



Civil and Administrative Tribunal
New South Wales

Case Name: Hogan v Stebnicki

Medium Neutral Citation: [2022] NSWCATCD 63

Hearing Date(s): 20 January 2022

Date of Orders: 01 June 2022

Decision Date: 1 June 2022

Jurisdiction: Consumer and Commercial Division

Before: P French, Senior Member

Decision: (1) The application is dismissed.

Catchwords: LAND LAW – Strata title – By-laws – Noise – Floor coverings – Interference with the peaceful enjoyment of the owner or occupier of another lot – Objective test

Legislation Cited: Strata Schemes Management Act 2015 (NSW)

Cases Cited: Briginshaw v Briginshaw [1938] 60 CLR 336
Felcher v The Owners Strata Plan 2738 [2017] NSWCATAP 219
Feletti v Eales; Eales v Felletti [2018] NSWCATCD 66
Gao v Agosti [2009] NSWCTTT 175
Nowak v Pellicciotti [2018] NSWCATAP 245

Texts Cited: Guideline for Apartment and Townhouse Acoustic Rating Version 1.0 (June 2017)

Category: Principal judgment

Parties: Patricia Hogan (First Applicant)
Brendan Hogan (Second Applicant)
Mark Stebnicki (First Respondent)
Jessica Stebnicki (Second Respondent)

Representation: Applicants (Self-represented)

Respondents (Self-represented)

File Number(s): SC 21/35010

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

- 1 By this application the applicant Lot 2 Lot Owners (Lot 2 Lot Owners) apply for an order under s 230(1) of the *Strata Schemes Management Act 2015* (SSM Act) that would give effect to an agreement or arrangement arising out of a mediation session they participated in with the respondent Lot 3 Lot Owners (Lot 3 Lot Owners). Specifically, the Lot 2 Lot Owners seek an order that would require the Lot 3 Lot Owners to comply with By-Laws 1 and 14 of the Strata Plan (which relate to noise and noise transmission through floors) by installing carpets and underlay on the floor surfaces of the living areas and bedrooms of Lot 3. This application was made to the Tribunal on 16 August 2021 (the application).
- 2 For the reasons set out in greater detail following, the application has been dismissed. There has been no failure by the Lot 3 Lot Owners to comply with the mediation agreement dated 11 May 2021 that would warrant such an order being made. Nor have the Lot 2 Lot Owners established on an objective basis that noise transmission from Lot 3 to Lot 2 through the floor of Lot 3 is so excessive as to constitute noise nuisance.

Procedural history

- 3 The application was first listed before the Tribunal, differently constituted, for a Directions Hearing by telephone on 13 October 2021 in accordance with the Tribunal's COVID-19 Revised Hearing Procedure. Both Lot 2 Lot Owners attended that listing of the application. Mr Mark Strebnicki attended on behalf of the Lot 3 Lot Owners. In accordance with the Tribunal's usual practice where both parties are present at the first listing of an application, the Tribunal attempted to assist the parties to resolve the dispute co-operatively by

conciliation. Those efforts were not successful. As a consequence, the Tribunal adjourned the application for a Special Fixture Hearing and issued directions to the parties for the filing and exchange of the documentary evidence that they intended to rely upon at the final hearing.

Evidence and hearing

- 4 Both parties complied with the Tribunal's directions for the filing and exchange of their documentary evidence. The Lot 2 Lot Owner's bundle was marked Exhibit A1. The Lot 3 Lot Owners' bundle was marked Exhibit R1.
- 5 The Special Fixture Hearing was conducted by telephone in accordance with NCAT's COVID-19 Revised Hearing Procedure. Both Lot 2 Lot Owners attended in person. Mr Brendan Hogan gave oral evidence under affirmation. Mr Mark Strenbnick attended the hearing on behalf of the Lot 3 Lot Owners. He gave oral evidence under oath. The parties had the opportunity to present their respective cases, to ask each other questions, and to make final submissions to the Tribunal.

