Civil and Administrative Tribunal

New South Wales

Case Name:	O'Riordan v Chu
Medium Neutral Citation:	[2023] NSWCATCD 61
Hearing Date(s):	30 May 2023
Date of Orders:	08 June 2023
Decision Date:	8 June 2023
Jurisdiction:	Consumer and Commercial Division
Before:	D Ziegler, Senior Member
Decision:	1. The application is dismissed. 2. If the respondent wishes to make a costs application, the respondent is to file and serve submissions and documents on the costs application by 14 days from the date of these orders. 3. If an application for costs is made by the respondent, the applicant is to file and serve submissions and documents on the costs application by 28 days from the date of these orders. 4. The respondent is to file and serve costs submissions in reply by 35 days from the date of these orders. 5. The costs submissions of the parties are to state whether the parties seek an oral hearing on the issue of costs, or consent to the costs application being determined on the papers in accordance with s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW). 6. The Tribunal may determine it appropriate to deal with any costs application on the papers and without a further oral hearing.
Catchwords:	LAND LAW – strata title – obligations of owners and occupiers – By-Laws – Strata Schemes Management Act 1996 (NSW) s 153 - whether noise transmission

	creates a nuisance – exercise of discretion.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Bayliss v Lea [1961] NSWLR1002 Cannell v Barton [2014] NSWCATCD 103 Chehelnabi v Gourmet and Leisure Holdings Pty Ltd [2020] NSWCATAP 102 Gisks v The Owners – Strata Plan No 6743 [2019] NSWCATCD 44 Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 425 Hargrave v Goldman (1963) 110 CLR 40 Sedleigh-Denfield v O'Callaghan [1940] AC 880 The Owners Strata Plan No 2245 v Veney [2020] NSWSC 134
Category:	Principal judgment
Parties:	Padraig Alan O'Riordan (Applicant) Yim Chu (Respondent)
Representation:	Counsel: R Coffey (Applicant) Solicitors: Sarvaas Ciappara Lawyers (Respondent)
File Number(s):	SC 23/04165
Publication Restriction:	Nil

REASONS FOR DECISION

1 This application involves a dispute between lot owners in a strata scheme.

2 The applicant is the owner of lot 202 and the respondent is the owner of lot 302. Lot 302 is directly above lot 202.

3 The applicant alleges that the respondent has breached s 153(1)(a) of the *Strata Schemes Management Act 2015* (NSW) (the "Strata Act") and by-laws 1 and 13 of the strata scheme's by-laws.

4 There was some discussion during the hearing as to precisely what order was being sought by the applicant as this was not clear from the application form or from any of the other materials before me. Eventually the applicant's counsel confirmed that the applicant seeks an order requiring the respondent to install a flooring system in the kitchen of lot 302 that will, when the temporary false ceiling of lot 202 is removed, achieve a "5 star AAAC rating".

Background

5 The applicant purchased lot 202 in August 2019. Soon after moving into the lot the applicant became aware of noise transfer from lot 302.

6 At some point the applicant installed a temporary false ceiling in lot 202 to address the noise transfer.

7 On 2 February 2021 the applicant commenced proceedings SC21/05077 in the Tribunal (the "Original Proceedings") seeking orders under s 232 of the Strata Act that the respondent comply with the scheme's by-laws and with s 153 of the Strata Act.

8 On 13 December 2021 the Tribunal made the following order (the "Original Order"):

> The Tribunal directs that by the 31st of December 2021 the respondent is to have a floor covering installed in the kitchen … by an installer qualified and currently licensed in that trade or skill … which complies with the requirements of the Body Corporate, ie Six Star AAAC rating in all the tiled areas of the said unit.

9 On 22 December 2021 a contractor engaged by the respondent installed new floor tiles over the existing floor tiles in the kitchen. The Owners Corporation approved these works.

