



Civil and Administrative Tribunal
New South Wales

Case Name: The Owners – Strata Plan No 7704 v Kim

Medium Neutral Citation: [2023] NSWCATCD 39

Hearing Date(s): 1 March 2023

Date of Orders: 22 May 2023

Decision Date: 22 May 2023

Jurisdiction: Consumer and Commercial Division

Before: R Alkadamani, Senior Member

Decision: (1) Order pursuant to ss 232 and 241 of the SSMA that the respondent ensure that the floor space in lot 3 in the two bedrooms, hallways, living and dining room is covered or otherwise treated so as to be sound proofed to an extent sufficient to prevent the transmission from the lot 3 floor space of noise in excess of 50 LnT,w or noise otherwise likely to disturb the peaceful enjoyment of other lot owners (the Work).
(2) The Work is to be carried out within 56 days of the date of these orders.

Catchwords: LAND LAW – strata title – obligations of owners and occupiers – transmission of noise

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), s 36
Strata Schemes Management Act 2015 (NSW), ss 110, 232, 241

Cases Cited: Felcher v The Owners – Strata Plan No 2738 [2017] NSWCATAP 219
Gao V Agonsti [2009] NSWCTTT 175

Texts Cited: None

Category: Principal judgment

Parties: The Owners – Strata Plan No 7704 (applicant)
Jiwoo Kim (respondent)

Representation: Mr A. Lewis (applicant)

No appearance for respondent

File Number(s): SC 22/35110

Publication Restriction: None

REASONS FOR DECISION

- 1 This is an application under the *Strata Schemes Management Act 2015* (NSW) (**SSMA**) seeking relief in relation to alleged excessive noise emanating from one of the lots in the strata scheme.
- 2 The applicant is the owners corporation (**the OC**) of the strata scheme. The strata scheme is a residential building of 18 lots located at ** Meadow Crescent, Meadowbank, NSW.
- 3 The respondent is the owner of lot 3 in the strata scheme, which is the lot from which excessive noise is alleged to be emanating.

The Hearing

- 4 The matter was heard on 1 March 2023. At the hearing Mr Lewis represented the OC. Mr Lewis is the chairperson of the strata committee.
- 5 There was no appearance for the respondent on the date the matter was listed for hearing. The Tribunal's file contains a copy of the notice of hearing which was addressed to Jiwoo Kim at 3/** Meadowbank Crescent, Meadowbank, 2114, NSW.
- 6 Section 263 of the SSMA provides that an address for service of documents on a lot owner includes the postal address of the lot. Consequently, I am satisfied the notice of hearing was posted to the respondent.
- 7 The matter was listed for hearing at 1:15pm on 1 March 2023. The matter was called outside the hearing room on 1 March 2023 on more than one occasion, including at 1:30pm and there was no appearance by the respondent.

- 8 Having regard to the importance of the just, quick and cheap resolution of the real issues in dispute prescribed by s 36(1) of the *Civil and Administrative Tribunal Act 2013* (**CAT Act**), the matters in the preceding four paragraphs and the efficient utilisation of public resources I determined that it was appropriate to hear the matter on 1 March 2023 and proceeded to do so.

Evidence

- 9 At the hearing on 1 March 2023 the OC relied on three exhibits, namely:
- (1) A statutory declaration of Anton Gregory Lewis dated 19 December 2022, which was marked exhibit 1;
 - (2) The documents annexed to the application as filed with the Tribunal, which were marked exhibit 2. Exhibit 2 included a report dated 21 December 2021 from Acoustic Dynamics Pty Ltd (**Acoustic Dynamics**); and
 - (3) A letter from the Department of Fair Trading dated 15 July 2022 to the effect that the respondent had not responded to the application for mediation. This letter was marked exhibit 3.
- 10 At the conclusion of the hearing on 1 March 2023 the Tribunal made orders granting leave to the applicant to file a further report from Acoustic Dynamics. In response, the OC filed further materials on 15 March 2023. The content of these materials exceeded the scope of the grant of leave. However, some of the material that exceeded the scope of the grant of leave is relevant to the resolution of the dispute. Moreover, the respondent did not raise any objection to the material filed 15 March 2023 or file any material in response notwithstanding directions providing the respondent with an opportunity to file material in response. In those circumstances, and having regard to s 36(1) of the CAT Act, I have decided to permit the tender of all the material filed 15 March 2023 and that material will be exhibit 4.