Material facts

- 6 The applicants are the owners of Lot (unit) 2 in Strata Plan 14531. Ms Patricia Hogan lives in that unit and has done so since 1993. She is 78 years of age and retired. The respondents are the owners of Lot (unit) 3 in that strata plan. They purchased the property in 2013, initially leasing it to tenants under a residential tenancy agreement. They then lived in the property between April 2015 and September 2020. Since September 2020, the property has again been leased to tenants under a residential tenancy agreement.
- 7 Strata Plan 14541 was registered in 1979. It is a residential block comprising of 15 Lots (units). Lot 2 is on the ground floor of the unit block. Lot 3 is on the second floor immediately above Lot 2.
- 8 The By-Laws of Strata Plan 14531 include two By-Laws (By-Laws 1 and 14) which concern noise nuisance with the Strata Scheme. They provide as follows:

1. Noise

An owner or occupier of a lot must not create any noise on the parcel likely to interfere with the peaceful enjoyment of the owner or occupier of another lot or of any person lawfully using the common property.

...

14. Floor coverings

(1) An owner of a lot must ensure that all floor space within the lot 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.

(2) This by-law does not apply to floor space comprising a kitchen, laundry, lavatory or bathroom

- 9 There is a long history of disputation between the parties dating back to 2013 about alleged serious noise transmission from Unit 3 through its floor into Unit 2. It is not necessary to traverse that history in any detail in the disposition of this application. It is sufficient to observe that the intensity of the dispute has ebbed and waned in relationship to who was occupying Lot 3 at the time, and is presently relatively acute.
- 10 The floor in dispute is a floating timber floor which covers the hall, living and dining areas and the bedrooms in Lot 3. On the Lot 3 Lot Owners' evidence I am satisfied that the floor was installed prior to their purchase of the Lot in approximately 2006. Part of the floor was replaced with the same material in 2010 due to water damage to the floor, again prior to the Lot 3 Lot Owners' purchase of the property. Despite inquiries made by the Lot 3 Lot Owners of the builder who installed the original specifications for the floor installation have not come to light. It is, however, from one exposed area of the floor in the kitchen of Lot 3 that the floor sits on an underlay.
- 11 In or about March 2014 the Lot 2 Lot Owners applied to NSW Fair Trading for Strata Mediation in relation to the dispute as it stood at that time. The Mediation was conducted between Ms Patricia Hogan and Mr Mark Srebnicki on 27 March 2014. That Mediation did not result in any settlement of the dispute or in any agreed actions between the parties at all. There is in evidence a letter to the parties from the Mediator dated 1 April 2014 which confirms that there was no agreed outcome from the Mediation Session.
- 12 It is contended by the Lot 2 Lot Owners that the Lot 3 Lot Owners agreed at that Mediation to install carpet and underlay in place of the floating timber floor.

That is denied by the Lot 3 Lot Owners and, as I have noted, no such agreement is recorded by NSW Fair Trading's Mediator. However, the Lot 3 Lot Owners do say that they purchased mats and rugs which were placed over most of the floating timber floor in August 2013 and January 2014 in an attempt to appease the Lot 2 Lot Owners. In support of that contention they have submitted contemporaneous photographs of these mats and rugs in situ after being installed.

- 13 On a date in early 2021 that is not in evidence the Lot 2 Lot Owners made another application to NSW Fair Trading for Mediation of the dispute. That Mediation took place on or about 11 May 2021 and was attended by both Lot 2 Lot Owners and both Lot 3 Lot Owners. It resulted in the following agreement in resolution of the dispute which is set out in a document titled "Settlement Agreement to a dispute under the Strata Schemes Management Act 2015". This document is on NSW Fair Trading letterhead. The document states that the agreement was made on 11 May 2021. The agreement states, relevantly:

...

THE PARTIES AGREE THAT:

- The respondent will provide access to unit 3 for acoustic testing to be carried out. The necessary arrangement for access will be coordinated by the strata managing agent and property manager of unit 3 and the acoustic testing will be carried out as soon as practicable;
- The respondent will arrange for any recommendations regarding sound reduction, if any, to be carried out within 30 days from the date that the acoustic report is provided to them;
- The applicant will approach resident/s of unit 3 where necessary in a friendly and cordial manner in future;
- If the above agreed actions are not carried out or do not resolve the issues at hand, the applicant may apply to the NSW Civil and Administrative Tribunal for a decision.

...

