Civil and Administrative Tribunal

New South Wales

Case Name:	Haramis v The Owners – Strata Plan No. 51923
Medium Neutral Citation:	[2023] NSWCATCD 15
Hearing Date(s):	13 December 2022
Date of Orders:	6 March 2023
Decision Date:	6 March 2023
Jurisdiction:	Consumer and Commercial Division
Before:	P French, Senior Member
Decision:	(1) The Tsevrementzis Report is admitted into evidence. (2) The Owners – Strata Plan No. 51923 must cause the carrying out of work to the common property pipework and party wall between Units 40 and 41 in accordance with the scope of work set out in the Soundblock quotation dated 7 April 2022 before 3 April 2023.
Catchwords:	LAND LAW – Strata title – duty to maintain common property in a good and reasonable state of repair
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) – s 38 Strata Schemes Management Act 2015 (NSW) – ss 106, 226, 232
Cases Cited:	Seiwa Pty Ltd v Owners Strata Plan 35042 [2006] NSWSC 1157 The Owners-Strata Plan No 33368 v Gittins [2022] NSWCATAP 130 Vujica v TNM Roofing Pty Ltd [2022] NSWCATAP 305
Texts Cited:	NCAT Procedural Direction 3: Expert Evidence

Category:	Principal judgment
Parties:	Dimitri Haramis (Applicant) The Owners – Strata Plan No. 51923 (Respondent)
Representation:	Dimitri Haramis (Self-represented) Joel McGrath, Strata Manager (Respondent)
File Number(s):	SC 22/39455
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 This is an application by Dimitri Haramis (the Lot Owner) for an order pursuant to s 232 and 106(1) of the *Strata Schemes Management Act* 2015 (NSW) (SSM Act) that would require the Owners - Strata Pan No. 51923 (the Owners Corporation) to carry out work to a common property party wall and its enclosed pipework to prevent or reduce noise transmission into the bedroom of his Lot from the bathroom of an adjoining Lot. This application was made to the Tribunal on 23 August 2022 (the application).

2 For the reasons set out following I am satisfied that the Lot Owner has established on his evidence that the Owners Corporation is in breach of the duty reposed in it by s 106(1) of the SSM Act with respect to the party wall and its enclosed pipework. This common property permits intolerable noise transmission into the bedroom of his Lot from the bathroom of the adjoining Lot. I have therefore made a work order that will require the Owners Corporation to carry out specified maintenance work to wall and pipework to remedy this breach.

Procedural history

3 The application was first listed before the Tribunal, differently constituted, for a Directions Hearing on 5 October 2022. The Lot Owner attended that listing of the application. There was no appearance on behalf of the Owners Corporation. At that hearing the applicant informed the Tribunal that all the documentary evidence he intended to rely on for the hearing was attached to his application and that this had been served on the Owners Corporation.

Consequently, the Tribunal issued directions in relation to the filing of documentary evidence in response to the application by the Owners Corporation and for any further evidence in reply by the Lot Owner. It also directed the Lot Owner (if required) to provide the Owners Corporation and its expert with access to his Lot for the purposes of preparing an expert report. I note particularly the terms of direction 4 of those directions:

> 4. The respondent(s) is (are) to provide IN HARD COPY to the applicant(s) and the Tribunal … a statement setting out the reasons for disputing the orders sought by the applicant(s) and all documents … on which the respondent(s) seek(s) to rely at the hearing by 2 November 2022.

Evidence before the Tribunal

4 As noted above, the applicant filed and served his primary documentary evidence with his application. I note that this included a report prepared by James Tsevrementzis, Acoustical Consultant, from Koikas Acoustics Pty Ltd (the Tsevrementzis Report). This bundle was marked Exhibit A. The Owners Corporation did file and serve evidence or any statement that set out the reasons for disputing the orders sought by the applicant.

Hearing

5 The applicant attended the hearing in person and gave oral evidence under oath. The Owners Corporation was represented at the hearing by its Strata Manager, Mr Joel McGrath, who also 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.

Preliminary issue – the admissibility of the Tsevrementzis Report

6 The Owners Corporation objected to the Tribunal admitting the Tsevrementzis Report into evidence. It was contended that this Report was inadmissible because it did not comply with NCAT Procedural Direction 3: Expert Evidence by acknowledging and adopting the Code of Conduct it incorporates. It was also contended that the Report failed to set out Mr Tsevrementzis' qualifications and experience or otherwise explain the basis for his opinion.