Findings

- 11 The Tribunal makes the following findings of fact.
- 12 Strata Plan 7704 is a strata scheme comprising of 18 residential lots located at ** Meadow Crescent, Meadowbank, NSW, 2114.
- 13 The applicant is the OC.
- 14 The respondent is the owner of lot 3.

15 Anton Gregory Lewis (**Mr Lewis**) and his partner are the owners of lot 1 in the strata scheme. They have resided in lot 1 for over 10 years (Ex 1).

16 The by-laws of the strata scheme include, relevantly, by-laws 1 and 14 which 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 any person lawfully using 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 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.

17 On 8 July 2021 Power Dekor (Sydney) Pty Ltd (**the Contractor**) provided the previous owner of lot 3 with a quote for the installation of floorboards. At the same time or around that time the Contractor also provided a document entitled “Acoustic Certificate” which was addressed to “*Strata Management and Body Corporate*” (**the Acoustic Certificate**). These documents were provided to the OC as part of an application by the previous owner of lot 3 to install floorboards.

18 The Acoustic Certificate included a table entitled “Test Results” in which the acoustic test results recorded for a flooring system described as “*12 mm Laminate Flooring + 2mm Powerlay + ECFS*” are described as follows (Ex 4, p. 44):

- L’nTw - 45
- AAAC Star rating – 5
- FIIC 60
- BCA pass - Yes

19 By letter dated 26 July 2021 the strata manager for the OC communicated to the previous owner of lot 3 that their application to install “*12 mm laminate flooring with 2mm acoustic underlay for a 5 star rating*” in the two bedrooms,

hallways, kitchen, living and dining room had been approved subject to certain conditions (Ex 4, p. 38).

- 20 Provision was made in the 26 July 2021 letter for the previous owner of lot 3 to sign the letter so as to indicate acceptance of the terms and conditions of the approval.
- 21 On 27 July 2021 the previous owner of lot 3 signed the 26 July 2021 letter from the strata manager and thereby indicated acceptance of the terms and conditions of the approval (ex 4, p.40).
- 22 The installation of the floorboards was completed on or about 2 August 2021.
- 23 Lot 1 is located under lot 3.
- 24 Mr Lewis says that since August 2021 there has been “*unacceptable noise transmission*” from lot 3 into lot 1 (Ex 1). The noise transmission problem only arose after the previous owner of lot 3 installed floorboards as part of the renovations.
- 25 The installation of floorboards was undertaken shortly before lot 3 was listed for sale and, ultimately, sold to the respondent.
- 26 Mr Lewis deposes that the “*disruption and inconvenience to [his and his partner’s] lives has taken a toll both mentally and physically*”. He further says:
- Every footstep, movement, cough and conversation in unit 3 is transferred through the floor to our unit. The insulation is now so poor, we even hear and feel cooking preparations such as cutting.
- 27 Mr Lewis and his partner have purchased white noise appliances to reduce the audibility of noise transmission from lot 3, taken to wearing ear plugs whilst at home or turning up their devices to “*drown out noise*” from lot 3.
- 28 The Tribunal finds that noise from lot 3 is transmitted to lot 1 in a manner that Mr Lewis and his partner have found disruptive and, from their perspective at least, burdensome.
- 29 However, the Tribunal does not accept that every footstep, movement, cough or conversation in unit 3 is transferred to unit 1. Mr Lewis’ statement in this respect may not have been intended literally. If it were intended literally the statement cannot be accepted because Mr Lewis could not, as a matter of

logic, be aware of noise, such as noise from a footstep or a cough from lot 3, which did not transfer to lot 1.