10 The applicant alleges that there has been continued noise disturbance since the respondent undertook those remedial works and on 27 January 2023 the applicant lodged these proceedings in the Tribunal. The application was originally lodged as a renewal of the Original Proceedings under sch 4 cl 8 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the "NCAT Act"). The respondent alleged that the works carried out by the respondent did not comply with the Original Order and sought "rectification works … to provide appropriate

acoustic isolation between the tiled floor in kitchen of unit 302 and the rooms situated below in unit 202".

11 On 14 February 2023 at a directions hearing, the Tribunal made the following order:

> The application is to be treated as a fresh application (rather than a renewal of proceedings under sch 4 cl 8 of the *Civil and Administrative Tribunal Act 2013*) in respect of (a) breach of any noise by-law; and (b) breach of s 153 of the *Strata Schemes Management Act 2015*.

Issues

12 The issues which I must decide in these proceedings are:

(1) Has the respondent breached s 153 of the Strata Act or the scheme's by-laws?

(2) If so, should the Tribunal, in the exercise of its discretion, make the order sought by the applicant?

Evidence

13 The applicant relied on a bundle of documents lodged on 27 February 2023 including a statement made by the applicant on 24 February 2023, a statement made by Maria Urban on 16 February 2023, a "noise diary" prepared by the applicant, an acoustic report prepared by Camille Hanrahan-Tan of Acoustic Directions dated 17 January 2023 (the "Applicant's Expert Report") and a copy of the scheme's by-laws.

14 The respondent relied on an acoustic report prepared by Richard Haydon and Nathan Wendt of Acoustic Dynamics dated 4 May 2023 (the "Respondent's Expert Report"), attaching a copy of an earlier acoustic report prepared by Acoustic Dynamics (dated 14 October 2021) which was relied upon by the respondent in the Original Proceedings. The respondent also relied upon a excerpt from the Bayside Development Control Plan 2022.

15 The applicant sought to cross-examine the authors of the Respondent's Expert Report but they were not made available for cross-examination. The respondent did not seek to cross-examine the applicant's lay or expert witnesses.

Legal framework

16 Section 153 of the Strata Act provides:

153 Owners, occupiers and other persons not to create nuisance

(1) An owner, mortgagee or covenant chargee in possession, tenant or occupier of a lot in a strata scheme must not—

(a) use or enjoy the lot, or permit the lot to be used or enjoyed, in a manner or for a purpose that causes a nuisance or hazard to the occupier of any other lot (whether that person is an owner or not), or

(b) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of the common property by the occupier of any other lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the common property, or

(c) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of any other lot by the occupier of the lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the lot.

17 Section 135(1) of the Strata Act requires lot owners to comply with the by-laws for the scheme. It provides:

135 Requirement to comply with by-laws

(1) The by-laws for a strata scheme bind the owners corporation and the owners of lots in the strata scheme and any mortgagee or covenant chargee in possession, or tenant or occupier, of a lot to the same extent as if the by-laws—

(a) had been signed and sealed by the owners corporation and each owner and each such mortgagee, covenant chargee, tenant and occupier, and

(b) contained mutual covenants to observe and perform all the provisions of the by-laws.

18 The by-laws of the scheme which the applicant alleges have been breached by the respondent are by-laws 1 and 13 (the “By-Laws”). They relevantly provide:

1 Noise

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

13 Floor coverings

1. An owner and occupier 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.

…

3. This by-law does not apply to floor space comprising a kitchen, laundry, lavatory or bathroom.

19 Neither s 153 nor s 135 conveys an order making power on the Tribunal. In the even that there is a dispute about compliance with either of these provisions,

the relevant order making powers can be found in ss 232 and 241 of the Strata Act.

20 Section 232 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.

21 Section 241 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.

22 The use of the word “may” in ss 232 and 241 connotes that those provisions confer discretionary order making powers on the Tribunal. That discretion must be exercised judicially.

Has there been a breach of the By-Laws?

23 By-law 1 applies only to occupants of lots. It is common ground that the respondent is the owner of lot 302 but there is no evidence before me which establishes that she is also an occupier of the lot. Indeed, the materials lodged by the parties indicate that the lot is managed by a managing agent and occupied by a tenant. Accordingly, as I am not satisfied that the respondent is the occupant of lot 302, she cannot be held to be in breach of By-law 1. Even if I am wrong in this regard, for the same reasons as are outlined below in relation to breach of s 153(1)(a) of the Strata Act, I would not be satisfied that there has been a breach of By-Law 1.