- 14 Following the 11 May 2021 Mediation agreement the Lot 3 Lot Owners requested the Strata Scheme's Strata Manager to arrange for acoustic testing of the Lot 3 floor. The Strata Manager engaged Blackett Acoustics Noise and Vibration Consultants (Blackett Acoustics) to carry out this testing on behalf of the Owners Corporation (not the Lot 3 Lot Owners). Blackett Acoustics carried out testing on 21 June 2021 and submitted its report to the Strata Manager on

5 July 2021. The author of the report is Jimi Ang who states his principal qualification as a B.Eng (Aeronautical). The salient contents of that report are set out following:

Re: Impact Noise Isolation Test (Post-installation) – Unit 3 ...

Introduction

Unit 3 ... has installed a hard flooring system (e.g. laminate floorboard) to replace all carpeted areas within the living areas of the apartment. A series of floor impact test were conducted on Monday, 21 June 2021 to investigate floor performance of the installed hard flooring system in the living room of Unit 3 and the living room located directly below in Unit 2. Information of the installed floor system is not available.

By-Law requirements

[By-Law 14 is set out]

Based on Blackett Acoustics experience with floor impact noise issues within residential apartments, our interpretation of the general By-Law requirement of “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”, is to achieve at least a 3 Star rating floor system. However, an Owner’s Corporation has the discretion to set its own By-Law in this regard.

It is noted that even a 3-Star performance floor impact noise is relatively modest. Different Owners Corporations in different buildings have decided for themselves what constitutes “disturb the peaceful enjoyment” based on that building’s circumstances. Very expensive (luxury) buildings have opted for 5-Star or 6-Star levels of impact sound insulation for owners wishing to change carpet and underlay floor covering.

The current Building Code of Australia (BCA) structure borne noise requirement which is of a minimum amenity (maximum impact sound level) of $L_{nT,w}$ equal to or less than 62dB. This is approximately equivalent to a 2 star rating floor system.

For $L_{nT,w}$, the lower the descriptor, the better the floor will perform to isolate against floor impact noise.

3 Methodology

The recognised method for testing and rating the floor impact performance of floors is described in:

ISO 140-7:2006: Acoustics – Measurement of sound insulation in buildings and building elements – Part 7: Field measurements of impact sound insulation of floors, and

ISO 717-2:2013: Acoustics – Rating of sound insulation in buildings and of building elements – Part 2: Impact sound insulation.

One-Third octave (100Hz to 3.15Hz) noise measurements were obtained by using an NT1 XL2 sound level meter, set to fast response.

The sound level meter was calibrated before and after the measurements with no significant drift recorded.

A Phon-X Ntek Slim tapping machine was placed randomly at four different positions on the course room directly above the receiver room

....

The noise levels generated by the tapping machine were measured in the receiver room in one-third octave bands (100Hz to 3.15Hz). The amount of reverberation (or “echo”) of the room was also measured using a series of balloon bursts as an impulse trigger, along with the room volume, so that the measured impact noise level can be standardised. The standardised noise levels in each frequency band are then compared to a reference curve ($L_{nT,w}$) and the rating of the impact noise determined.

4 Measurement results

...

Table 4.1 Measured Performance of Floor Covering

Description	Measured $L_{nT,w}$ floor performance
Floor system installed between Unit 3 and Unit 2 ... Details of the installed floor system not available during time of assessment	53

For $L_{nT,w}$, the lower the descriptor, the better the floor will perform to isolate against floor impact noise.

5 Discussion

The AAAC has published a booklet entitled “Acoustical Star Ratings for Apartments and Townhouses”; Table 5.1 below presents the recommended Star Rating for typical impact floor performance.

Table 5.1 AAAC Star Rating System for Typical Performance of Floor Systems

Floor covering	Descriptor	Level
AAAC* 6 Star Rating Floor	$L_{nT,w}$	40
AAAC* 5 Star Rating Floor	$L_{nT,w}$	45
AAAC* 4 Star Rating Floor	$L_{nT,w}$	50

AAAC* 3 Star Rating Floor	LnT,w	55
AAAC* 2 Star Rating Floor	LnT,w	65

Based on the result presented in Table 4-1 and comparing to the AAAC star rating system, the following can be established:

The installed floor system is ranked as 3-star rating with some attributes of 4-star (based on the existing floor/ceiling construction between Unit 3 and Unit 2) consistent with the AAAC star rating system.

