Civil and Administrative Tribunal
New South Wales

Case Name:	Nowak v Pellicciotti
Medium Neutral Citation:	[2018] NSW CAT
Hearing Date(s):	9 February 2018
Date of Orders:	13 April 2018
Date of Decision:	13 April 2018
Jurisdiction:	Consumer and Commercial Division
Before:	J A Ringrose – General Member
Decision:	1. The application is dismissed 2. Each party is to bear their own costs
Catchwords:	Application by lot owner seeking compliance with by-laws – lot owner creating noise likely to interfere with peaceful enjoyment of an adjoining lot owner – floor coverings sufficient to prevent the transmission of noise likely to disturb the peaceful enjoyment of another lot owner or occupier.
Legislation Cited:	Strata Schemes Management Act 2015 ss. 153, 232 and 241.
Cases Cited:	St Helen Melting Co. v Tipping [1865] 11 HSC 562 Hargrave v Goldman [1963] 110 CLR 40 Curragh Coals Sales Co. Pty Ltd v Wilcox [1984] FCR 46 George v Rockett [1990] 170 CLR 104 at 112 Opera House Investments v Devon Buildings Pty Ltd [1936] 55 CLR 110 at 116 per Latham J Walsh v The Owners – Strata Plan number 10349 [2017] NSWCATAP 230 Felcher v The Owners – Strata Plan number 2738 [2017] NSW CATAP 219 Gao v Agosti [2009] NSW CTTT 175
Category:	Principal judgment

Parties:	Joseph Nowak – Applicant Marcello Pellicciotti - Respondent
Representation:	Each party appeared in person
File Number(s):	SC 17/37708
Publication Restriction:	Nil

REASONS FOR DECISION

Application

1 By an application filed on 22 August 2017 the applicant as the owner of unit 4 in strata plan 16028 brought proceedings against the respondent as the owner of unit 6 in that strata plan seeking "enforcement of by-laws 1 and 14". He claimed that the by-law had been breached when the respondent recovered the floor of unit 6 by removing carpeting and laying a different floor covering. He alleged that he was told that the flooring would be better than carpet but that the noise had now increased.

2 The application seeks an order that the carpet be restored. It is claimed that the occupants of unit 4 are woken up with footsteps when the occupants of unit 6 get out of bed.

3 A mediation request was declined by the respondent and accordingly the matter can be determined by the Tribunal.

4 Directions were made on 22 September 2017 requiring the applicant to provide his evidence by 13 October 2017 and the respondent to provide his evidence by 20 October 2017. The member directed that the respondent was to provide access to his unit for an expert to undertake tests if required.

5 The applicant sought an extension of time which ultimately required documents to be provided by 10 November 2017.

Applicant's Evidence

6 Mr Joseph Nowak is the owner and resident of unit 4/14 Boundary Street, Tweed Heads, which is known as Surfview Apartments. He has lived in the complex for approximately 12 years and he claimed that the respondent Marcello Pellicciotti purchased unit 6 in about March 2017 and moved into the property with his family in late May.

7 The applicant claimed that in April 2017 he received a letter from the respondent advising of his intention to renovate his unit and proposing that the carpet and tiles would be replaced with a hardwood floor which would be glued on an acoustic underlay comprised of a 15mm thick engineered floor on 5mm cork/rubber acoustic underlay. He claimed that it was suggested that the hardwood floor would produce less noise than the current carpet.

8 Following the receipt of the letter Mr Nowak made his own further enquiries as the respondent did not produce evidence to support his claim.

9 At the Annual General Meeting of the Owners Corporation held on 13 April 2017 the intention to undertake renovations was raised but it was claimed that no motion was passed and works were ultimately completed by 11 May 2017.

10 Mr Nowak claims that he first noticed noise emanating from unit 6 after the floors had been installed and the respondent's family had moved in. He raised his concerns with the respondent in person and via email. The dispute was listed for mediation in July 2017 and the request for him to attend the mediation was declined by Mr Pellicciotti.

