



Civil and Administrative Tribunal
New South Wales

Case Name: Shaw v Euen

Medium Neutral Citation: [2023] NSWCATCD 68

Hearing Date(s): 15 June 2023

Date of Orders: 29 June 2023

Decision Date: 29 June 2023

Jurisdiction: Consumer and Commercial Division

Before: P French, Senior Member

Decision: (1) Dan Mei is added as a respondent to the application.
(2) The respondent Lot Owner, Dan Mei, and occupant, Desmond Euen, must not cause or permit the smoking tobacco products in the courtyard of their Lot (Lot 7).

Catchwords: LAND LAW – Strata title – nuisance – hazard - tobacco smoke transmission between lots

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), 44
Interpretation Act 1987 (NSW) – ss 34, 35
Smoke-free Environment Act 2000 (NSW) – ss 3, 6, 6A, Schedule 1
Strata Schemes Management Act 2015 (NSW) – ss 153, 241

Cases Cited: Briginshaw v Briginshaw [1938] 60 CLR 336
Chehelnabi v Gourmet and Leisure Holdings Pty Ltd [2020] NSWCATAP 102
Gisks v The Owners – Strata Plan No 6743; The Owners – Strata Plan No 6743 v Gisks [2019] NSWCATCD 44
Mirana Investments Pty Ltd and Ors v Coupe [2012] QCATA 187
Owners Corporation SP 49822 v May & Ors (Strata &

Community Schemes) [2006] NSWCTTT 739
Pittman v Newport [2022] NSWCATCD 173
The Owners Strata Plan No 2245 v Veney [2020]
NSWSC 134

Texts Cited: Nil

Category: Principal judgment

Parties: Haydn Shaw (Applicant)

Dan Mei (First respondent)

Desmond Euen (Second respondent)

Representation: Haydn Shaw (Self-represented)

Dan Mei (Self-represented)

Desmond Euen (no appearance)

File Number(s): SC 23/09707

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

- 1 This is an application by Haydn Shaw (the applicant Lot Owner) for an order pursuant to s 241 of the *Strata Schemes Management Act* 2015 (the Act; SSM Act) that would require Dan Mei and Desmond Euen (the respondent Lot Owner and Lot Occupant respectively) to comply with the obligation imposed on them by s 153(1)(a) of the Act not to use or enjoy their Lot, or permit their Lot to be used or enjoyed, in a manner or for a purpose that causes a nuisance or hazard to the applicant Lot Owner. Specifically, the applicant Lot Owner wants an order that will compel the respondent Lot Occupier to cease causing cigarette smoke to be emitted from the respondent Lot Owner's Lot into the applicant Lot Owner's Lot. This application was made to the Tribunal on 28 February 2023 (the application).
- 2 For the reasons set out following, I have made the order sought by the applicant Lot Owner. I am satisfied that the respondent Lot Occupant

persistently uses and enjoys the respondent Lot Owner's Lot to smoke cigarettes which generate smoke, fumes and odour that drifts into the applicant Lot Owner's Lot, causing him nuisance and hazard, contrary to s 153(1)(a) of the Act.

Procedural history

- 3 The application was first listed before the Tribunal, differently constituted, by AVL for Directions 23 March 2023. Mr Shaw and Mr Euen both attended that listing of the application. In accordance with its usual practice, the Tribunal attempted to assist the parties to resolve the dispute by Conciliation. Those efforts were not successful. Consequently, orders were made for the filing and exchange of the documentary evidence that the parties intended to rely upon for the final hearing. The application was otherwise adjourned for a Special Fixture Hearing.

Evidence and hearing

- 4 The applicant Lot Owner complied with the Tribunal's directions for the filing and exchange of his evidence on 28 April 2023. That was in accordance with an amended timetable made on 14 April 2023. His bundle, filed on 28 April, 2023 was marked Exhibit A1.
- 5 The Tribunal's file recorded that the respondent Lot Occupier responded to the Tribunal initial directions for the filing and exchange of evidence by filing a 'submission' on 17 April 2023, prior to extensions of time being granted for the parties to file and serve their evidence. That filing was not posted to the Tribunal's hardcopy or electronic file and could not be found by a Registry search conducted prior to the hearing. Attempts were made prior to the hearing to contact Mr Euen to request a further copy of that submission. The applicant Lot Owner denied ever receiving copy of that submission. As explained below, Ms Dan Mei attended the hearing on her own and Mr Euen's behalf. She did not attend with a copy of the submission filed by Mr Euen on 17 April 2023. The respondent Lot Owner and Occupier filed no further evidence in response to the applicant Lot Owners documents after receiving them (in accordance with the opportunity provided with the amended directions).

