and extent of the harm or interference; the social or public interest value in the defendant’s activity; the hypersensitivity (if any) of the user or use of the claimant’s land; the nature of established uses in the locality (eg residential, industrial, rural); whether all reasonable precautions were taken to minimise any interference; and the type of damage suffered.” (footnotes omitted)

The evidence of the parties

The evidence of the applicant

The Petkovich statement

32 In the Petkovich statement Mr Petkovich gave the following evidence:

- (1) he is the occupier of lot 5 of SP58615;
- (2) the respondent has been leaving out bread/feed for birds from sunrise to 10am, and from 3pm to sunset since prior to July 2021. Up to 30 birds congregate at those times waiting for the feed to be dispensed. Birds take the feed/bread from the ground in lot 6 to house/units roofs, fences, power lines, clothes lines to eat. The feed/bread then breaks away dropping to the areas where they eat;
- (3) he has asked the respondent numerous times to cease feeding the birds;

- (4) he has to high pressure wash his backyard due to the bird droppings for his family's health and safety. He has had to regularly re-wash clothes that have been soiled by birds;
- (5) there has been an increase in vermin since the feeding of birds commenced which twice has required pest control treatment on his roof. The wood fence between the respondent and himself has slowly deteriorated from the scratching and pecking of the birds on it;
- (6) his personal enjoyment of his yard has deteriorated due to the respondent feeding birds on a daily basis;
- (7) he has attached photographs taken from his back yard taken on 1 May 2021, 3, 4 and 21 July 2021, 7 August 2021, 8 September 2021, and 3 March 2022 showing various birds at different times of the day.

The Dpenha statement

33 In the Dpenha statement Mr Dpenha gave the following evidence:

- (1) he is the occupier of lot 1 of SP58615;
- (2) on 5 July 2021 at 8.27am, he observed the respondent throw pieces of bread on the common property, leading to birds like magpies, noisy miners and cockatoos feeding on these bread droppings;
- (3) on 29 July 2021 at 4.45pm, he observed cockatoos feed on bread pieces over the roof of lot 6 and making unbearable noise;
- (4) the respondent has been seen on many occasions feeding birds and dropping off bread pieces in the common property which has resulted in rats on his roof;
- (5) he has attached photographs taken on 5 July 2021 at 8.27am and 29 July 2021 at 4.45pm showing various birds;
- (6) this has caused an inconvenience to the common property, with birds gathering around the common property every morning and evening feeding on bread pieces and causing bird dropping.

The Hayze statement

34 In the Hayze statement Mr Hayze gave the following evidence:

- (1) he is the occupier of a lot in an adjoining property;
- (2) the respondent has been putting bread out to feed birds daily since prior to July 2021. Birds take the bread from the ground of lot 6 of SP58615, and then sit on his roof and clothes line and eat it;
- (3) he lives with and cares for his elderly parents who both have serious health issues. The birds are very noisy all day and his parents struggle to rest and sleep;
- (4) he cannot hang his washing on the clothes line because the birds sit there and soil the clothes. When he has done this he has had to re-wash them and put them in the clothes dryer to dry them;

- (5) he has had to arrange pest control treatment on his roof many times because he has a mice and rat problem because of the feeding of the birds.

The Lyon statement

35 In the Lyon statement Ms Lyon gave the following evidence:

- (1) she is the occupier of a lot in an adjoining property;
- (2) the respondent has been putting bread out to feed birds every day from sunrise to sunset since prior to July 2021. Birds congregate at those times waiting for their feed. Birds take the bread from the ground of lot 6 of SP58615, and then sit on her fence and roof and eat it;
- (3) she has spoken to the respondent about this issue and asked her to stop feeding the birds, especially as she has had her new colorbond fence put up. She would reply “yes ok” and then when it is feeding time she goes out to the back of her house where the back fence divides them and puts bread for the birds to eat. She has seen the respondent do it with her own eyes and has had an argument with her about it. The respondent replied swearing curse words at her and shouting, and threw a broken broom handle at her;
- (4) she cannot hang her washing on the clothes line because the birds sit there and soil the clothes. When she has done this she has had to re-wash them and put them in the clothes dryer to dry them;
- (5) she has had to arrange pest control treatment on her roof many times because of an increase in vermin;
- (6) the birds have damaged the plants in her garden;
- (7) the noise the birds make when they are all sitting and waiting for their feed is absolutely ridiculous. She is a pensioner who lives alone and has have been diagnosed with deep depression, anxiety, and chronic back pain; recently she has been experiencing very painful migraine as a result of to the birds’ noises. She is emotionally drained and tired from arguing with the respondent about the birds and with scaring them away every day;
- (8) she has attached photographs taken from her back porch which is directly opposite lot 6 of SP58615 taken on 26 February 2022, and 3, 5, 6 and 8 March 2022, showing the birds sitting on her fence waiting for their feed.

The Lewry report

36 In the Lewry report Mr Lewry gave the following evidence:

- (1) he has have attended SP58615 three times in the last six months to carry out rodent baiting in and around lots 1, 2, 3, 4, and 5 (opposite and adjacent to lot 6) due to complaints of rats in roof spaces and running along fences;

- (2) he suggests that the owners/occupants of lot 6 be requested to stop feeding pigeons and other pest birds in and around the property;
- (3) he expresses the opinion that apart from the risks of bird lice and diseases from these vermin birds spreading to occupants of nearby units, the continual placement of bread and food scraps for the birds is constantly attracting rats onto the property.

