Civil and Administrative Tribunal

New South Wales

Case Name:	Norman v The Owners Strata Plan No 60182
Medium Neutral Citation:	[2022] NSWCATCD 152
Hearing Date(s):	20 June 2022
Date of Orders:	06 September 2022
Decision Date:	6 September 2022
Jurisdiction:	Consumer and Commercial Division
Before:	G Bassett, General Member
Decision:	(1) The application is dismissed.
Catchwords:	LAND LAW — Strata title — By-laws
Legislation Cited:	Strata Schemes Management Act 2015 – Sections 90, 150, 232, 238 Civil and Administrative Tribunal Rules 2014 – rule 38
Cases Cited:	Cooper v The Owners Strata Plan No 58068 [2020] NSWCA 250 Guo v The Owners – Strata Plan No 70067 (No 2) Vickery v The Owners Strata Plan No 80412 [2020] NSWCA 284
Category:	Principal judgment
Parties:	Alan Norman (Applicant) The Owners – Strata Plan No 60182 (Respondent)
Representation:	Applicant (self-represented) A Abbott (Respondent)
File Number(s):	SC 22/06031

Publication Restriction: Nil

REASONS FOR DECISION

Application and procedural history

1 On 8 February 2022, the lot owner applied for orders that:

(a) the respondent pays for contributions for legal costs pursuant to section 90 of the Strata Schemes Management Act 2015 ("the Act")

(b) invalidate a by-law, under section 150 of the Act

(c) resolve a dispute or settle complaints under section 232

(d) remove a person from the strata committee or officer under section 238.

2 The matter came before the Tribunal for conciliation hearing on 4 March 2022. Some respondents were removed as parties. The usual directions were made for a contested hearing when the matter did not settle.

Evidence of the parties

3 The parties lodged 9 different lots of documents for hearing and gave oral evidence. All this material was considered in coming to this decision. The applicant relied on affidavits sworn 28 March 2022 and 11 July 2022. The respondent relied on affidavits sworn 3 May 2022, attached documents and written submissions. Oral evidence was given at hearing.

4 The applicant objected to special by-law 3 made in November 2006 which stated that owners must not carry out flooring works unless they complied with conditions, being owners must:

(a) provide required documents, obtain approval, and insure flooring works

(b) comply with works requirements

(c) certify after completion and maintain flooring works

(d) indemnify, and accept liability for, flooring works and acknowledge that in the case of a failure to comply, the owners could take remedial action.

5 In the affidavit of a senior strata manager, it was indicated the owner's corporation registered a consolidated change of by-laws on 17 August 2021. Those consolidations incorporated the 2006 by-law 3.

6 By-law 3 was subject of extensive explanatory notes. It is not the purpose of the Tribunal to recreate all those notes here. Nevertheless, “certify” is stated to mean the owner must obtain certification of flooring works from an engineer nominated by the owner’s corporation. The word “maintain” meant to ensure all flooring works comply with “noise / impact isolation product equal or better than an Impact Insulation Class (IIC) rating of 57 (Impact Sound 150 140-7:1998+717-2:1998)”.

7 Mr Norman alleged the by-law exceeded the acoustic level required under the Building Code of Australia (“BCA”) and was harsh, unconscionable, and oppressive.

8 The applicant submitted he was forced to engage legal representation in defending his position because the owner’s corporation had engaged such representation. Mr Norman submitted the owner’s corporation was not helpful in resolving the issue. It would not engage in communications. It did not supply its own acoustic reports in a timely manner. It would not mediate. He alleged its legal representative had required his expert acoustic report to be reviewed by their own expert.