- 6 Notwithstanding this, Ms Mei told the Tribunal that she wanted the hearing to proceed. She indicated that she would be able to put hers' and the respondent Lot Occupier's case without the documents filed on 17 April 2023.
- 7 The hearing was conducted in person. Mr Shaw attended the hearing and gave oral evidence under affirmation. Ms Mei attended the hearing on her own behalf and on behalf of Mr Euen. She 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.

Proper parties

- 8 When the application was filed, the applicant cited only Mr Euen as the respondent. At the hearing it emerged that he is an occupant of Lot 7, not a registered proprietor of it. He is the domestic partner of Ms Mei, who is the registered proprietor.
- 9 The order sought by the applicant properly embraces Mr Euen as an occupier of Lot 7. However, in circumstances where it is Ms Mei who is effectively defending the proceedings, and she is the Lot Owner, I was satisfied that she is also a proper respondent party to the application. I therefore ordered her joinder pursuant to s 44(1) of the *Civil and Administrative Tribunal Act 2013* (NSW).

Material facts

- 10 The applicant is the registered proprietor of Lot 20 in Strata Plan 81996. He moved in to occupy that Lot from 23 October 2021. He does not presently occupy the Lot for reasons which are set out following.
- 11 As already noted, Ms Mei is the registered proprietor of Lot 7 in Strata Plan 81996. She occupies that Lot with Mr Euen, who is her domestic partner. She has owned and occupied Lot 7 since 2008.
- 12 Strata Plan 81996 is a residential strata plan comprising 61 Lots in a high rise building located in Waterloo.
- 13 Prior to the Annual General Meeting conducted in 2021, the By-Laws of Strata Plan 81996 included By-Law 10 in relation to "smoke penetration". That By-Law provided:

(a) An owner or occupier of a lot must ensure that smoke caused by smoking of tobacco or any other substance by the owner or occupier, or any invitee of the owner or occupier, on the lot does not penetrate the common property or any other lot.

(b) An Owner or occupier, and any invitee of the owner or occupier, must not smoke tobacco or any other substance on the common property.

- 14 At its 2021 Annual General Meeting the Owners Corporation for Strata Plan 81996 adopted a Special By-Law 14 in relation to cigarette smoking within the Strata Plan. Its' text is in the following terms:

1) An Owner or Occupier of a Lot must not:

(i) Smoke any substance on any area of the common property; or

(ii) Smoke any substance in a Lot so as to allow smoke from such substance to enter the common property or another Lot; or

(iii) Drop, throw, place or leave any refuse from smoking, including without limitation any butt or match, on the common property.

2) An occupier of a Lot must take all reasonable steps to ensure that invitees, guests, customers and/or visitors of the occupier do not:

(i) Smoke any substance on any area of the common property or allow smoke from such substance to enter the common property; or

(ii) Smoke any substance in a Lot so as to allow smoke from such substance to enter the common property or another Lot; or

(iii) Drop, throw, place or leave any refuse from smoking, including without limitation any butt or match, on the common property.

3) An Owner of a Lot must take all reasonable steps to ensure that the occupier of his Lot complies with the terms of this By-Law

4) The terms of this By-Law are in addition to the terms of Section 117 Nuisance of the Strata Schemes Management Act 1996 (sic)

- 15 The applicant Lot Owner gave evidence that he is asthmatic, and that this is triggered by air-borne substances such as cigarette smoke. He gave evidence that asthmatic attacks make it difficult for him to breathe, sleep, and concentrate, and seriously affect his general wellbeing. He has submitted no medical evidence in support of these contentions, but they were not subject to challenge by Ms Mei, and I accept them to be true.

- 16 Lot 7 is on the ground floor of the residential block. It has a substantial walled and paved courtyard or alfresco area on its western side. The courtyard is

partially enclosed or sheltered by the building immediately above but is otherwise open to the elements.