7 NCAT Procedural Direction 3 only applies to specific categories of proceedings. These are set out in on its cover page. This proceeding does not

fall into any of those categories. The applicable procedural rule is therefore found in s 38(2) of the NCAT Act. It provides that the Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

8 Any shortcoming in relation to the opinion evidence of Mr Tsevrementzis therefore does not affect the admissibility of that evidence. Not only may the Tribunal consider it, but having regard to the requirements imposed by s 38(5)(c) of the NCAT Act (which requires that the Tribunal take such measures as are reasonably practicable to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered), it is obliged to do so.

9 Any shortcomings in the opinion evidence of Mr Tsevrementzis goes to the weight that can be given to that evidence not its admissibility: *Vujica v TNM Roofing Pty Ltd* [2022] NSWCATAP 305 at [34] ff.

Material facts

10 The applicant is the owner of Lot in Strata Plan No 51923 which is Unit 40. In oral evidence he stated that he had owned the Lot for 20 years.

11 The respondent is the Owners Corporation for that strata plan. The Strata Plan is or includes a large residential apartment complex located directly above Rockdale Plaza Shopping Centre.

12 Unit 40 has adjoining Lots on either side (Units 41 and 39). Two party walls between the Lot Owner's Lot and these other Lots have bathrooms on the other side of the party wall. The bathroom of Unit 41 is on the other side of the party wall with the Lot Owner's bedroom. The bathroom of Unit 39 is on the other side of the party wall with the Lot Owner's lounge room.

13 This dispute concerns noise transmission from the bathroom of Unit 41 into the bedroom of the Lot Owners Lot. The Lot Owner does not experience noise transmission into the lounge from Unit 39. He contends that he did not experience noise transmission from Unit 41's bathroom when he first moved into the Lot. He contends that it began to develop some years after he moved in and in more recent years has become seriously worse each year.

14 The Lot Owner has made repeated complaints to the Owners Corporation's Strata Manager about the noise transmission over several years. This has resulted in the Owners Corporation taking some steps to attempt to address the situation. This has included changing tap ware in Unit 41's bathroom and attempting to persuade the Unit 41 occupant not to use, or to reduce their use, of the bathroom in the late evening and early morning. It appears to be accepted by the Owners Corporation that these efforts have not been successful.

15 It also appears to be accepted between the parties that the noise transmission is caused by reverberations of the water pipes in the interior of the party wall that serve Unit 41's bathroom. There is no issue that these water pipes are common property of the Strata Scheme.

16 The Lot Owner contends that the noise transmission from the bathroom of Unit 41 is very disruptive of his sleep and that this negatively impacts on his overall well-being. The sleep disruption arises because the Unit 41 occupant is a night shift worker who uses the bathroom late at night and in the early hours of the morning when the Lot Owner is attempting to sleep.

17 As noted above, the Lot Owner relies upon a report prepared by Mr James Tsevrementzis of Koikas Acoustics Pty Ltd dated 4 November 2021. That report is entitled "Noise Measurement of Intrusive Shower Noise from Adjoining Residential Unit [address of Lot]". The report is not signed. However, there is a signature panel where Mr Tsevrementzis states under the company's and his own name that he is an "Acoustical Consultant" (M.A.A.S.)". M.A.A.S is a reference to Mr Tsevrementzis' membership of the Australian Acoustical Society.

18 The salient elements of Mr Tsevrementzis' report are set out in the following extracts:

> Noise measurements were taken within Unit 40 … between the hours of 7:30pm and 10:45pm on Tuesday 19th October 2021. Measurements were conducted to ascertain whether the noise from the shower to the complainant's apartment is deemed intrusive as per the EPA's Noise Policy for Industry's background noise level + 5dB, the POE) 1997 (Offensive Noise) criteria, and/or the relevant Strata by-laws.

The noise testing was conducted with an NTi XL2 Type 1 precision spectrum analyser which is traceable to NATA calibration certification. On-site calibration measurements were taken before and after measurements, no system drift was observed. Noise measurements were taken both with the shower in use and without to ascertain the level of the intrusive noise. Comparison to the EPA's Noise Guide for Local Government assessment procedures and method of qualification of the noise was undertaken and assessed against the background noise levels measured then the shower was not in use. Noise results are shown below in Table 1.