24 The applicant also contends that the floor coverings in the kitchen of lot 302 are inadequate to prevent the transmission of noise. However, By-law 13 specifically excludes “floor space comprising a kitchen, laundry, lavatory or bathroom”. Accordingly, By-Law 13 does not apply to the current circumstances and the respondent cannot be found to be in breach of By-Law 13.

Has there been a breach of section 153(1)(a)?

Relevant lay evidence

25 The applicant relies on a statement in which he attested, relevantly, that following installation by the respondent of the new floor in lot 302 “noise disturbances continued to occur”.

26 The applicant also relies on a “noise diary” in which he has recorded various noise events over a period of approximately twelve months. The diary contains columns headed “Timestamp”, “Type of Noise”, “Room Heard In” and “Notes”. The dates recorded in the diary commence in March 2022 and end in February 2023. The applicant says the “gaps” in the diary are attributable to two trips to Ireland in 2022 but he has not provided the dates of those trips. The diary contains approximately 320 entries which largely record “footsteps” at various times of day and night, as well as sounds of an unidentified “banging”. On two occasions the diary records “woke me from sleep” and on one occasion the diary records “had to bang on roof”. There are several references to “doorbell” but no record of voices, music, television or other sounds.

27 The applicant also relies on a statement provided by Ms Maria Urban who attests that she has stayed in the spare bedroom of lot 202 both before and after the “subfloor installation”, which I take to be a reference to the new flooring installed by the respondent in December 2021. She says that she does shift work and sleeps during the day. She says that prior to installation of the flooring she “was not able to sleep without having white noise to distract me from the noise of loud footsteps” and that since the installation she has stayed in the lot on a few occasions, also sleeping during the day. She says that she could “still hear the footsteps and noise. These occasions it was not as loud but still required white noise to distract from the sound and did wake me at times”.

Expert evidence

28 Both parties also relied on expert acoustic reports. The salient elements of the Applicant's Expert Report can be summarised as follows:

(1) The Association of Australian Acoustical Consultants (AAAC) has developed a star rating system to rank the acoustical quality of multi-unit residential developments. The star ratings range from 2 to 6 star.

(2) The applicant's expert conducted both a standardised tapping test and a simulated impacts test to measure impact noise. The Applicant's Expert Report concludes that the noise level measured by the standardised tapping test achieved an acoustical level of 50 LnT,w which equates to a "4 star rating".

(3) The simulated impacts test referred to in the Applicant's Expert Report involved one engineer being positioned in lot 302 whilst another was positioned in lot 202 below. The engineer in lot 302 carried out the following activities from both the kitchen and bathroom of the lot: "regular walking", "heavy walking", "heel drops", "opening and closing drawers" and "power cable drop". The engineer in lot 202 measured the sound level produced by these activities using a hand-held NTI-Audio XL2 sound analyser. "Heel drops" are described as "drop onto their heels from their toes" and "power cable drop" is described as "drop a rubberised power cable plug from chest height".

(4) The report records that the sound level for these activities measured in lot 202 ranged from 4dB to 34dB above the background noise. The report also states that "Typically, any sound that is 8dB above the background noise level will be quite audible." Importantly the report states:

(a) Sounds produced in the kitchen of lot 302 exceeded the 8dB threshold in the kitchen/living area of lot 202 only in respect of "heavy walking", "heel drops" and "power cable drop". There was no excess recorded in any room in lot 202 for regular walking or for opening and closing drawers;

(b) When measured from the master bedroom of lot 202, sounds produced in the kitchen of lot 302 exceeded the 8dB threshold only in respect of "heel drops" and "power cable drops".

(5) The applicant's expert also conducted an airborne noise transmission test with a result equivalent to an AAAC "6 star" rating.