The installed floor system meets the current BCA requirement of a minimum amenity (maximum impact sound level) of Ln, Tw less than or equal to 62.

Based on post-installation test results, the installed floor system has achieved compliance with the By-Law requirements of “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.”

In order to minimise the probability (sic, possibility?) of breaching the requirements of not unreasonably disturbing another Owner or Occupier, it is recommended that the occupants with installed hard flooring systems take the following additional precautions into consideration:

No shoes in the apartment i.e. leave shoes at the front door.

Felt or other soft pads under the feet of all the furniture such as chairs, tables and lounges etc.

Children (if any) are to have play mats to play on so that they do not bang there toys on the floor etc.

Scatter rugs.

Carpet runners in hall ways and other high traffic areas.

....

- 15 The Lot 2 Lot Owners also rely on a further extract from the Association of Australian Acoustical Consultants' *Guideline for Apartment and Townhouse Acoustic Rating* Version 1.0 (June 2017), which is found at page 6 of that publication:

	Sound insulation expressed as DnT,w + Ctr				
	35	40	45	50	55
Type of	2	3	4	5	6

Noise Source	Star	Star	Star	Star	Star
Normal speech	Audible	Just audible	Not audible	Not audible	Not audible
Raised speech	Clearly audible	Audible	Just audible	Not audible	Not audible
Dinner Party/Laughter	Clearly audible	Audible	Just audible	Not audible	Not audible
Shouting	Clearly audible	Clearly audible	Audible	Just audible	Not audible
Small Television/ Small Entertainment System	Clearly audible	Clearly audible	Audible	Just audible	Not audible
Large Television. Large Hi-fi Music System	Clearly audible	Clearly audible	Clearly audible	Audible	Just audible
DVD with	Clear	Clear	Clear	Audi	Audi

Surround Sound	ly audib le	ly audib le	ly audib le	ble	ble
Digital Television with Surround Sound	Clear ly audib le	Clear ly audib le	Clear ly audib le	Audi ble	Audi ble

16 The Lot 2 Lot Owners also rely upon the contents of the following table. The specific publication from which this table has been sourced is not specified:

Table 1 below presents the typical impact floor performance and recommended criteria which can be used as a comparison to the measured level.

Table 1: Typical Performance of Floor Systems and Recommended Criteria

Floor covering	Descriptor	Level
175mm concrete slab	Lnt,w	72
Medium-pile carpet with 10mm thick standard soft foam/felt underlay, 200mm thick concrete slab, suspended ceiling below	Lnt,w	30-35
Medium-pile carpet with 10mm thick standard soft foam/felt underlay, 200mm thick concrete slab, no ceiling below	Lnt,w	35-40
Hard floor surface on high-performance acoustic underlay system (full floating floor) with suspended ceiling below	Lnt,w	45
AAC 6 Star Rating Floor	Lnt,w	40

AAC 5 Star Rating Floor	Lnt,w	45
AAC 4 Star Rating Floor	Lnt,w	50
AAC 3 Star Rating Floor	Lnt,w	55
AAC 2 Star Rating Floor	Lnt,w	65
Minimum standard in the Building Code of Australia (BCA) Acoustic Provisions	Lnt,w + Ci	62

- 17 Additionally, the Lot 2 Lot Owners rely upon the following extract of an online publication produced by the Carpet Institute of Australia Limited, which is entitled “Acoustic Benefits of Carpet”:

Impact Sound through Floor/Ceiling Systems

Noise from footfall in the apartment above is a common source of complaint among modern apartment dwellers.

Building Code of Australia (BCA) Acoustic Criteria

The BCA incorporates Deemed-to-Satisfy provisions for impact sound insulation of floor/ceilings separating apartments.

The Carpet Institute commissioned CSIRO acoustical laboratories to test a range of carpets for impact sound insulation in accordance with the BCA requirements. All floors tested with carpet were found to easily pass the BCA criterion for impact sound. Results are summarised in Table 3

Table 3 Impact Sound Insulation Values and BCA Requirements

Product	Impact sound rating (Ln,w +Ci,dB)	Performance
Requirements for Class 2 & 3 buildings	62 or less	
Carpet with underlay	30	Excellent impact

on concrete		sound insulation
Carpet without underlay on concrete	42	Good impact sound insulation
Concrete floor	68	Inadequate impact sound insulation

Carpet is the most effective and practical option for protecting residents of multi-storey buildings from impact generated noise of occupancies above.