- 17 Lot 20 is on the level above Lot 7. Viewed facing Lot 7 from its courtyard Lot 20 is immediately adjacent to the left of Lot 7. Lot 20 has a partially enclosed western facing balcony and western facing bedroom windows. The balcony is reached via sliding glass doors that open from the interior of the living/dining room of the applicant Lot Owner's Lot.
- 18 There is contention between the parties as to the distance between Lot 20 and Lot 7. It essentially depends upon from where the measurement is taken. The applicant Lot Owner takes the measurement from the nearest point (or at least a near point) in the respondent Lot Owner and Occupier's Lot and his bedroom windows and estimates 3 metres. Ms Mei takes the measurement from the corner of a section of the enclosed portion of her courtyard that is furthest from Lot 20 (where she contends Mr Euon smokes) and the applicant Lot Owner's bedroom room windows and estimates a distance of at least 6 metres.
- 19 It is not in issue that Mr Euon smokes cigarettes in the respondent Lot Owner's courtyard. It also appears not to be in contention that he usually (or always) does so from the same location, which is a chair situated under the enclosed area of the respondent Lot Owner's courtyard furthest from Lot 20.
- 20 The applicant Lot Owner has submitted some meteorological data over a five year average which reports that wind tends in a westerly direction in Waterloo. He contends that this exacerbates the transfer of cigarette smoke from Lot 7 into Lot 20, which is on the western side of Lot 7.
- 21 I do not understand it to be in issue that Mr Euon is a heavy smoker, that he tends to chain smoke and that he smokes repeatedly throughout the day. In any event that is the applicant Lot Owner's evidence and Mr Euon has filed no evidence and did not appear at the hearing to deny that fact. Ms Mei's evidence was to the effect that Mr Euon has tried to cut down "but would die if he couldn't smoke" and that he is often away from home for extended periods for work and other travel.

- 22 Shortly after he moved into Lot 20 in October 2021 the applicant Lot Owner was affected by cigarette smoke that permeated his Lot though his partially open balcony and bedroom windows from Lot 7. Consequently, he initiated a discussion with Mr Euon from the balcony of his Lot in which he advised Mr Euon of the impact his smoking on him and asked Mr Euon to stop smoking in the Lot 7 courtyard. However, this request did not have any impact. The applicant Lot Owner contends that the frequency and extent of Mr Euon's smoking was unaffected by this request.
- 23 From 7 January 2022 through to the institution of these proceedings in February 2023 the applicant Lot Owner made frequent and persistent complaints in writing and by telephone to the Strata Plan's Strata Manager and Building Manager about the impact on him of Mr Euon's cigarette smoking on him. Many of his complaints via email attach photographs which depict Mr Euon smoking in the courtyard of Lot 7.

The applicant Lot Owner was variously advised by representatives of the Strata Manager and the Building Manager that correspondence had been issued to the Lot 7 Owner warning about the transmission of cigarette smoke from Lot 7 into Lot 20 and demanding that this cease. He was also advised by the Building Manager that the Ms Mei had formed an intention to sell her Unit and move which was likely to resolve the issue.

- 24 By letter dated 14 February 2022, the Strata Manager issued the respondent Lot Owner with a breach notice in relation to By-Law 10 Smoke Penetration which required her to comply with that By-Law and "ensure smoke is not [penetrating] to surrounding lots".
- 25 On 21 July 2022 the Strata Manager issued a further breach notice to the respondent Lot Owner requiring her to comply with By-Law 10 (sic). That breach notice states in part:

...

In accordance with the by-law that was approved at the recent AGM, smoking is now not allowed at the building. Therefore this is in contravention of the Smoking by-law, which states: ...

...

Please ensure that you are complying with the building's by-laws and cease smoking immediately.

Please note that if this is not resolved the Strata Committee will proceed with a Notice to comply where possible fines may apply.

...

- 26 On 15 September 2022 the Strata Manager issued a further breach notice to the respondent Lot Owner requiring her to comply with By-Law 14 Smoke Penetration. That letter states in part:

...

As per previous breach letters issues, we have again received numerous complaints from other residents regarding smoke penetration...

...

Please cease smoking immediately and ensuring that smoke does not penetrate other units.

Please note that if this is not resolved the Strata Committee will proceed with a Notice to Comply where fines apply.