Table 1: Summary of Measured Noise Levels

Location	Noise Metric	Noise level, dB
Inside the bedroom of Unit 40 (Shower)	LAeg, 15 minutes	48
Background noise levels bedroom of Unit 40 before 10pm (No Shower)	LA90	29
Background noise levels bedroom of Unit 40 after 10pm (No shower)		28

An EPA study in what was deemed to be "offensive noise" was undertaken in the 1980's and included a social survey to determine this. The study found that a reasonable person with normal hearing considered that a noise 5 dB above the background noise level to be "offensive".

As shown in Table 1 above, the noise emanating from the shower is found to be non-compliant with the nominated noise criterion for the bedroom. Noise exceeds the "offensive" noise criterion by 5 dB during the daytime, 14 dB during the evening, and 25 dB for the night-time period. During the night-time the shower noise should be near to inaudible so as not to give rise to sleep disturbance.

…

19 The Lot Owner relies upon a quotation provided by an entity trading as Soundblock Solutions dated 7 April 2022. The quotation sets out a detailed scope of work for the installation of acoustic insulation to the pipework in the

interior of the party wall between the Lot Owners bedroom and the bathroom and the walk-in robe of Unit 41. This involves partial demolition and reconstruction of the party wall. In the supporting documents associated with that quotation Soundblock Solutions opines (with reference to a sketch diagram which is not reproduced here):

> This building is a full brick/concrete construction. This is a brick party wall, having cement rendered finish to Bed 1 & WIR in Unit 40, and full tile finish to bath and Ens in Unit 41 (neighbour). Noises originated from shower piping in both Bath & Ens to Unit 41.
>
> The piping is embedded in brick party wall behind wall tiles.
>
> Refer to sketch to left
>
> The neighbour turned on their shower to assist with identifying the location of sound transfer. Noise can be easily heard in four locations (marked with BLUE WAVES). The quotation is focusing on treatment of the party wall only (marked with PINK LINES), by which noises in three sources along party wall can be well treated. However, the fourth noise location which is at the end of bib wall of WIR can't be treated. This is because the noise is generating inside, and transferring through a rigid construction. The best solution to fully stop the noise is to cut and open the brick wall and then wrap the pipe with sound lag to isolate vibration.
>
> After installation of Barrier board wall system to party wall, the noise at this nib wall end would be reduced and may no longer be invasive

20 Soundblock quotes its' scope of work at $10,255.00.

Contentions of the parties

21 As already noted, Lot Owner contends that the extent of the noise transmission is unbearable. He contends it causes serious disruption to his sleep and that the noise and sleep disturbance affects his well-being. He contends, in effect, that the noise transmission is caused by a defect in the common property (being the malfunction of the pipework serving Unit 41's bathroom) and that the Owners Corporation has a statutory duty under s 106(1) of the SSM Act to rectify this defect by installing noise insulation around the pipework in accordance with the scope of work contained in the Soundblock quotation dated 7 April 2022.

22 I do not understand the Owners Corporation to dispute there is noise transmission from Lot 41's bathroom into the bedroom of Lot 40. However, in its submission, the noise transmission is a building feature rather than any

state of disrepair in the common property that engages its obligations under s 106(1). The Owners Corporation also submits that the dispute is, in essence, a nuisance dispute involving two Lot Owners in which it has no part to play.

Jurisdiction

23 There is no issue that the Tribunal has jurisdiction to hear and determine this dispute in accordance with the provisions of the SSM Act.

Applicable law

24 Section 106 of the SSM Act imposes a statutory duty on an Owners Corporation to maintain and repair common property. It provides, relevantly:

> **106 Duty of Owners Corporation to maintain and repair property.**
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property ...
>
> …

25 In *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157, Brereton J said with respect to an equivalent predecessor provision to s 106(1) (references omitted):

> 3. ... Section 62(1) imposes on an owners corporation a duty to maintain, and keep in a state of good and serviceable repair, the common property. That duty is not one to use reasonable care to maintain and keep in good repair the common property, nor one to use best endeavours to do so, nor one to take reasonable steps to do so, but a strict duty to maintain and keep in repair.
>
> 4 The duty to maintain involves an obligation to keep the thing in proper order by acts of maintenance before it falls out of condition, in a state which enables it to serve the purpose for which it exists. Thus the body corporate is obliged not only to attend to cases where there is a malfunction, but also to take preventative measures to ensure that there not be a malfunction. The duty extends to require remediation of defects in the original construction of the common property and it extends to oblige the owners corporation to do things which could not be for the benefit of the proprietors as a whole or even a majority of them.
>
> …