29 The Rockdale Council DCP which applied when the strata scheme was constructed states:

> All residential development except dwelling houses are to be insulated and to have an Impact Isolation between floors to achieve an Acoustical Star Rating of 5 in accordance with the standards prescribed by the … AAAC"

30 The Applicant's Expert Report concludes:

(a) The LnT,w impact noise does not comply with the Original Order as it does not achieve a 6 star rating;

(b) The LnT,w impact noise does not comply with the Rockdale Council DCP requirement of a 5 star AAAC rating;

(c) The simulated impact noise tests show that low frequency noise from daily living "is likely to disturb the peaceful enjoyment of the resident of Unit 202".

(d) "Rectification works" should be carried out to provide appropriate acoustic isolation between the tiled floor in kitchen of Unit 302 and the rooms situation below in Unit 202.

31 The salient elements of the Respondent's Expert Report are summarised as follows:

(a) The respondent's expert also conducted a standardised tapping test and achieved a similar result to the test conducted by the applicant's expert. The respondent accepts the result of the applicant's expert tapping test (noting that the range for an AAAC "4 star" rating is 46 to 50).

(b) The respondent's expert did not conduct an airborne simulation test or a simulated impact test.

(c) The current performance of the kitchen tiles achieves compliance with the Building Code of Australia, the Strata Act and the By-Laws.

32 It was not contentious that the Building Code of Australia requires kitchen tiles to achieve a LnT,w of less than or equal to 62 (which is equivalent to an AAAC 2 star rating).

Other evidence

33 The respondent also relied on the Bayside Development Control Plan 2022 which has replaced the Rockdale Council DCP. The new plan relevantly states:

> All residential development (except dwelling houses) is to be insulated and to have an Impact Isolation between floors to achieve an Acoustical Star Rating in accordance with the standards prescribed by the … AAAC with a minimum:
>
> a. 3 star for tiled areas within kitchens, balconies, bathrooms and laundries …;
>
> b. 4 star for timber flooring in any area;
>
> c. 5 star for carpet in any area.

Nuisance

34 In *The Owners Strata Plan No 2245 v Veney* [2020] NSWSC 134 ("*Veney*"), Darke J held, at [47], that "nuisance" for the purpose of s 153(1)(a) of the

SSMA should be interpreted in accordance with the common law meaning of an actionable nuisance, consistent with the approach previously taken by the Tribunal in applications under the former *Strata Schemes Management Act 1996* (NSW), for example in *Cannell v Barton* [2014] NSWCATCD 103 at [95] and *Gisks v The Owners – Strata Plan No 6743* [2019] NSWCATCD 44 at [26] ([46]-[47]).

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

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

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

37 In *Bayliss v Lea* [1961] NSWLR1002 the Court approved the following statement from Fleming on Torts 2nd ed, Clarendon Press, 1961at 400-1:

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

38 In *Chehelnabi v Gourmet and Leisure Holdings Pty Ltd* [2020] NSWCATAP 102 ("*Chehelnabi"*) the Appeal Panel, after reviewing the authorities, explained, at [74] - [75], the two primary elements which need to be satisfied for an actionable nuisance in respect of noise to be established:

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

39 I turn now to apply these principles to determine whether, by using or permitting the use or enjoyment of lot 302 with its current kitchen flooring, the respondent has committed or would commit an actionable nuisance.

40 The first element referred to in *Chehelnabi* has clearly been established. The lay and expert evidence establishes that some noise can be heard by the applicant in the use of his lot which emanates from the respondent's lot.

41 However, I am not satisfied that second element has been made out. My reasons for this are as follows.

42 The lay evidence does not demonstrate noise transfer which is excessive or unreasonable. The applicant says in his statement that "noise disturbances continued to occur" but gives no evidence of the level or impact of those disturbances. His noise diary refers mainly to "footsteps" and undefined "banging" but there is very little probative evidence as to the level or impact of those sounds. There is also no evidence of other noises such as voices, music, television or other sounds of daily living.