- 27 In October 2022 the Strata Committee for Strata Pan 81996 resolved to apply to NSW Fair Trading for mediation of the dispute with the Lot 7 Lot Owner concerning cigarette smoke emanating from her Lot. NSW Fair Trading scheduled this mediation to occur on 19 January 2023. This was advised by letter from NSW Fair Trading Mediation Services, Strata and Community Living the Strata Manager and Lot 7 Lot Owner dated 21 February 2022. By letter dated 31 October 2022 the Strata Committee wrote to the Lot 7 Lot Owner about the mediation. That letter stated in part:

...

As per the previous correspondence, we note that smoking at the property has continued. Therefore, the owners corporation have resolved to issue a mediation application to yourself to discuss the breach.

Please see enclosed copy of the application. Please ensure you attend by phone link as per the letter.

Please note that if the matter is not resolved at mediation The Owners Corporation will be proceeding to NCAT to seek orders to have the smoking stopped.

We remind you that as per the below building by-law, smoking is not allowed:

...

Please see attached photo evidence of smoking on your lot.
[Photographs of Mr Euon smoking are attached]

- 28 The respondent Lot Owner and Occupier refused or failed to participate in mediation with the Strata Manager on 19 January 2022.
- 29 In November 2022 the applicant Lot Owner also made an application to NSW Fair Trading for Mediation with the respondent Lot Owner and/or Occupant in respect of the drift of cigarette smoke from Lot 7 into his Lot. The NSW Fair Trading Mediation Service scheduled a Mediation for 10am on 21 February 2023. It issued letters to the Lot 7 and 20 Lot Owners confirming this arrangement on 23 November 2022. However, after initially agreeing to participate in this mediation the Lot 7 Lot Owner and Occupier failed to participate in the mediation or in any attempt to reschedule it.
- 30 In or about February 2023 the applicant Lot Owner moved out of Lot 20. He contends that he was obliged to do so because he could no longer tolerate the adverse health impact the Lot 7 Occupant's cigarette smoking was having on him. He has leased Lot 20 to a tenant on a temporary basis and intends to move back into the premises after this dispute is resolved.

Contentions of the parties

- 31 The applicant Lot Owner contends that Mr Euon's cigarette smoking in the courtyard of Unit 7 is extensive, frequent, and persistent. He contends that cigarette smoke frequently drifts into his Lot via his balcony and through his bedroom window. He contends that this frequently aggravates his asthma causing him illness and otherwise affects his functioning and well-being. He contends that the respondent Lot Owner and Occupier have failed to take any reasonable action to prevent cigarette smoke drift from Lot 7 despite his requests and complaints and the actions initiated by the Strata Manager and Building Manager. He contends that he is therefore entitled to an order pursuant to s 241 of the Act that will compel the respondent Lot Owner and Occupant not to use or enjoy Lot 7 in a manner which causes a nuisance and hazard in his use of Lot 20.

- 32 The respondent Lot Owner submits that residents of the Strata Plan lived in harmony until the applicant Lot Owner moved in. She contends that the applicant Lot Owner is a ‘troublemaker’ who ‘complains about everything’. She contends that various residents in the Strata Plan smoke, not just Mr Euon, which is evidenced by the fact that she is constantly cleaning cigarette butts from her courtyard which have been dropped from units above. She contends that she ‘knows’ Mr Shaw smokes THC in his Lot. She contends that the area in which Mr Euon smokes cigarettes is at least 6 meters from the applicant Lot Owner’s apartment and therefore that his “outdoor smoking complies with the 4 metre public health rule”. She contends that she has sought the approval of the Owners Corporation to install an awning or sail over her courtyard to prevent cigarette smoke drift, but this has been refused. For each of these reasons, she contends that the applicant Lot Owner’s application ought to be dismissed.

Jurisdiction

- 33 There is no issue that the Tribunal has jurisdiction to deal with this application according to the provisions of the SSM Act.

Applicable law

- 34 Section 241 of the Act confers power on the Tribunal to order a person the subject of an application to do or refrain from doing a specified act in relation to a strata scheme:

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.

- 35 Section 153 of the Act provides, relevantly, that an owner in possession of a lot in a strata scheme must not use their Lot in a way that causes or permits a nuisance to any other Lot:

153 Owners, occupiers and other persons not to create a nuisance

- (1) An owner ... in possession ... 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 than person is an owner or not),

...