9 Mr Norman alleged the owner’s corporation was biased and selective in its application of the by-law. As examples of such selectivity, he alleged a chairperson of the strata committee was not required to certify works that she had done. A lot of an owner employed with the strata manager organisation was also not required to certify works done by them. However, in response to a direction made at the end of the hearing, the new strata manager for the units supplied an affidavit attesting to other lot owners that had provided compliance certificates and or acoustic reports for flooring works at their lots. An owner at Lot 113 was so requested though a copy of the acoustic report could not be found in records. The owner of Lot 113 also gave an affidavit referring to floating floor works done in 2008. He said he provided a compliance certificate from the installer as requested by the owner’s corporation under by-law 3. Evidence was also given about an application to the Supreme Court about a former unit holder about noise prior to the 2006 by-law 3. That person provided

an acoustic test to certify the works in dispute though that document could not be found due to the passage of time.

10 Turning to the facts alleged by the parties in this case the Tribunal notes that the multiple affidavits and supporting documents of the parties gave selective overviews of events and associated documents. As best it can, the Tribunal has perused that evidence in detail to establish the chronology of events and in order to assess any particular weight that ought to be given to the evidence.

11 On 24 April 2020, Mr Norman submitted plans to the strata committee for installation of flooring. Those works were ratified. The owners corporation said this ratification was subject of Mr Norman complying with the by-law.

12 On 28 September 2020, the owner of Lot 70 complained of noise to the strata manager. The complaint stated that since flooring works had been done noises such as “walking about”, furniture being moved and vacuuming could be heard intermittently. On 28 September stomping was heard. On 7 October 2020, the owner of Lot 70 complained again. This complaint was about party noise, loud conversations and loud stomping. The Lot 70 owner stated there had been no issues before floor works were done.

13 The owners corporation requested an acoustic test under the by-law. An inspection was done in November 2020.

14 That report found flooring in the master bedroom was compliant with the by-law, but flooring works in the living room were not. It did not state the ways works were not compliant. Nor did it suggest any form of treatment to aid in compliance. After that report had been received, the strata manager wrote to the owners corporation on 13 January 2021 and stated the works were compliant but asked Mr Norman to lay rugs. The manager was of the view that any application to NCAT over the matter “could be harsh and unconscionable”, given the works largely complied with the BCA but not the provisions of the by-law. Mr Norman said he was not asked to put rugs down until 17 March 2021. The strata manager emailed Mr Norman on 18 March (attached letter dated 1 March 2021) regarding breach of the by-law from the failure to meet impact sound ratings. A copy of the test was supplied even though it had been available to the owners corporation since late 2021. It drew attention to the

failure in the living room. Mr Noman was asked for an underlay certificate, confirmation he engaged an engineer and a copy of any engineer's post-installation report. Mr Norman said he purchased rugs on 18 March. However, a perusal of the email of Mr Norman's solicitor on 19 March alleged the floor was approved by a former strata manager in May 2020. It reiterated his placement of rugs to mitigate noise. It also stated Mr Norman did not wear high heels and any guests were asked to remove footwear on entry. The owner in the downstairs unit was accused of making vexatious claims about noise against Mr Norman. Another email from the solicitor on the same day mentioned drilling noises from another unit. No copy of an underlay certificate or engineer report was provided. Mr Norman's solicitor attached pictures of rugs.

15 Despite taking these steps, in Mr Norman's materials there is a document dated 14 May 2021 showing the owners corporation issued a breach notice for not having paid a renovation bond before commencing floor renovations. The corporation also advised it had obtained independent legal advice. Mr Norman said that notice was incorrect as the bond was held in a trust account.

16 On 8 June 2021 the lawyers acting for the owner's corporation wrote to the Lot 70 complainant and advised they were acting for it. No funding had been approved for this.

17 The owner of Lot 70 complained to the owners corporation of noise again on 29 June 2021. The complainant said he called security as noise was so bad. He said there was "stomping". He said that his complaint a year earlier had been about Mr Norman doing renovation work on a Sunday.

18 At an extraordinary general meeting on 13 July 2021, a motion was passed to issue a notice to comply to Mr Norman. Another motion was passed to engage the lawyers on behalf of the owner's corporation. The notice stated the applicant failed acoustic floor tests under by-law 3 and failed to reduce noise transmission as required under the by-law.