26 In *The Owners-Strata Plan No 33368 v Gittins* [2022] NSWCATAP 130 the Appeal Panel summarised the relevant principles pertaining to the duty to repair (relevantly) as follows at [57] to [59] (references omitted):

> The scope of the duty of an owners corporation to maintain and keep in a state of good repair common property has been the subject of extensive judicial consideration …
>
> The pertinent principles … are:
>
> (1) The owners corporation has a strict duty under s 106 (1) of the SSM Act to maintain and keep in a state of good and serviceable repair the common property. That duty is not merely to take reasonable steps or use best endeavours.
>
> (2) The duty under s 106 (1) of the SSM Act includes keeping common property in order by acts of maintenance before it falls out of condition. The duty includes taking preventative measures to ensure there is not a malfunction. The duty also includes remediation of defects in the original construction of the common property.
>
> (3) As soon as something in the common property is no longer operating effectively or at all, or has fallen into disrepair, there has been a breach of the s 106 (1) duty.
>
> (4) Breach of the duty under s 106 (1) of the SSM Act gives each Lot owner a statutory cause of action.
>
> (5) Repairs to common property (including renewal or replacement of common property) that does not involve alteration or addition for the purpose of improving or enhancing the common property does not require a special resolution of the owners corporation under s 108 of the SSM Act.
>
> (6) Renewal or replacement of common property under s 106 (2) of the SSM Act is only engaged when the item of common property is no longer operating effectively, or at all, or has fallen into a state of disrepair.
>
> (7) Renewal or replacement of common property under s 106 (2) of the SSM Act is limited by a concept of reasonable necessity.

27 Section 232 of the SSM Act sets out the orders that the Tribunal may make to settle disputes or rectify complaints in a Strata Scheme. It provides, relevantly:

> **232 Orders to settle disputes or rectify complaints**
>
> (1) Orders relating to complaints and disputes: The Tribunal may, on application by an interested person … make an order to settle a complaint or dispute about any of the following: -
>
> …
>
> (e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act ….
>
> (2) Failure to exercise a function: For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if –

(a) it decides not to exercise the function, or

(b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

…

Consideration

28 There is no issue in this case that the applicant Lot Owner is an "interested person" entitled to apply for an order under s 232 because he is Lot Owner: s 226(1)(d) of the SSM Act. There is no issue that the party wall and the interior pipework of the party wall between Units 40 and 41 is common property of the Strata Scheme. There is no issue that the Lot Owner has requested the Owners Corporation to carry out remedial works to the wall and the pipework to prevent noise transmission into the bedroom of his Lot and it has refused to do so. This constitutes a request by the Lot Owner for the Owners Corporation to exercise the function imposed on it by s 106(1) which has been refused. The precondition imposed by s 232(2) on the Tribunal's order making power under s 232(1) has thus been satisfied.

29 As I have set out above, the Owners Corporation's primary defence to the application is that Mr Tsevrementzis' Report is not properly before the Tribunal. While I have not accepted that this objection goes to the admissibility of this report, it is also necessary to consider if this objection affects the weight that can be given to the report.

30 The Owners Corporation is critical of the fact that Mr Tsevrementzis did not sign his report and that he has not set out his qualifications.

31 It may be desirable, but it is not essential, that an 'expert' report is signed by its author. The essential issue is whether the report is the genuine opinion of Mr Tsevrementzis. I did not understand Mr McGrath to contend that Mr Tsevrementzis did not write this report or that its contents did not set out his opinion.

32 In any event, the Owners Corporation did not file any defence that put the authenticity of Mr Tsevrementzis' opinion in issue as required by the directions made on 5 October 2022. Nor did it notify the Lot Owner or Tribunal prior to the

hearing that Mr Tsevrementzis was required for cross-examination. If the authenticity of the report was in issue it would be necessary for this issue to be put to Mr Tsevrementzis by the Owners Corporation. In these circumstances, I am satisfied that Mr Tsevrementzis' report should be accepted as his opinion.

33 A similar point must be made in relation to Mr Tsevrementzis' qualifications. While it must be accepted that an 'expert' is generally required to set out their qualifications and experience as the basis for their opinion, in this case the Owners Corporation was directed to file a defence that could have stated an objection to the Lot Owner's case on this basis, but it failed to do so.