- 30 Mr Lewis' evidence was that the current noise transmission from lot 3 to lot 1 occurred only after the installation of the new flooring system as part of the renovation works by the previous owner of lot 3. The Tribunal accepts this evidence.
- 31 Mr Lewis complained about the noise from lot 3 to the residents in that lot, who were children of the respondent. This led the residents of lot 3 providing consent for an acoustic expert to access lot 3 and provide a report.
- 32 On 14 December 2021 a consultant from Acoustic Dynamics attended lot 3 and conducted acoustic tests.
- 33 On 21 December 2021 Acoustic Dynamics provided their report on the results of their attendance and their testing.
- 34 The Association of Australian Acoustical Consultants (**AAAC**) has developed a star rating system to categorise the levels of noise transmission. Ratings range from 6 stars (the least noise transmission) to 2 stars.
- 35 Acoustic Dynamics measured the and applied the AAAC star rating to those measurements. Acoustic Dynamics' measurements recorded that the noise transmission from lot 3's living and dining room to lot 1's living and dining room was 60 LnT,w1 (Ex 2, p. 11 of the report). This was characterised as a 2 star rating on the AAAC star ratings. The measurement for the noise transmission from lot 3's bedroom to lot 1's bedroom was 61 LnT,w1 (Ex 2, p. 11 of the report). This was characterised as a 2 star rating on the AAAC star ratings.
- 36 The Acoustic Dynamic report described the AAAC star rating system as follows (Ex 2, p. 9 of the report):
- Members of the Association of Australian Acoustical Consultants (AAAC) developed the Star Rating system to rank the acoustical quality of multi-unit residential developments and to quantify and communicate the opinions of AAAC members on the design of residential buildings.
- 37 The Acoustic Dynamic report then sets out the AAAC star ratings by reference to noise transmission levels in relation to inter-tenancy activities as follows (Ex 2, p. 9 of the report):

- (i) 2 stars – up to 65 LnT,w
- (ii) 3 stars – up to 55 LnT,w
- (iii) 4 stars – up to 50 LnT,w
- (iv) 5 stars – up to 45 LnT,w
- (v) 6 stars – up to 40 LnT,w

38 Acoustic Dynamic are consultants practicing in the field of acoustic and noise issues. The contents of their report disclose that they are familiar with the various relevant standards and testing methodology. Consequently, the Tribunal accepts that the Acoustic Dynamic report sets out the AAAC star rating for noise transmission levels.

39 The Tribunal finds that the reference to “5 star rating” in the strata manager’s 26 July 2021 letter was a reference to the AAAC star rating system. This is evident from fact that the Contractor’s Certificate characterised the flooring system as having an AAAC star rating of 5. Moreover, the evidence in these proceedings supports the inference that the AAAC star rating system is the commonly used measure to characterise or categorise the noise transmission performance of flooring systems.

40 The Tribunal further finds, based on the testing conducted by Acoustic Dynamics, that the flooring system installed in lot 3 does not meet the noise transmission requirements of a 5 star rating under the AAAC star rating system. Rather, the flooring system installed in lot 3 only achieved a 2 star rating under the AAAC rating system.

41 The Acoustic Dynamic report describes a 2 star rating as follows:

A 2 star AAAC rating for floors is generally considered to be below the acceptable standard of sound transmission performance, and may not be sufficient to prevent the transmission of “noise likely to disturb the peaceful enjoyment of the owner or occupier of another lot”

42 One of the documents in exhibit 4 is entitled “*Association of Australian Acoustical Consultants Guideline for Apartment and Townhouse Acoustic Rating*”. In section 6 of that document (Ex 4, p. 13) it describes the attributes of a 2 star rating as follows:

Type of Noise	2 Star
Normal Speech	Audible

Raised speech Clearly audible
Dinner Party/Laughter Clearly audible
Shouting Clearly audible
Small Television/Small Clearly audible
Entertainment System

.....