- 18 In a Statutory Declaration dated 26 November 2021 the applicant Ms Patricia Hogan states the following:

I have lived in my current residence ... for 28 years from April 1993. Prior to the carpet being removed from unit 3, there was no noise disturbance ...

The floor noise in unit 3 started post floor installation. Starting from 2012, daily floor noise from unit 3 had flooring commenced, including talking, footfall, objects bouncing on the floor, and alarms.

I frequently hear talking, footfall, objects dropping, placed on floor, scaping furniture, vacuum bouncing, banging, and cat tree gym moving across the floor early morning, afternoon and late evening. Prior to carpet being removed, I did not hear any of these floor noise disturbances.

The neighbours alarm sounds at 5am each morning, waking me. I then hear the bathroom fan switch on, and toilet flushing. I could not hear any of these noises before the new floor.

The noise is intermittent across each day; early morning, and late at night. At times, footfall, and talking is lengthy in duration, lasting more than 10 minutes on each occasion. I leave my apartment frequently on those occasions. I cannot perform activities without interruption from the floor; having to adjust my television louder to hear programs and music. I wear noise cancelling headphones, to escape floor noise and get rest. I typically leave my apartment in the morning, staying away for hours. I did not need to make these lifestyle adjustments prior to the new flooring.

The noise has been reduced by rugs, but I can still hear footfall, objects placed on the floor, cat tree trolley moved early morning, afternoon, and late evening. I can also hear the unit 3 alarm sounding at 5am, bathroom fan switch activated and toilet flush at this time.

This is having a toll; my sleep and rest is impacted. It is not safe for me to sleep with earplugs, because I live alone, so it is hard to block noise to get rest during the day, early morning or late at night.

..

- 19 In a Statutory Declaration dated 26 November 2021 the applicant Mr Brend Hogan states the following:

... prior to the carpet being removed from unit 3 there was no floor related noise audible in my mother's unit ...

...

The carpet was removed over 10 years ago by the predecessor.

Starting 2013 through 2021, I have heard footfall noise, objects placed on the floor, furniture scraping, talking, originating from the flooring in [unit 3] ... The noise could be described as a nuisance, could last 5-10 minutes in duration, and would require some effort to either stop conversation, or pack up and leave the apartment. On most occasions, I would shorten visits, and leave, taking mum away from her unit.

I recently heard that might be described as exercise equipment, trolley scraping, bouncing, across the upstairs floor. I had to ask my mother to repeat herself, stop talking until the noise stopped. We decided to leave the apartment.

The noise has reached a critical point, with the noise intrusion across the day and night affecting our mother's health and well-being, her ability to rest and maintain a peaceful enjoyment of her residence.

- 20 The strata scheme is in the North Sydney Local Government area. In this respect the Lot 3 Lot Owners rely upon the provisions of the North Sydney Development Control Plan 2013, Part B, section 1.3.8 which states:

Objective

To ensure all residents are provided with a reasonable level of acoustic privacy.

Control

...

Table B-1.3: Internal acoustic insulation criteria.

Item	Criteria
...	
...	
Impact Isolation of	Where the floor of a dwelling separates a habitable room of one dwelling and a habitable room, bathroom, toilet, laundry, kitchen, plant room, stairway, public corridor, hallway and the like of a separate tenancy, the floor shall be designed to

Floors	achieve a weighted standardised impact sound pressure level, Ln'tw not more than 55dB.
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- 21 In his Statement dated 10 December 2021, Mr Mark Stabnicki relevantly states:

...

Lot 3 flooring

4. I have not removed, replaced or changed the flooring installed by the former owner ... during my ownership

...

My occupancy of lot 3

11. I lived in lot 3 with my now wife, Jessica Stebnicki, between 25 April 2015 and 9 September 2020.

12. During the tenancy, I commonly observed noises of normal daily living activities from the lots above, including:

- a. closing of cupboards and doors;
- b. movement of objects and people on floors;
- c. television, alarm clock and music sounds; and
- d. taps, toilet flushing and sounds of urinating.