19 On 16 and 27 July 2021, Mr Norman's solicitor indicated to the strata manager that Mr Norman would undertake further acoustic testing. The solicitor for the owners corporation replied with an email of a notice to comply served on 9

August 2021. The notice itself was dated 30 July 2021. That notice stated the works failed to comply by failing acoustic flooring tests. It stated required documentation under the by-law and as requested in March 2021 had not been provided. Further, it alleged Mr Norman did not maintain the works to reduce noise transmission. Mr Norman said this notice was issued 4 months after he had complied with the by-law.

20 The lawyers wrote to Mr Norman asking for compliance on 2 September 2021. Mr Norman engaged his own acoustic expert to prepare a report. On 23 September the owners corporation gave Mr Norman details of the legal representative of Lot 70. That lawyer wrote to Mr Nomarn's lawyer saying the owner of Lot 70 would press for removal of Mr Norman's flooring works. A new testing date was organised with the Lot 70 complainant. However, there was no agreement as to supervision of any further acoustic test.

21 On 12 October Mr Norman reviewed strata records. He alleged this review showed no other lot owner had been asked to provide an acoustic report or engineers certificate to certify acoustic works. He alleged they also showed the notice to comply and breach notice were issued largely due to the insistence of the owner of Lot 70.

22 On 2 November 2021, Mr Norman's expert issued an acoustic report. Notably, that report was done on the area said not to comply in the owner's corporation report, that being the open plan living / dining / kitchen area. Unequivocally, that reporter found the works complied with special by-law 3 and the BCA. The owner's corporation sought advice on that report from its expert. Their expert informed them the report of Mr Norman's expert showed flooring was "marginally compliant with strata by-law requirements". Even with such a qualified finding, the owner's corporation then deemed the matter to be closed and no further discussions regarding flooring compliance followed. Mr Norman alleged that over the rest of November there were various communications, meetings and alleged oral conversations as to whether the acoustic test had been favourable to Mr Norman.

23 A strata committee meeting on 2 December 2021 confirmed Mr Norman's Lot 90 flooring complied with the by-law. The meeting resolved not to engage in

any Fair Trading mediation of the matter with Mr Norman. Despite that, the solicitors for the owner of Lot 70 wrote to the owners corporation on 8 December 2021 and challenged the processes of the 2 December meeting. The lot 70 owner objected to the finding at the meeting that Mr Norman's flooring was compliant. Over the balance of December Mr Norman again requested a settlement of the matter and various communications occurred about this. Mr Norman said that at an extraordinary meeting on 16 December 2021 the strata committee all stood down.

24 On 18 January 2022 the strata manager wrote to Mr Norman and informed him the new committee rejected settlement discussions. On 28 January 2022 the strata manager wrote to Mr Norman saying settlement had been rejected as the matter of floor compliance had been resolved.

25 In response to the claim of Mr Norman for legal costs, the owner's corporation submitted that it advised Mr Norman that correspondence through solicitors unnecessarily added to expenses of all concerned. It provided copies of letters and emails between August and November showing efforts to minimise costs. For example, an email from the owners corporation to Mr Norman and his solicitor states that no action in respect of flooring compliance was being taken due to request from the owner of Lot 70. The letter set out steps for consideration of Mr Norman's acoustic report. Another lengthy letter between respective solicitors dated 21 October 2021 set out a chronology on behalf of the parties, stated the owners corporation would not make an offer of settlement, denied the matter was personal, alleged each breach of by-law was considered on its merits in an unbiased way and asked for future communications to be between Mr Norman and the strata manager.

26 Mr Norman filed this application to the Tribunal on 8 February 2022.

27 Mr Norman gave evidence of his legal costs and costs for the proceeding in the Tribunal. He sought solicitor costs of $12,873.85 as he asserted he was the only lot owner "required to prove my compliance to the Special By-law". He further sought personal "loss of earnings" for 5 days for preparation for Fair Trading mediation and Tribunal conciliation / direction and formal hearings in the sum of $14,748.85.