- 43 The Acoustic Dynamic report also noted, correctly, that the Building Code of Australia (**the Building Code**) provides the following minimum requirement for noise insulation rating of floors:

F5.4 Sound insulation rating of floors

(a) A floor in a Class 2 or 3 building must have an $R_w + C_{tr}$ (airborne) not less than 50 and $L_{n,w}$ (impact) not more than 62 if it separates -

- (i) sole occupancy units; or
- (ii)

- 44 There was no dispute that F5.4 is the relevant provision of the Code for requirements of noise transmission in multi-tenancy buildings such those in the strata scheme in this application.
- 45 The Tribunal finds that the OC has not established that the noise transmission in respect of noise transmission from the floor of lot 3 to lot 1 is more than 62 $L_{n,w}$.
- 46 The Acoustic Dynamic report observes that the “*transmission performance requirements of the Building Code of Australia are set to a standard that would only achieve a 2 star AAAC rating*” (Ex 2, p. 10 of the report).
- 47 In relation to the comparability of measurements of $L'_{nT,w}$ to $L_{n,w}$ the National Construction Code handbook explains the relationship as follows:

$L'_{nT,w}$: A measure of the noise impact performance of a floor. It is characterised by how much sound reaches the receiving room from a standard tapping machine. It is measured in the field and is therefore subject to the inherent inaccuracies involved in such a measurement. The term is referred to as “weighted standardised field impact sound pressure level”. It is a field measure of the amount of impact sound reaching a space via a floor. It is the equivalent field measurement to the $L_{n,w}$ laboratory measurement. The lower the number the better the performance.

Consideration

- 48 The application is brought pursuant to s 232 of the SSMA. Section 232 of the SSMA relevantly provides:

232 Orders to settle disputes or rectify complaints

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

- (a) the operation, administration or management of a strata scheme under this Act,
- (b) an agreement authorised or required to be entered into under this Act,
- (c) an agreement appointing a strata managing agent or a building manager,
- (d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,
- (e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,
- (f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.

- 49 Section 241 of the SSMA is also relevant. It provides:

241 Tribunal may prohibit or direct taking of specific actions

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

- 50 The OC and the owner of lot 3 are interested persons for the purposes of s 226 of the SSMA. The Tribunal finds that it has jurisdiction to determine the claim.
- 51 The issue for determination is whether the noise emanating through the floor of lot 3 breaches by-laws 1 and 14. Those by-laws are in a form commonly found in strata schemes in New South Wales.
- 52 The test to be applied in determining disputes involving by-laws 1 and 14 in these proceedings is objective: see *Gao V Agonsti* [2009] NSWCTTT 175 and *Felcher v The Owners – Strata Plan No 2738* [2017] NSWCATAP 219. The Tribunal's finding recorded above that the noise from lot 3 is transmitted to lot 1 in a manner that Mr Lewis and his partner have found disruptive and, from their perspective at least, burdensome is not a finding as to whether, objectively, the noise emanating from lot 3 breaches by-laws 1 and/or 14.

- 53 The Acoustic Dynamics report ascribes a two star rating to the noise transmission from lot 3's living and dining area to lot 1's living and dining area and from lot 3's bedroom to lot 2's bedroom. A 2 star rating in the AAAC classifications *"is generally considered to be below the acceptable standard of sound transmission performance, and may not be sufficient to prevent the transmission of 'noise likely to disturb the peaceful enjoyment of the owner or occupier of another lot'"*.
- 54 The Acoustic Dynamic report did not measure noise transmission levels in excess of 62 Ln,w so it cannot be said that the Code has been breached. Two of the measurements were very close to 62 Ln,w; namely 60 LnT,w1 in lot 1's dining/living area and 61 LnT,w1 in the main bedroom of lot 1. Those noise transmission measurements were borderline compliant with the Code.
- 55 The extent of the noise transmission from lot 3 is illustrated by the Acoustic Dynamic measurements which describe that a rating of 2 stars indicates transmission of a range of noises from everyday activities, including normal speech, emanating from lot 3 is audible in lot 1 (Ex 4, p. 13).
- 56 I also take into account Mr Lewis' evidence of the range of noises that he does hear in his lot which emanate from lot 3. Those noises are generated by everyday activities in lot 3 and included footsteps, conversations, coughs and even cooking preparation activities such as cutting some foods. Mr Lewis' description of noise transmission to lot 1 from lot 3 is consistent with the description of audible noises for a 2 star rating classification described in the *"Association of Australian Acoustical Consultants Guideline for Apartment and Townhouse Acoustic Rating"*, Ex 4, p. 13).
- 57 Although the matter is finely balance, I am not satisfied that the flooring system in lot 3 is permitting noise to be transmitted to such an extent as to disturb the enjoyment of the owner or occupier of another lot, namely lot 1 and that this breaches by-law 1 or by-law 14 because the evidence does not establish that noise transmission from the flooring system installed in lot 3 breaches the requirements of the Code.
- 58 For completeness, the Tribunal does not find that the use and enjoyment of lot 3 by the respondents is occurring in a manner or for a purpose that causes a