- 22 The Lot 3 Lot Owners also rely upon an email exchange dated 8 December 2021 between their current Property Manager and tenant, Ms Georgia Mills, in which Ms Mills was invited to comment on the noise complaints made by Ms Hogan in her Statutory Declaration, dated 26 November 2021. Relevantly Ms Mills states:

Unit 2 and her son make several allegations that are simply incorrect, these include:

5am alarms "each morning" – we do not get up at or near that time, so any alarm she can hear is not from us;

Bathroom fan at 5am – again we are not up at this time so any fan noise or toilet flushing is not from us. We note that we can also hear toilets flush, bathroom fans, vacuuming, objects dropping, conversations, TV, music etc and this is a usual part of strata living and does not impact us in any way;

"Cat tree trolley" – we have no idea what this is, we do not own anything that could be described as a trolley to be dragged across the floor – the cat tower does not have wheels and if we move it we pick it up and carry it, and unless she has been surveilling us without our consent then there is no way she could know when or how often we move it (which is not daily);

Exercise equipment – we do not keep or use such equipment in the apartment, aside from a pilates mat which obviously makes no noise.

We have gone out of our way to appease her unreasonable demands for total silence, including purchasing additional mats, walking softly and not wearing shoes in the apartment. We also minimise our use of the balcony because each time we do we risk her verbally attacking us or otherwise complaining. We do this solely because we want to be left alone to enjoy our apartment in peace and not endure constant unpleasantness and vexatious complaints.

...

Contentions of the parties

- 23 The Lot 2 Lot Owners contend that the Lot 3 Lot Owners have failed to comply with agreements reached in mediation in 2014 and 2021 by installing carpet and underlay with a 5-star rating that will prevent noise transmission through the floor of Lot 3 into Lot 2. They contend that this has resulted in a continuing breach by the Lot 3 Lot Owners of By-Law 14. They contend that the noise transmission is serious and persistent throughout most of the day and impacts on Ms Hogan's sleep, her ability to use her own Lot for ordinary domestic purposes (relaxation, watching TV etc), and on her mental well-being.
- 24 The Lot 3 Lot Owners deny that they have failed to comply with the terms of any Mediation agreement made with the Lot 2 Lot Owners. They contend that there was no such agreement reached in 2014, and that they have done all that was required by the 2021 Mediation agreement. They deny that they are in breach of By-Law 14. They contend that the floor of Lot 3 complies with and exceeds the noise insulation performance requirements of the Building Code of Australia and the North Sydney Development Control Plan 2013

Jurisdiction

- 25 There is no issue that the Tribunal has jurisdiction to hear and determine this application according to the provisions of the SSM Act.

Applicable law

- 26 Section 230(1) of the SSMA relevantly provides that the Tribunal may make orders to give effect to any agreement or arrangement arising out of a mediation session.
- 27 The Lot 2 Lot Owners bear the onus of establishing that the Lot 2 Lot Owners have failed to comply with the terms of a Mediation Agreement. This includes, in the circumstances of this case, establishing that the Lot 3 floor does not

comply with the requirements of By-Law 14, and that as a result, the Lot 2 Lot Owners are in continuing breach of that By-Law.

- 28 Noise nuisance must be established on an objective basis. It is not the standard of a hypersensitive or obsessive Lot occupier: *Feletti v Eales*; *Eales v Felletti* [2018] NSWCATCD 66 at [35]; see also *Gao v Agosti* [2009] NSWCTTT 175; *Felcher v The Owners Strata Plan 2738* [2017] NSWCATAP 219; and *Nowak v Pellicciotti* [2018] NSWCATAP 245.
- 29 In *Felcher v The Owners Strata Plan 2738* [2017] NSWCATAP 219 at [31]-[32] the Appeal Panel stated, in respect of an application alleging a breach of by-laws which were in identical terms to the by-laws under consideration in these proceedings:

31 ... A court or tribunal is informed and persuaded only by the presentation of evidence. Evidence is material which tends to persuade the court or tribunal of the truth or probability of the facts being alleged. Evidence may be photography, documentary or testimonial. But it will only succeed in persuading the Tribunal if it appears as being truthful, reliable and cogent. In civil cases, the standard of proof depends on the balance (or preponderance) of probabilities. This simply means that a party must prove that their case is more likely than not to be true. If the scales tip in favour of the party, however slight, they have proved their case. But if the probabilities are equal, they have failed to prove their case.