Note: Depending on the circumstances in which it occurs, the penetration of smoke from smoking into a lot or common property may cause a nuisance or hazard and may interfere unreasonably with the use or enjoyment of common property or another lot.

- 36 The “note” at the end of s 153 does not form part of the SSM Act by operation of s 35(2)(c) of the *Interpretation Act* 1987, but it is extrinsic material by operation of s 34(2)(c) of that Act that can be used as an aid to the interpretation of 153 if that need arises.
- 37 Neither the term “nuisance” or “hazard” are defined in the Act. However, there is superior court authority to the effect that the term “nuisance” means private nuisance: *The Owners Strata Plan No 2245 v Veney* [2020] NSWSC 134.
- 38 The term “hazard” should be given its ordinary meaning, which is something that is ‘a risk’ or ‘an exposure to danger or harm’ or ‘the cause of such a risk’ or ‘a potential source of harm, injury or difficulty’ (Macquarie Dictionary). It “plainly relates to situations with a potential for harm which has not yet occurred”: *Mirana Investments Pty Ltd and Ors v Coupe* [2012] QCATA 187 at [48].
- 39 In *Chehelnabi v Gourmet and Leisure Holdings Pty Ltd* [2020] NSWCATAP 102 at [52]ff an Appeal Panel of the Tribunal provides a useful summary of the relevant authority in relation to the meaning and application of s 153(1)(a):

53. In *Veney*, Darke J found, at [46], 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*, 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]).

54. In broad terms, 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 founded 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].

55. 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.”

56. That statement is consistent with the submissions of the parties here and so we will, with respect, adopt that meaning. We are satisfied that there is no need to hear further from the parties prior to doing so.

57. The parties also referred us to *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248, where Ward J framed the question for determination in relation to a claim for nuisance as:

“...whether there has been a substantial and unreasonable interference by the defendants with the rights of Mr and Mrs Quick in relation to or in connection with the use of their land”.

58. Ward J considered the principles relating to establishing whether a defendant has created or maintained a nuisance....

59. Ward J, at [58], said that unreasonable interference required a determination of whether the events in question interfered with the comfortable and convenient enjoyment by the plaintiffs of the land, and that “this turns on whether there has been an excessive use by the defendants of their land resulting in what is considered to be an unreasonable interference with the enjoyment by the plaintiff of his land, having regard to the ordinary usages of humankind living in a particular society ...”

60. In considering this question, her Honour went on to refer to the decision of the Full Court of the Supreme Court of New South Wales in *Bayliss v Lea* [1961] NSWLR1002 (*‘Bayliss’*) in which the Court approved the following statement from Fleming on Torts 2nd ed, Clarendon Press, 1961 at 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?”

- 40 The respondent Lot Owner's reference to the "4-metre Law" appears to be derivative of the *Smoke-free Environment Act 2000* (NSW) (**S-FE Act**). The object of that Act is found in s 3:

3. Object of Act

The object of this Act is to promote public health by reducing exposure to tobacco and other smoke, as well as aerosol or vapour (whether or not containing nicotine) generated by e-cigarettes, in certain public places.

- 41 Section 6 of the S-FE Act designates enclosed public spaces as smoke-free areas for the purposes of the Act. Schedule 1 of the Act contains a list of examples of enclosed public spaces, which includes 'hospitals' and 'childcare facilities'.
- 42 Section 6A of the S-FE Act designates certain outdoor public areas smoke free areas for the purpose of the Act. It relevantly provides:

6A Smoke-free areas – outdoor public places

(1) An outdoor public place is a *smoke-free area* for the purposes of this Act if it is any of the following places (or part of any of those places).

- (a) a place that is within 10 metres of children's play equipment, but only if the children's play equipment is in an outdoor public place.
- (b) a swimming pool complex
- (c) an area set aside for or being used by spectators to watch an organised sporting event at a sports ground or other recreational area, but only when an organised sporting event is being held there,
- (d) the platform of a passenger railway or light rail station,
- (e) a ferry wharf,
- (f) a light rail stop (with *light rail stop* to include any area where persons queue or gather when waiting at a light rail stop).
- (g) a bus stop (with *bus stop* to include any area where persons queue or gather then waiting at a bus stop),
- (h) a taxi rank (with *taxi rank* to include any area where persons queue or gather then waiting at a taxi rank),
- (i) a place that is within 4 metres of a pedestrian access point to a building (as provided by subsection (2)).
- (j) a commercial outdoor dining area,
- (k) a place at a public hospital, health institution or health service under the *Health Services Act 1997* that is designated as a smoke-free

area by a by-law or regulation under that Act and notified by signs displayed in, or at an entrance to, any such area,

(l) any other outdoor public place that is prescribed by the regulations as a smoke free area.