34 Had the Owners Corporation done so, the Lot Owner would have had the opportunity to call Mr Tsevrementzis' to give evidence as to his qualifications, and this could have been tested in cross-examination by the Owners Corporation. Mr Tsevrementzis does state in his report that he is an "Acoustical Consultant" and that he is a Member of the Australian Acoustical Society. It is also apparent from the face of his report that he works for a consultancy, Koikis Acoustics Pty Ltd, which specialises in acoustics. In the absence of any proper challenge to these qualifications and experience I accept them at face value.

35 Additionally, Mr Tsevrementzis' sets out in his opinion the testing methodology and the objective standards upon which his opinion is based. I note that there is little subjectivity in his analysis. Mr Tsevrementzis' test results were simply reported against the objective standards he referenced, and his conclusions are based on industry accepted tolerances for noise transmission. The Owners Corporation has not filed any expert evidence of its own that challenges Mr Tsevrementzis' testing methodology or the objective standards he references or the conclusions he reached having regard to those matters. As I already stated, nor did it seek to challenge that evidence by cross-examining Mr Tsevrementzis. In these circumstances, I am satisfied that Mr Tsevrementzis' opinion to the effect that there is severe (offensive) noise transmission into the Lot Owners Unit from the Unit 41 bathroom should be accepted.

36 The next limb of the Owners Corporation's case is that the noise transmission does not result from any defect in the common property because it is a "building feature". That is a bare assertion made by Mr McGrath at the hearing.

There is no evidence of a suitably qualified person that corroborates that assertion. No building standard or tolerance is referred to in support of that contention. Having regard to contemporary standards I do not accept that building features that permit offensive noise transmission between Lots in a communal living environment such as a Strata Scheme are not defective. The Lot Owner's unchallenged evidence is that this noise transmission did not occur when he purchased into the Strata Plan 20 years ago. It is his evidence that the noise transmission commenced later and that it has escalated significantly over the past few years. There was also no challenge to the Lot Owner's evidence that he did not experience noise transmission from the bathroom on the other side of the party wall with Unit 39. That evidence is consistent with ageing and wear of the building features involved, and a specific problem with the pipework in the party wall between Units 40 and 41, although this cannot be proved definitively without invasive inspection of the pipework.

37 As *Siewa* and Gittins make clear, an Owners Corporation's duty to maintain common property is a strict one and it extends to maintaining it in a condition which enables it to serve the purpose for which it exists. In this case the pipework in the interior of the party wall exists for the purpose of supplying water to Unit 41's bathroom. It is a necessary implication of that function that this is not done in a way that creates offensive noise in an adjoining Lot. There is clearly a malfunction in the pipework in this case which causes offensive noise transmission into Lot 41. The pipework is not "serviceable" for the purposes of s 106(1) on this basis.

38 The Owners Corporation's contention that the noise transmission is a nuisance caused by the Lot 41 occupant which does not involve it cannot be accepted. There is no evidence that the Lot 41 occupant is engaging in other than ordinary use of their bathroom, even if they do so at atypical hours because of shift work. No unreasonable use of the Lot 41 bathroom is established on the evidence.

39 The Owners Corporation's duty to maintain the pipework in good and serviceable repair is thus engaged by the malfunctioning pipework. It has

refused to carry out remedial works to prevent the offensive noise transmission by the malfunctioning pipework in breach of its obligation to do so. The Lot Owner is therefore entitled to an order that will require the Owners Corporation to carry out the necessary remedial work.

40 There is a scope of works in evidence for what is required to insulate the pipework that is sufficiently detailed for the Tribunal to make a remedial work order in accordance with the Soundblock quotation.

41 The Owners Corporation objects to the work set out in that scope of work because it is invasive and disruptive. That is no answer to the application. The Owners Corporation is not relieved of the duty to maintain common property by the disruption and inconvenience to Lot Owners that may be caused during maintenance work. The Owners Corporation has not filed any alternative, less invasive or disruptive, remedial methodology to that proposed by Soundblock.

Orders

42 For the foregoing reasons, I make the following orders:

(1) The Tsevrementzis Report is admitted into evidence.

(2) The Owners – Strata Plan No. 51923 must cause the carrying out of work to the common property pipework and party wall between Units 40 and 41 in accordance with the scope of work set out in the Soundblock quotation dated 7 April 2022 before 3 April 2023.

****

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