32 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. ...

- 30 What is stated in *Fletcher* is an orthodox application of the civil standard of proof satisfaction test contained in *Briginshaw v Briginshaw* [1938] 60 CLR 336 per Dixon J at p362. In this respect it falls to the Lot 2 Lot Owners to establish the affirmative of their allegations to the reasonable satisfaction of the Tribunal bearing in mind that reasonable satisfaction is not produced by inexact proofs.

Consideration

- 31 In order to determine the outcome of this application the Tribunal must pose and answer the following questions:

- (a) Have the Lot 2 and Lot 3 Lot Owners concluded a Mediation agreement that engages the Tribunal's powers under s 230(1) of the SSM Act?
- (b) If so, have the Lot 3 Lot Owners failed to fulfil the terms of that agreement?
- (c) Does any noise transmission from Lot 3 into Lot 2 through the Lot 3 floor constitute noise nuisance and a breach by the Lot 3 Lot Owners of By-Laws 1 and 14 of the Strata Plan?
- (d) Subject to the above, are the Lot 2 Lot Owners entitled to an order that would require the Lot 3 Lot Owners to install carpet and underlay with a 5 Star acoustic rating in place of the Lot 3 floating floor?

- 32 The Lot 2 Lot Owners' contention that there was a Mediation agreement concluded between the parties in 2014 in which the Lot 3 Lot Owners committed to installing carpet in place of the floating floor in Lot 2 cannot be accepted. It is clear from NSW Fair Trading's letter dated 1 April 2014 that the Mediation conducted on 27 March 2014 did not lead to any agreement between the parties to resolve the dispute as it then stood. There is therefore no agreement arising from that Mediation that is capable of being enforced by an order under s 230(1) of the SSM Act.
- 33 The Mediation conducted between the parties by NSW Fair Trading on 11 May 2021 did lead to an agreement that is potentially capable of enforcement by an order under s 230(1). Of the four heads of agreement contained in that document two required action by the Lot 3 Lot Owners.
- 34 In respect of the first head of agreement there can be no issue that the Lot 3 Lot Owners provided access to Lot 3 to enable acoustic testing of the floor to take place. They did so promptly. There are therefore no grounds for any order under s 230(1) in relation to that head of agreement.
- 35 The second head of agreement required the Lot 3 Lot Owners to arrange for any recommendations regarding sound reduction, if any, arising from the acoustic testing to be carried out within 30 days of the acoustic report being provided to them. In the final paragraph of its report, Blackett Acoustics makes 5 general recommendations, described as "additional precautions" to reduce noise transmission through 'hard flooring systems'. They are: not wearing shoes in the apartment: placing soft pads under furniture: providing children

with play mats; and, using scatter rugs and runners in hallways and other high traffic areas.

- 36 In oral argument it appeared to be accepted by the Lot 2 Lot Owners that such measures have been in place for some time in Lot 3. In her Statutory Declaration, Ms Hogan refers to the noise “having been reduced by rugs”. In her email to the Lot 2 Lot Owners of 8 December 2021, the current tenant refers to “purchasing additional mats” and “not wearing shoes”. I note that the Lot 3 Lot Owners do not refer to any current child play noise.
- 37 As I understand it, the Lot 3 Lot Owners do not put their case on the basis that the Lot 2 Lot Owners have not carried out the Blackett Acoustics’ recommendations and they do not ask the Tribunal to order the Lot 3 Lot Owners to implement any of these recommendations. There are therefore no grounds for an order under s 230(1) in relation to the second head of agreement.
- 38 The Lot 2 Lot Owner’s case is that there is intolerable noise nuisance despite the Lot 2 Lot Owners’ implementation of additional measures to reduce noise transmission. They contend that the only solution is the installation of carpet and underlay with a 5 Star rating in place of the floating floor.
- 39 The Lot 2 Lot Owners did not expressly agree in Mediation to install carpet in place of the floor. Therefore, the only way they could have become bound by the Mediation agreement to do so is if Blackett Acoustics recommended this. Blackett Acoustics did not recommend this. There is therefore no basis upon which an order could be made pursuant to s 230(1) that would require the Lot 2 Lot Owners to install carpet.
- 40 For the foregoing reasons, the Lot 2 Lot Owners application in reliance upon s 230(1) must be dismissed.
- 41 The Tribunal does have other potentially relevant order making powers under s 232 and 241 of the SSM Act that have not been invoked by the Lot 2 Lot Owners. However, there is no utility in allowing an amendment of their application to pursue orders under those sections because the substance of their complaint will fail even if alternatively framed. That is because it falls to

the Lot 2 Lot Owners to establish, on an objective basis, that the Lot 3 Lot Owners are responsible for noise nuisance constituting an unreasonable interference with their use of Lot 2 (s 153), or alternatively, that it constitutes a breach of By-Law 14.