43 Ms Urban's evidence is also not persuasive. She says that when she slept in lot 202 during the day she could hear "footsteps and noise" which woke her "at times". No details are provided as to how often this occurred or what the other

"noise" was. The fact that she was disturbed by noise on occasion during the daytime is not enough to establish excessive or unreasonable noise.

44 The expert evidence also does not convince me that the noise transfer through the kitchen floors is unreasonable or excessive. In this regard:

(1) The experts agree that the LnT,w impact noise achieves a 4 star AAAC rating. The AAAC describes a 4 star rating as "generally considered to be a "reasonable" or "good" standard of impact isolation which is likely to be acceptable by the majority of occupants".

(2) The applicant's expert says that the airborne noise testing achieves a 6 star rating which is the highest possible level of sound transmission performance.

(3) The Applicant's Expert Report says that the simulated impact noise tests show that low frequency noise from daily living "is likely to disturb the peaceful enjoyment of the resident of Unit 202". However, no explanation is given for this statement and indeed the information provided in relation to these tests does not support this conclusion. In this regard the simulated impact testing reveals that heavy walking, heel drops and power cable drops in the kitchen of lot 302 are "quite audible" in lot 202. However, no explanation is provided as to the meaning of "quite audible". More significantly the report contains no information regarding the volume of the noise made by the various activities in situ so that it is difficult to assess the significance of the data given about the noise transmission. For example, there is no explanation of the difference between "regular" and "heavy" walking, the weight of the power cable which was dropped, or otherwise as to the level of noise caused by the various activities described. The fact that some sounds emanating from lot 302 are audible in lot 202 is not enough to establish that there is an unreasonable or excessive noise transfer.

45 Although the kitchen floors in lot 302 may not comply with the Rockdale Council DCP, this in itself is not sufficient to establish that the noise transfer in this particular case is excessive or unreasonable. In any case other materials are also relevant. In this connection:

(1) The Rockdale Council DCP has been replaced with the Bayside Development Control Plan. The star rating for the kitchen floor in lot 302 meets (and indeed exceeds) the requirements of the new plan;

(2) The lot 302 kitchen floor exceeds the acoustic requirements of the Building Code of Australia.

46 It is also relevant that the scheme's own by-laws recognise that a more lenient approach is required when assessing noise transmission through kitchen floors. By-Law 13 specifically carves out kitchens, laundries and bathrooms

from the requirement to “prevent the transmission from the floor space of noise likely to disturb the peaceful enjoyment of the owner or occupier of another lot.” It would be antithetical to conclude that the noise transfer through the kitchen floors is excessive or unreasonable in circumstances where the scheme’s own by-laws effectively exempt kitchen floors from the requirement to prevent noise transmission.

47 Overall, whilst the transmission of some noise may cause inconvenience and a level of disruption to the occupier of lot 202, the evidence does not establish that the inconvenience is beyond what other occupiers in the scheme can be expected to bear. Strata schemes necessarily involve community living where lot occupiers dwell in very close proximity to one another. Some level of noise transfer and disturbance is to be expected. The applicant has not established that in this instance the noise transfer is excessive.

48 Accordingly, having considered the totality of the evidence, I am not satisfied that by using or permitting the use or enjoyment of lot 302 with its current kitchen flooring, the respondent has committed or would commit an actionable nuisance.

49 In reaching this conclusion I have been cognisant of the fact that in the Original Order the Tribunal required the respondent to have a floor covering installed which achieved a 6 star rating. However, as this application is being treated as a fresh application I am not bound by that order. Moreover in the absence of any reasons for the Tribunal’s decision, it is not possible to assess the basis for that decision and whether, or the extent to which, it should be taken into account in making this decision. In any case, although the Original Order required a 6 star rating to be achieved, the applicant’s counsel conceded during the hearing of this application that it would be virtually impossible to achieve such a rating and therefore he did not press for this outcome.