nuisance to other lot owners in contravention of s 153 of the SSMA. The noise emanating from lot 3 arises from everyday, unexceptional activities. There is no complaint concerning activities such as the use of power tools at inappropriately early or late hours or similar noise producing activities.

59 I turn to consider whether the agreement of the previous owner of lot 3 to abide by the conditions set out in the letter of 26 July 2021 provides a basis on which the OC is able to obtain the relief sought as against the respondent, being the current owner of lot 3.

60 Sub-section 110(2) of the SSMA permitted the OC to impose reasonable conditions on the approval of a minor renovation.

61 The conditions in the 26 July 2021 letter contained the terms of the OC's consent to the approve the minor renovations, which included the replacement of the flooring system. Those conditions permitted the previous owner of lot 3 to install "*12 mm laminate flooring with 2mm acoustic underlay for a 5 star rating*" in the two bedrooms, hallways, kitchen, living and dining room had been approved subject to certain conditions (Ex 4, p. 38). I have recorded above the Tribunal's finding that the reference to a 5 star rating in the 26 July 2021 letter is a reference to the AAAC rating system. On the basis of the evidence set out above, there is no doubt, and the Tribunal finds, that the flooring system as installed in lot 3 does not achieve a 5 star rating in respect of noise transmission.

62 In those circumstances, the minor renovation effected by the previous owner of lot 3 does not comply with the conditions imposed by the OC as set out in the 26 July 2021 letter.

63 The next question is the appropriate remedy.

64 So as to ensure that the parties have a clear path forward it is appropriate that the Tribunal formulate orders by reference to noise transmission measurements so as to reduce the scope for future disputation.

65 The orders of the Tribunal will be to the effect that the the owner of lot 3, the respondent, must ensure that the floor space in lot 3 in the two bedrooms, hallways, living and dining room is covered or otherwise treated so as to be

sound proofed to an extent sufficient to prevent the transmission from the lot 3 floor space of noise in excess of 50 LnT,w or noise otherwise likely to disturb the peaceful enjoyment of other lot owners (**the Work**). The Work is to be carried out within 56 days of the date of these orders.

- 66 I note that by law 14 does not apply to flooring in a kitchen and for this reason the kitchen area in lot 3 will not be included in the Tribunal's order.
- 67 I note that the 26 July 2021 letter recorded a rating of a 5 stars. However, it appears that both the OC and the previous owner of lot 3 may have been led to rely on the Acoustic Certificate dated 8 July 2021 provided by the Contractor. The Acoustic Certificate may have been inaccurate in describing the noise transmission characteristics of the flooring system. For that reason I consider it appropriate that the current owner of lot 3 be required to undertake work which might achieve only a 4 star rating.

Orders

- 68 The Tribunal makes the following orders:
- (1) Order pursuant to ss 232 and 241 of the SSMA that the respondent ensure that the floor space in lot 3 in the two bedrooms, hallways, living and dining room is covered or otherwise treated so as to be sound proofed to an extent sufficient to prevent the transmission from the lot 3 floor space of noise in excess of 50 LnT,w or noise otherwise likely to disturb the peaceful enjoyment of other lot owners (**the Work**).
 - (2) The Work is to be carried out within 56 days of the date of these orders.

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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