(2) A ***pedestrian access point*** is an entrance to or exit from a building for use by pedestrians, but does not include:

(a) an entrance to or exit from a building that is used only for residential purposes (including a boarding house and a building in a caravan park), or

(b) an entrance to or exit from a building that is used partly for residential purposes and partly for other purposes if the entrance or exit concerned is used solely for entry to or exit from that party of the building that is used for residential purposes, or

(c) an emergency exit that is locked to entry.

...

- 43 The applicant Lot Owner bears the onus of establishing the respondent Lot Owners and Occupant's contravention of s 153(1)(a) to the civil standard, which is the balance of probabilities. This requires them to establish the affirmative of their allegations to the reasonable satisfaction of the Tribunal bearing in mind that reasonable satisfaction is not produced by inexact proofs: *Briginshaw v Briginshaw* [1938] 60 CLR 336 per Dixon J at p 362.

Consideration

- 44 Having regard to what has been set out above, in order to determine the outcome of this application, the questions the Tribunal must pose and answer are as follows:
- (a) Does the respondent Lot Owner and Occupant cause or permit the use of their Lot, and in particular, the courtyard of their Lot, to smoke tobacco products?
 - (b) If the answer to (a) is "yes", does tobacco smoke, fumes and odour emitted during such use enter the airspace of applicant Lot Owner's balcony and into the interior of the applicant Lot Owners' Lot?
 - (c) If the answer to (b) is "yes" does this constitute a substantial and unreasonable interference with applicant Lot Owner's ordinary use of their Lot (nuisance) and/or does it constitute a hazard?
 - (d) If the answer to (c) is "yes" what remedy are the applicant Lot Owners entitled to?

Does the respondent Lot Owner and Occupant cause or permit the use of their Lot, and in particular, the courtyard of their Lot, to smoke tobacco products?

- 45 In her oral evidence Ms Mei did not deny that Mr Euon smokes cigarettes in the courtyard of Lot 7. In fact, she did say ‘he would die’ if he could not. She also stated that he has “cut down” and “is hardly ever there” due to work and travel, but I was not persuaded by this evidence. Mr Euon provided no statement concerning his cigarette use and he did not make himself available for cross-examination at the hearing. This significantly affects the weight that can be given to Ms Mei’s rather general assertions.
- 46 I am satisfied on the applicant Lot Owner’s evidence, which is constituted by oral evidence given under affirmation as to his own direct observations, photographic evidence of Mr Euon smoking in the courtyard of Lot 7 on multiple occasions between January 2022 and February 2023, and his history of written complaint about this to the Strata Manager and Building Manager that Mr Euon’s use of the Lot 7 courtyard to smoke cigarettes is extensive, frequent, and persistent over the whole material time for this dispute.
- 47 I also infer from the Strata Manager’s letter to the respondent Lot Owner dated 15 September 2022 that the applicant Lot Owner is not the only person who has complained about Mr Euon’s smoking. The letter states that the Strata Manager has received numerous complaints about it from other owners and occupants.
- 48 I note that this does not mean that I have found that Mr Euon’s smoking occurred every day for the material time. I accept that there may have been days or even weeks when he was away from Lot 7 during this period.

Does tobacco smoke, fumes and odour emitted during such use enter the airspace of applicant Lot Owner’s balcony and into the interior of the applicant Lot Owner’s Lot?

- 49 I am comfortably satisfied on the evidence that cigarette smoke is capable of, and does, rise from the balcony of Unit 7 and enters the air space of Unit 20. In *Pittman v Newport* [2022] NSWCATCD 173 at [101] I analysed the substantial reference material filed by the applicants in that case and concluded (references omitted):

101. The reference material relied upon by the applicant Lot Owners (summarised at paragraphs 56 to 58 above) is compelling in its demonstration that even low levels of cigarettes use (1 cigarette) can be detected up to 9 meters away ... The interior of the applicant Lot Owners' Unit is well within that range. It also compellingly documents the propensity of cigarette smoke to 'permeate' the vicinity in which it is generated, including its ability to rise and spread ... and enter via gaps in doors, windows, cracks in walls, over balconies ... There can be no doubt having regard to this reference material that the applicant Lot Owners have established the capacity and mechanisms by which cigarette smoke drift enters their balcony and apartment from Unit 201.