Issues for determination

28 The first issue for determination is whether the by-law should be invalidated. The second issue is how to resolve the dispute over whether the flooring works of the applicant are compliant. If found to be compliant, the third issue is whether the owners corporation, in its insistence on pressing a breach notice and notice to comply and refusing to mediate on having been given the applicants expert report which led to this Tribunal litigation, caused the applicant to unreasonably incur legal costs. Fourthly, if unreasonableness is found, the issue is whether the Tribunal ought to make an order under section 90 for the applicant's costs of the proceeding. Finally, should the Tribunal remove a person from the strata committee or officer under section 238 of the Act as sought by the applicant?

Findings and determination

29 Mr Norman submitted the by-law ought to be found harsh, unconscionable and oppressive as it exceeds the acoustic level required by the BCA.

30 Under section 150 of the Act, the Tribunal may make an order declaring a by-law to be invalid if the Tribunal considers the by-law is harsh, unconscionable or oppressive. Factors to be considered in determining what is harsh, unconscionable or oppressive when invalidating a by-law have been recently outlined in *Cooper v The Owners Strata Plan No 58068* [2020] NSWCA 250 (12 October 2020). That matter involved an invalidation of a by-law seeking a blanket ban on domestic animals. At [56, 78 94], the Court of Appeal held:

> If, in accordance with the applicants' primary submission, a criterion for concluding that a by-law may be harsh, unconscionable or oppressive is that it interferes with the property rights of a lot owner by controlling or prohibiting a particular use in circumstances where that use does not materially and adversely affect the enjoyment of any other lot, such a criterion may be implied from the language, context and purpose of s 136(1). Attention seems to have focused on the constraint under s 139(1) because of an assumption that the language of s 136(1), conferring the power to make by-laws, is unconstrained. However, few, if any, statutory conferrals of power can be so characterised. Rather, it is necessary to identify the purpose for which the power is conferred. It is true that purposes may not be pursued without qualification,[34] but a limiting purpose must be obeyed.
>
> …
>
> For a by-law to restrict a lot owner in the enjoyment or exercise of his or her rights incident to ownership would in my view be "harsh, unconscionable or

> oppressive" at least where the restriction could not on any rational view enhance or be needed to preserve the other lot owners' enjoyment of their lots and the scheme common property.
>
> …
>
> In its prohibition of by-laws that are oppressive, s 139(1) does not require that there be identified some group within an owners corporation that oppresses, by means of the by-law, the lot owners affected. The inherent qualities of the by-law and the way it impacts upon lot owners make it oppressive if, as in the case of by-law 14.1, it forbids a common incident of property ownership without providing benefit to others. Accordingly, it is immaterial whether the by-law in question may have been adopted or maintained by a large majority or even unanimously. If a by-law that contains an oppressive prohibition were adopted unanimously, that would suggest that no lot holder at the time of the vote wished to undertake the prohibited use. That would not detract from the quality of oppression, which does not depend upon whether any current lot holder desires to act contrary to the by-law. By-laws bind incoming purchasers. The oppressive character of a by-law, inherent from the time of its adoption, unanimous or not, may come to be felt by a person who acquires a lot at a later date.

31 The Tribunal finds that the by-law subject of this dispute is one that applies to all lot owners and gives benefit to all lot owners. It requires a lot owner who makes flooring changes to provide assurance to other lot owners that the works are done in accordance with international standards. It obligates lot owners who carry out such works to provide documents to this effect. The by-law is not harsh, unconscionable, or oppressive as it only interferes with the property rights of a lot of owner carrying out flooring amendments in order to materially ensure other lot owners that unacceptable noise will not affect their enjoyment of any other lot. The restrictions to comply with objective standards and provide evidence of compliance are needed on any rational view to enhance or preserve the other lot owners' enjoyment of their lots. The by-law refers to the ISO standards to be adopted. In the absence of any evidence to the contrary from the applicant, the Tribunal is satisfied that both experts who carried out acoustic inspections and provided, albeit conflicting findings, were applying at least these ISO standards when they prepared a report based on Australian standards. Mr Norman's report was supplied after he had used rugs in the living area. There was no independent expert evidence to show that the strata manager's opinion expressed in his communication to the owners corporation on 13 January 2021 that the strata's report was at a standard higher than the Australian standards was correct. That manager was no expert in the area. In any event, the owners corporation in advising of breach, and