11 The applicant did agree that the respondent attempted to remedy noise issue by placing soft padding under the bed legs and placing carpet runners over the path of movement in the bedroom and over the timber flooring. He claimed that these attempts were unsuccessful in reducing the noise nuisance.

12 On 22 September 2017 the Tribunal made directions for the provision of evidence including a direction that Mr Nowak obtain an acoustics report and that Pellicciotti provide access to his unit for the purposes of tests being carried out.

13 Testing was undertaken on 11 October 2017 but it is noted that Mr Nowak refused to allow Pellicciotti or an expert who attended with him, to obtain access to unit 4 for the purposes of viewing the tests undertaken and/or for the purposes of providing an alternate independent report for the respondent.

14 Although the applicant provided a short affidavit the evidence otherwise included the following items:-

(a) the acoustic report of Palmer Acoustics Australia Pty Ltd.

(b) engineer's specifications suggesting that a carpet rating would generally be between 30 and 39 whilst timber flooring would range about 55.

(c) a copy of a letter from the respondent.

(d) statutory declarations of Peter O'Neill (unit 3) and Kevin Bowden (visitor).

(e) An email from Acoustics Sales.

(f) various diary notes referring to instances at different times.

(g) emails between the parties.

(h) a piece of flooring.

15 The applicant referred to a report of a ATP Consulting wherein it was noted that "recommended additional impact sound mitigations necessary for the bedrooms will ensure full compliance with the impact sound insulation

criteria". It was submitted that the report of ATP Consulting should be rejected on the basis that no additional acoustic testing was commissioned by Mr Pellicciotti to support the evidence of this finding. This observation is made in the face of the applicant's concession that he refused to allow any expert on behalf of the respondent to gain access to his property.

16 The submissions referred to the provisions of by-law 1 and by-law 14 and noted that s. 153 of the Act prevented a tenant or occupier of a unit from using or enjoying that unit in a manner or for the purposes of causing a nuisance or hazard to the occupier of any other unit.

17 Reference was also made to the provisions of s. 232 of the Act which it is claimed enabled the Tribunal to make an order to settle a complaint or dispute between parties about any matters including:-

(a) an exercise of or failure to exercise a function conferred or imposed by or under the Act or the By-laws of the strata scheme. Reference was also made to s. 241 which enabled the Tribunal to order any person, the subject of an application, to do or refrain from doing a specified act in relation to a strata scheme. Reference was further made to the National Construction Code of the Building Code of Australia 2016 which provides that floors separating sole occupancy units must provide insulation against the transmission of airborne and impact generated sound sufficient to prevent illness or loss of amenity to the occupants. It was conceded that the impact weighted standardised impact and sound pressure level should not be more than 62 when determined under 1S0717.2.

18 The applicant submitted that Mr Nowak failed to undertake preliminary testing to ensure the new timber flooring would be compliant with by-law 14 and he argued that a a matter of fact the noise emanated from the timber flooring does not transmit less nor is the carpet originally installed. He claimed the increase in noise emanating from the respondent's unit disturbed his peaceful

enjoyment of his unit and that accordingly Mr Pellicciotti had breached By-laws 1 and 14 as well breaching s. 153 of the Act in that the noise emanating from the floor had created a nuisance.

19 It was argued that Mr Pellicciotti should be directed by the Tribunal to make good the breach of By-laws 1 and 14 by installing an alternative floor covering that complied with s. 153(1) of the Act and that restored the floor coverings to the previous material or to a material that produced a star rating of 6.

20 It was argued that the Tribunal had power conferred under s. 232 and 241 of the Act to make the order directing the respondent to remedy his breach of by-laws.

Respondent's Submissions

21 The respondent's submissions comprised two affidavits of Mr Pellicciotti dated 24 October 2017 and 8 November 2017. The affidavits contained a large number of annexures.