50 I have also considered the applicant’s submission that the impact noise transmission star rating is in fact less than the 4 star rating agreed by the experts because once the temporary false ceiling is removed, the impact noise transmission will worsen. Regrettably, neither expert report addresses this issue directly. However, the applicant submits that this conclusion can be

inferred from the following statement made in the Applicant's Expert Report in relation to the impact noise test: "The contribution of the airborne noise to the impact noise LnT,w result was determined to be insignificant and not affecting the impact noise result. The noise isolation is equivalent to 6 stars and will have been substantially improved by installation of the new ceilings in Unit 302".

51 Unfortunately, no explanation is provided in the report as to what is meant by "substantially improved" or how the removal of the false ceilings might impact the result of the airborne transmission test. More significantly, the report does not opine as to whether, or to what extent, the installation of the false ceilings or the improvement of the airborne noise transmission may have impacted the impact noise test results. Overall, there is simply not enough evidence to satisfy me that the removal of the temporary false ceilings will reduce the AAAC star rating for the impact noise transmission to 3 stars or less.

52 For all of these reasons I am not satisfied that a breach of s 153(1)(a) has been established.

Exercise of discretion

53 I would add that even if I had been satisfied of a breach of s 153(1)(a) or the By-Laws, in the exercise of my discretion, I would have declined to make the order sought by the applicant.

54 The order sought is that the respondent install a flooring system in the kitchen of lot 302 that will, when the temporary false ceiling of lot 202 is removed, achieve a "5 star AAAC rating".

55 Such an order is unacceptably vague. It does not include a scope of works or indeed any details as to what the respondent would be required to do in order to achieve a 5 star rating. The Applicant's Expert Report unfortunately is not helpful in this regard. It refers to various "likely" deficiencies in the existing flooring and recommends "rectification works … to provide appropriate acoustic isolation" but provides no guidance as to what such works would involve.

56 Thus, if the Tribunal made the order sought by the applicant, the respondent would effectively be left to work out what she is required to do to comply with the order.

57 Orders in the nature of mandatory injunctions that leave doubt about what the recipient of the order is required to do are unacceptable and to make such an order is an error of law: *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425 at [110]-[114].

58 I am also mindful of the fact that the respondent has taken steps in good faith to comply with the Original Order. That order was also unfortunately vague and these proceedings may well have been avoided had the Original Order provided clear guidance as to what works were actually required. I am not confident that the making of another imprecise order would result in the dispute between the parties being resolved.

59 Also relevant to the exercise of the discretion is the fact that it is common ground that the kitchen floor which precipitated these proceedings is the original common property kitchen floor. The respondent had not made any changes or additions to the kitchen floor prior to the Original Orders. Any issue with sound transmission through the floors is likely therefore to be the responsibility of the owner's corporation rather than of individual lot owners. It would be unreasonable to make the respondent personally responsible for addressing this issue, particularly in circumstances where she has already expended time and money in an effort to address it.

60 For these reasons, even if I had been satisfied that there had been a breach of s 153(1)(a) or the By-Laws, I would have declined to make the order sought.

Conclusion and Orders (including costs)

61 Rule 38A of the *Civil and Administrative Tribunal Rules 2014* (NSW) ("NCAT Rules") does not apply to these proceedings. Therefore, the general rule operates that parties bear their own costs, unless there are "special circumstances": see NCAT Act, s 63. I am not aware of any special circumstances that would warrant the making of a costs order in favour of the respondent. Nonetheless, in case the respondent intends to make an

application for costs, I am making directions for the parties to exchange submissions on costs.

62 For these reasons I am making the following orders:

(1) The application is dismissed.

(2) If the respondent wishes to make a costs application, the respondent is to file and serve submissions and documents on the costs application by 14 days from the date of these orders.

(3) If an application for costs is made by the respondent, the applicant is to file and serve submissions and documents on the costs application by 28 days from the date of these orders.

(4) The respondent is to file and serve costs submissions in reply by 35 days from the date of these orders.

(5) The costs submissions of the parties are to state whether the parties seek an oral hearing on the issue of costs, or consent to the costs application being determined on the papers in accordance with s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW).

(6) The Tribunal may determine it appropriate to deal with any costs application on the papers and without a further oral hearing.

****

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