- 42 By-Law 14 does not specifically mandate an acoustic performance level the floor of Lot 3 must comply with. Nor does it require the use of carpet floor coverings. It is open to the Owners Corporation to amend the By-Law so as to do so, but in the absence of any such specification, it is necessary to interpret the words “treated to an extent sufficient to prevent the transmission from the floor space of noise likely to disturb the peaceful enjoyment of the owner of occupier of another lot” having regard to external, objective reference points.
- 43 Blackett Acoustics references the structure borne noise insulation requirements of the Building Code of Australia which specifies a maximum impact sound level of L_n, T_w less than or equal to 62dB. This is the equivalent of a 2 Star Rating for floor performance. It determined that the Lot 3 floor has a maximum impact sound level less than or equal to 53, which is equivalent to a 3 Star Rating with 4 Star Rating features. It is not clear to me on the evidence if the Building Code of Australia applies in respect of this building given its age, but in any event, the Lot 3 floor performance exceeds the minimum standard required by that Code. The performance of the floor also complies with the requirements of the North Sydney Development Control Plan 2013.
- 44 The objective evidence relied upon by the Lot 2 Lot Owners demonstrates that carpet with underlay has much better noise insulation properties than other floors, including timber laminate floors. But it is not enough for them to show that carpet would provide better noise insulation; they must prove noise nuisance, and a breach of By-law 14. There is nothing in By-Law 14, or any other By-Law, that indicates that a performance standard better than that specified in the Building Code of Australia or the North Sydney Council Development Control Plan 2013 is intended.
- 45 The Lot 2 Lot Owners live in a communal living environment. There is no doubt that in this environment they are capable of hearing sound generated by the occupants of other Lots. In his Statement, Mr Stebnicki says that during the

period of his occupancy of Lot 3, he heard various sounds emanating from other Lots in the apartment block. His current tenant, Ms Mills, says the same in her email of 8 December 2021. The likelihood of being able to hear sounds from other Lots is illustrated by the *Guideline for Apartment and Townhouse Acoustic Rating* Version 1.0 the Lot 2 Lot Owners have placed in evidence. There is clearly a relationship between the floor type and sound transmission. However, it is clear that even the highest rated floor type, including carpet with underlay, cannot eliminate all noise transmission between Lots.

- 46 By-Law 14 does not require the Lot 3 Lot Owners to achieve the highest possible floor performance level in terms of minimising noise transmission. Properly construed, it requires them to meet a minimum standard. That is denoted by the word “sufficient”, meaning ‘enough’ or ‘adequate’. I am satisfied on the basis of the Blackett Acoustics report that the Lot 3 floor has been treated sufficiently, or adequately, to minimise the transmission of unreasonable noise, given the communal living environment of the Strata Scheme.
- 47 I conclude from the whole of the evidence that Ms Hogan has a sensitivity to noise that is inconsistent with the communal living environment in which her home is situated. She appears unable to tolerate the sound transmission that is to be expected in such an environment. However, her greater sensitivity to noise does not impose an obligation on the Lot 3 Lot Owners to restrict the ordinary use of their Lot.
- 48 I also entertain a substantial doubt as whether some of the noise transmission Ms Hogan apprehends as coming from Lot 3 does in fact come from that Lot. Ms Mills’ email dated 8 December 2021 denies that the occupants of Lot 3 wake to an alarm at 5am each day, routinely use the bathroom, including its exhaust fan, at that time, or that they use exercise equipment likely to generate percussive noise, or that they have a cat tree “trolley”. I acknowledge that Ms Mills’ evidence is not sworn or affirmed, but I see no reason not to take it at face value.

Orders

- 49 For the foregoing reasons I make the following order:

(1) The application is 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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