50 I adopt this analysis in the circumstances of this case.

51 The courtyard of Lot 7 is unenclosed, and the balcony of Lot 20 is only partially enclosed. Lot 20 also has exterior windows which if open would allow smoke to enter the bedroom of Lot 20. Both the windows and balcony of Lot 20 are in close vertical proximity measured from the floor of the Lot 7 courtyard. Neither party has submitted precise evidence of the distance, and it depends on where in the courtyard the measurement is taken, but I am satisfied that the distance is no more than approximately 6 meters. I accept the applicant Lot Owner's evidence that the wind direction typically tends in a Westerly direction in that locality. It thus is a vector that takes cigarette smoke from Lot 7 towards Lot 20. I am satisfied for the reasons given in *Pittman* that the smoke enters Lot 20 through the balcony doors and bedroom windows and can become trapped or of lingering for long periods in Lot 20.

52 I am also persuaded by the applicant Lot Owner's evidence that smoke drift into Lot 20 is frequent. He was a credible witness who gave evidence under affirmation. I believed his evidence. It is corroborated by his repeated complaint about the issue over an extended period to the Strata Manager and the Building Manager.

53 I am not persuaded by the respondent Lot Owner's submission that there are lots of other cigarette smokers in the Strata Plan which could be the source of the cigarette smoke drift into Lot 20. There is no satisfactory evidence of this. It is a bare assertion. Similarly, I am not persuaded by the respondent Lot Owner's submission that the cigarette smoke the applicant Lot Owner complains about is the result of his own THC use. The applicant Lot Owner

denies every smoking THC in Lot 20. The respondent Lot Owner has provided no evidence to support this allegation. It is a bare assertion.

Does this constitute a substantial and unreasonable interference with applicant Lot Owner's ordinary use of his Lot (nuisance) and/or does it constitute a hazard?

- 54 As the outline of authorities set out above makes clear, is not sufficient for the applicant Lot Owner to merely prove some form of interference with his Lot that is associated with the respondent Lot Occupier's use of tobacco products on their Lot. The law permits a person to use their land in a manner that interferes with the use by a neighbour of their land, provided this interference is not unreasonable.
- 55 The application of the unreasonableness test requires an articulation of the context in which that test is to be applied. In this case the 'lands' in issue are Lots within a strata scheme. The strata scheme is a high rise residential block located in a residential neighbourhood. This is a relatively high-density type of communal living. The applicant and respondent Lot Owners use their Lots as a home. In my view there is a degree of reciprocity (give and take) required of occupiers of land in a communal living environment of this type. An owner of land of this type cannot reasonably expect to be unaffected by their neighbour's use of their own land.
- 56 The 'use' of the respondent Lot Owner's Lot which is in issue is its use to smoke tobacco products (cigarettes). The nuisance alleged by the applicant Lot Owner is exposure to second-hand tobacco smoke.
- 57 In assessing the reasonableness of the respondent Lot Occupier's use of their Lot to smoke cigarettes it is appropriate to have regard to Special By-Law 14 which prohibits this, and to the Owners Corporation's attempts to compel the respondent Lot Owner and Occupier to comply with that by-law. It can hardly be considered reasonable to engage in conduct that it contrary to a By-Law.
- 58 It must be accepted that there is no safe level of exposure tobacco smoke. As I stated in *Pittman* at [112] after reviewing various reference material submitted in those proceedings:

112. ...That fact is recognised in the Preamble and Article 8 of the World Health Organisation's *Framework Convention on Tobacco*

Control 2003, to which Australia is a State Party, and it is elaborated in Principle 1 of the 'Statement of Principles and relevant definitions underlying protection from exposure to tobacco smoke' (2008), which has been developed as part of the implementation of that treaty. The potential harm of tobacco smoke drift, including in residential environments, such as strata schemes, is also recognised in both the Australian Government's currently in force *National Tobacco Strategy* (2012-2018), and its' draft prospective strategy (2022-2030) (see strategies 8.8 and 10.4 respectively). It has also achieved some legislative recognition in the Note that appears to s 153 of the Act, to which I may have regard in determining if cigarette smoke drift falls within the scope of the tort of private nuisance which is prohibited by that section. I also note that the serious health risk associated with exposure to tobacco smoke was accepted by the Tribunals as incontrovertible in *Sheath* at [19] to [22], in *Bhandari v Laming* at first instance (a finding not disturbed on Appeal), and in *Gisks* at [29].