providing its notice to comply, referred more to Mr Norman's failure to provide an engineer's reports on sound levels after the work was done in 2020 as was required under the by-law. The owners corporation dutifully relied more on their expert's findings that standards were not met in the living area rather than accept the opinion of their manager. The application to invalidate the by-law is dismissed.

32 Under section 232 of the Act, the Tribunal may make an order to settle disputes or rectify complaints about the operation, administration or management of a strata scheme under this Act. While not expressly stated, Mr Norman's application was to settle a dispute in relation to the question as to whether his flooring works were compliant with the by-law and that the owners corporation had mismanaged the strata scheme in not finding his works compliant. Mr Norman made no claim for damages. He simply seeks an order on his flooring is compliant.

33 The power of the Tribunal to give a very wide ambit to the types of orders and issues over which it can make order under section 232 has been subject of judicial commentary. In *Vickery v The Owners Strata Plan No 80412* [2020] NSWCA 284 (11 November 2020) the Court of Appeal stated at [167]:

> 167 ….. But the Act is not structured in such a way that the conferral of specific powers on the Tribunal should be seen as limiting the conferral of the general power under s 232(1). The specific powers conferred on the Tribunal do not form a class or a genus by reference to which the general power under s 232(1) is to be read down. I agree with what Leeming JA has said in this respect (at [119] and [120]). I agree with what Basten JA has said at [28]. That construction is consistent with the principle in *Owners of the Ship, "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54. I do not think that the principle in *Shin Kobe Maru* faces an obstacle in the language of s 232 once it is acknowledged that that language extends to a power to make orders to resolve a complaint or dispute and not merely to bring about a consensual resolution of a complaint or dispute. In the absence of consensus, the way to resolve a dispute is to decide all aspects of the dispute and make appropriate orders to give effect to such a decision.

34 Even though the Tribunal may make an order under section 232 as opposed to merely facilitating "a consensual resolution of a complaint or dispute", the Tribunal does not make any such order in the circumstances of this case. Mr Norman's application for such an order was unnecessary as it was made plain to him before his application was lodged in February 2022 that the strata committee had resolved the issue and the floor was compliant. At the very

latest, the owners corporation communicated this to him in its letter of 28 January 2022. It is more probable than not that Mr Norman knew from at least the time of the strata committee meeting on 2 December 2021 that the issue of compliance was no longer pressed because of his expert's report. Instead of accepting that, Mr Norman pressed further communications in relation to settlement and / or mediation.

35 Did the owners corporation cause Mr Norman to unreasonably incur legal costs? His application under section 90 requires the Tribunal to first make an order for his costs and then order payment of those costs by the owners corporation. Under section 90 of the Act an owner of a lot may bring a claim for an order that any money (including costs) payable by an owners corporation under an order made in the proceedings must be paid from contributions levied only in relation to the lots and in the proportions that are specified in the order.

36 In general, under section 60(1) of the *Civil and Administrative Tribunal Act 2013* ("the Act"), each party to proceedings in the Tribunal in the Consumer and Commercial Division is to pay the party's own costs.

37 There are exceptions. Rule 38 of the *Civil and Administrative Tribunal Rules 2014* empowers the Tribunal to make an order for costs when an amount in a dispute is over $30,000.00. In this matter there was no amount in dispute, save as to the issue of costs.

38 In addition, under section 60(2) of the Act, the Tribunal may award costs in relation to proceedings if it is satisfied that there are special circumstances warranting an award of costs. Section 60(3) sets out those circumstances, being:

> (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
>
> (d) the nature and complexity of the proceedings,
>
> (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,

(f) whether a party has refused or failed to comply with the duty imposed by section 36 (3),

(g) any other matter that the Tribunal considers relevant.