The oral evidence of Mr Petkovich

37 Mr Petkovich gave the following oral evidence:

- (1) the evidence in the Petkovich statement;
- (2) the feeding of the birds by the respondent has been continuing;
- (3) the damage and inconvenience caused by the birds has been continuing.

The evidence of the respondent

The Almin declaration

38 In the Almin declaration the respondent gave the following evidence:

- (1) she has been the owner of lot 6 of SP58615 for multiple years;
- (2) she lives alone in lot 6 of SP58615, and has been diagnosed with chronic mental illness;
- (3) she provides food in her backyard to her dogs that consists of a variety of foods such as (bread, steak, rice, fried chicken, vegetables and dried food) and clean water for their drinks. She does not feed her dogs on the common property. Once a day she cleans her background;
- (4) she has no intention to feed wild birds/wild animals, and does not provide food for them. She is annoyed with the incoming birds but has no power to evict them since she lives alone and is disabled;
- (5) she has attached a medical certificate dated 7 May 2022 of a general practitioner in which he expresses the opinion that she is suffering from chronic mental illness including mixed depression and anxiety, and insomnia. She needs her dogs at home which provide her with company and help with her stress;
- (6) she has attached photographs including photographs depicting four dogs in her backyard, plates of food, and the backyard after it has been washed using a hose.

Whether the Tribunal has jurisdiction to determine the proceedings

39 I am satisfied that the applicant is an interested person within the definition in s 4(1) and s 226(1)(a) of the SSM Act by reason of being the owners corporation of SP58615.

40 I am also satisfied that the respondent is the owner of lot 6 of SP58615.

41 I am further satisfied that the Tribunal has jurisdiction to determine the proceedings for the following reasons:

- (1) given that the applicant is an interested person within definition in s 4(1) when read with s 226(1)(a) of the SSM Act, and has a dispute with the respondent about the operation, administration or management of SP58615, then in accordance with *Vickery* at [28] and *Huang* at [29]-[30], the Tribunal has jurisdiction under s 232(1)(a) to make orders to settle the dispute between the parties. If satisfied that the respondent had breached any one or more of s 153(a), (b) and (c) of the SSM Act by causing a nuisance by feeding wild birds, then the Tribunal would have power under s 241 of the SSM Act to make an order restraining the continuation of the nuisance;
- (2) these provisions are picked by ss 28(1) and (2)(a) and 29(1)(a) of the NCAT Act, and pursuant to Sch 4 cl 3(1) of the NCAT Act this jurisdiction is allocated to the CC Division.

Whether the proceedings should be heard in the absence of the respondent

42 I am satisfied that the Registry served the 9 May 2022 notice on the respondent.

43 As the condition in r 35(2)(a) of the Civil and Administrative Tribunal Rules 2014 (NSW) has been satisfied by the service of the 9 May 2022 notice, I have decided to exercise the discretion under this rule to proceed with the hearing in the absence of the respondent.

Whether the respondent has created a nuisance to other lot owners in SP58615, and if so any relief should be granted to the applicant

44 The only direct evidence of the respondent feedings birds on the common property is that of Mr Dpenha in the Dpenha statement, and that it occurred on 5 July 2021. This evidence does not provide a precise location of the incident on 5 July 2021. The other evidence of Mr Dpenha that the respondent has been seen on many occasions feeding birds and dropping off bread pieces in the common property is not expressed to be based on his personal observation. In the light of the evidence of the respondent in the Almin declaration that she does not provide food for wild birds/wild animals, and does not feed her dogs on the common property, I am not satisfied that the respondent has been feeding birds on the common property of SP58615.

45 I accept the evidence of Mr Petkovich in the Petkovich statement and Ms Lyon in the Lyon statement that the respondent leaves out bread daily in the

backyard of lot 6 of SP58615. However, in view of the lack of specificity of this evidence, and the evidence of the respondent that she provides food in her backyard to her dogs that consists of a variety of foods such as (bread, steak, rice, fried chicken, vegetables and dried food), I am not satisfied that the respondent has been feeding birds in her lot.

46 As the applicant has not established that the respondent is feeding birds in her lot or on the common property of SP58615, it follows that the proceedings should be dismissed.

47 If I had been satisfied that the respondent is feeding birds in her lot or on the common property of SP58615, then:

- (1) I would have been satisfied that there is an interference to a substantial degree in the enjoyment of the land of the neighbours of the respondent. I would have accepted the evidence of Mr Petkovich in the Petkovich statement, Mr Dpenha in the Dpenha statement, Mr Hayze in the Hayze statement, and Ms Lyon in the Lyon statement as to the consequences of the feeding of the birds including excessive noise interfering with sleep, damage to a wooden fence and a garden, the increase in vermin, and the soiling of washing hung on the clothes line to dry;
- (2) I would have been satisfied that this interference is unreasonable. I would not have accepted that it is a reasonable use of her lot for the respondent to feed wild birds.

Order

48 I make the following order:

- (1) the proceedings are dismissed.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

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