- 59 Having regard to the applicant Lot Owner's frequency of complaint about cigarette smoke drift into Lot 20 and his photographic evidence of Mr Euon frequently smoking in the courtyard of Lot 7, I am satisfied that the applicant Lot Owner's use and enjoyment of Lot 20 is very substantially affected by cigarette smoke emanating from Lot 7.
- 60 I accept the applicant Lot Owner's evidence that the cigarette smoke constitutes a foul odour, aggravates his asthma, affects his cognitive function, and his overall wellbeing. It's carcinogenic properties also have the potential to cause far more serious physical harm (see *Pittman* at paragraphs 51 ff).
- 61 I reject the respondent Lot Owner's contention that the so-called "4 metre outdoor smoking rule" proves that any smoke drift experienced by the applicant Lot Owner is incapable of harming him. In this respect adopt in these proceedings the analysis of this issue I set out in *Pittman* at [62] and [115]:

115. As I have set out above, this reference appears to invoke the provisions of the *Smoke-free Environment Act* 200(NSW). The object of that Act is to promote public health by reducing exposure to (relevantly) tobacco smoke. It does so by designating enclosed public spaces as smoke free areas. The Act therefore has no direct application in the circumstances of this case (which relates to 'private' space), but even by analogy, it offers no real assistance to the respondent Lot Owners' case. The only reference to '4 metres' is found in s 6A(1)(i) which concerns pedestrian access points to a building excepting as set out in s 6A(2). A pedestrian access point is an area in which people are moving rather than situated for a continuing period (such as being at home). Any place at a public hospital is a smoke-free area (s 6A(1)(k)),

and smoking is prohibited within 10 metres of children's play equipment, which is substantially more than the distance between the Unit 201 balcony and the interior of Unit 301. The various other smoke-free areas designated by s 6A(1) are public areas where people are likely to accumulate and stay for a time which indicates that Parliament considered there to be an unacceptable risk of harm from exposure to cigarette smoke in such locations in those circumstances.

- 62 I am satisfied that the respondent Lot Occupier's use of Lot 7 and particularly its' courtyard to smoke cigarettes is a nuisance to the applicant Lot Owner in the circumstances of this case. That is, that it is tortious conduct and a civil wrong which is unlawful. For the reasons set out above it constitutes a substantial and unreasonable interference with the applicant Lot Owner's use of Lot 20 to occupy as a home, so much so that he has been obliged to temporarily move out of the property to avoid it.
- 63 While communal living requires give and take, exposure to actual discomfort and disease and potential additional serious health risk is well beyond the reciprocity required of the applicant Lot Owner and permitted for the respondent Lot Occupier having regard to contemporary notions of comfort and safety. In any event, in the circumstances of this case, cigarette smoking on the Lot is a contravention of Special By-Law 14 of Strata Plan 81996.
- 64 I am also satisfied on essentially the same bases as I have set out above with respect to nuisance that cigarette smoke drift from Lot 7 into Lot 20 constitutes a hazard contrary to s 153(1)(a) of the Act. There is no safe level of exposure to second-hand tobacco smoke. It is a serious risk of harm.

What remedy is the applicant Lot Owner entitled to?

- 65 As the applicant Lot Owner has established that cigarette smoke drift into Lot 20 from Lot 7 is both a private nuisance and a hazard, he is entitled to an order that will require the respondent Lot Owner and Occupier to prevent this from occurring. I will therefore order that the respondent Lot Owner and Occupier must not smoke tobacco products in the courtyard of Lot 7 or allow any other person to do so.

Orders

- 66 For the foregoing reasons I make the following orders:
- (1) Dan Mei is added as a respondent to the application.

- (2) The respondent Lot Owner, Dan Mei, and occupant, Desmond Euen, must not cause or permit the smoking tobacco products in the courtyard of their Lot (Lot 7).

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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