39 At paragraphs 15 and 16 of *Guo v The Owners – Strata Plan No 7006*7 (No 2) [2019] NSWCATAP 266, the Tribunal's Appeal Panel stated:

> The term "special circumstances" is not defined in the NCAT Act. It has been interpreted to mean circumstances that are out of the ordinary but not necessarily extraordinary or exceptional. The discretion to award costs must be exercised judicially having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11].
>
> In Alexander James Pty Ltd v Pozetu Pty Ltd (No. 2) [2016] NSWCATAP 75 at [14] the Appeal Panel stated:
>
> > 14. An assessment whether circumstances are "special" involves the exercise of a value judgement carried out by way of comparison between what is not "special", and what is special. There are no scientific means by which the former can be ascertained. The evaluative process is necessarily one of impression informed by the particular provisions of section 60, which by sec 60(3)(f) incorporates also a consideration of section 36(3) of the Act.

40 The Tribunal does not find there are any special circumstances justifying an order for Mr Norman's costs. Each party to the proceeding engaged their own legal representation as well as the owner of Lot 70. Mr Norman was more than willing to engine with the owners through his solicitor. There may well be circumstances that are out of the ordinary in this matter in that unit holders and the owner's corporation resorted to legal representation early rather than speaking through the committee and meeting structure allowed for in strata processes. Yet, no particular party was disadvantaged. The owners corporation had to properly, and objectively consider the complaint of other lot owners and take steps when Mr Norman did not provide an engineers report when requested in March 2021. Mr Norman's contention that he was singled out particularly for harsh treatment was not borne out by the evidence of the owners corporation that other unit holders had been asked to comply with standards and the by-law, though admittedly these compliances related to matters well in the past. The actions in agitating this issue were taken by all concerned and were not extraordinary or exceptional to one party's default. It was Mr Norman that used his solicitor to announce he had rectified the breach by putting down rugs. Mr Norman did not provide, or it appears, acquire an

engineer's report when he initially did the flooring works as required under the by-law. Even after Mr Norman was aware that his own expert report would be accepted, thus removing any contention as to whether he breached the by-law, he chose to engage through a solicitor and he continued to attempt to bring on a mediation and or settlement offer when it was clear the issue was resolved. Mr Norman brought the application to the Tribunal in February 2022 when clearly aware his works had been accepted as compliant. Finally, as there was no amount in dispute of more than $30,000, the Tribunal may consider whether costs might follow the event. Mr Norman is not successful on any of his claims. In ordinary circumstances an order for costs would not be made in favour of an unsuccessful party.

41 In making that application in February 2022, Mr Norman added the claim the respondent pays for his contributions for legal costs pursuant to section 90 of the Act. Costs prior to the application arose, at least in equal part, due to his willingness to engage lawyers. Costs of the application for an order for settlement or resolution arose when he was fully aware the actual dispute for which he sought an order for settlement or resolution had been resolved since the owner's corporation meeting late in 2021. Mr Norman ignored the owners corporation request to communicate directly rather than through solicitors in order to minimise costs such as set out in the letter of 21 October 2021. As no order is made for costs, it follows that the application that the respondent pay for contributions for legal costs pursuant to section 90 also falls by the wayside.

42 At the beginning of the hearing Mr Norman again requested an order to remove a person from the strata committee or officer under section 238. No evidence on this claim was given at hearing. It was unclear whether this was the owner of Lot 70 or some other member(s) of the committee. Any individual lot owners were removed as parties at the first conciliation hearing. The Tribunal accepts the owners corporation evidence that there was a change of committee membership after the meeting on 16 December 2021. It also may be possible the lot owners that Mr Norman objected to were no longer on the committee after the change in membership at that meeting. Documents before this meeting show the committee took steps to prevent any unit holder that had a vested interest in the flooring works matter (such as the owner of Lot 70, for

example), from having any input into the vote at the 2 December 2021 meeting.

No order is made with respect to section 232.

Order

43 The following order is made:

(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