22 The respondent claimed that he was the registered owner of unit 6 in strata plan 16028 and that he resided in the property with his wife and 5 year old son. Floor renovations were undertaken when the carpet and underlay were replaced with timber and cork/rubber acoustic underlay.

23 When the floors were inspected prior to purchase it was noted that the flooring was covered with old carpet and as the respondent's wife was allergic to dust mite generally present in carpets, this was one of the reasons it was decided to replace the carpet with timber floor coverings.

24 The contract to purchase the unit was executed on 21 March 2017 and the owner of the unit at that time attended the meeting on 23 March and gave notice of the impending change of ownership. Correspondence was forwarded to all units in the building informing them of plans to renovate the premise which included replacing the carpet and tiles with glued hardwood

floor and acoustic underlay with a minimum of 15mm thick engineered floor on a 5mm cork/rubber acoustic underlay.

25 At the Annual General Meeting on 13 April 2017 the respondent notified the meeting of his intention to renovate the premises and received no objections at that stage. The committee members consented to the proposed renovation and letters from the chairman with an email from the strata manager and another email from Mr Ross signified that agreement.

26 The respondent observed that the By-laws of the building did not provide any minimum and/or specific sound impact transmission requirements and prior to undertaking the floor renovation Mr Pellicciotti sought advice from a specialist timber flooring company, Zealsea Timber Flooring as to the insulation necessary to achieve a complaint free sound impact standard. Material was installed in accordance with that advice and the work was undertaken on 9 May 2017.

27 On 19 May 2017 the respondent moved into the premises with his family and in late May he invited the applicant to the premises as a friendly gesture. He stated that upon observing the timber floor the applicant became agitated and started to tap on the floor informing Mr Pellicciotti that he was not happy about it.

28 A few days later the applicant approached the respondent and complained about noise and demanded that the timber floor be removed and substituted with a thick carpet and underlay. Despite an indication that his wife was allergic to dust mites and a proposal that mats and carpet runners and rugs could be run around the premises to help reduce noise, this proposal was rejected at that stage by the applicant.

29 New carpet runners and 9mm rubber mats were purchased none the less and the carpet runner was placed in the hallway with the rubber mats in the son's bedroom to reduce the noise. Photographs depicting these items have been included as an annexure to the affidavit.

30 The respondent claimed that during the period from June to August 2017 on a number of occasions the applicant behaved in an unacceptable or improper manner towards himself and other neighbours. In some instances it was claimed that the applicant would bang on the ceilings or wall to create loud noises and a statutory declaration of Mr Grey was attached to indicate some of these episodes of conduct.

31 The respondent submitted that the building was 38 years old and it was common for one to hear noises coming from the apartment above and that with a building of that age one could not expect units to be entirely soundproof.

32 Correspondence between the parties from 8 June 2017 to 11 August 2017 in an endeavour to resolve the applicant's complaints have been annexed to the affidavit.

33 Mr Pellicciotti stated that a number of units in the building had no carpet and this included the applicant's unit. Correspondence was attached from the occupant of unit 2 which included representations concerning noise emanating from the applicant's unit to the unit below.

34 Although the applicant refused permission for an expert on behalf of the respondent to attend the site while testing was undertaken, Mr Pellicciotti forwarded email correspondence to an acoustic engineer from ATP Consulting Engineers (noise and vibration specialists), seeking an opinion as to whether the floor renovations were compliant with the sound impact requirements of the Building Code of Australia 2016. Mr Temelkoski provided his opinion confirming that the floor renovations complied with impact sound insulation requirements under BCA 2016 and a copy of the relevant email exchange has been attached.

35 The respondent also engaged his own acoustic expert to be present at the premises on the day of testing but the applicant refused to allow his expert to

attend the testing and refused to allow him to be present and observe the test conducted by Palmer Acoustics.

36 The report obtained by the applicant from Palmer Acoustics was then forwarded to Mr Temelkoski for his comments and he confirmed that the main result associated with the living room was within the compliance of BCA 2016 requirements whereas the results for the bedroom was "marginally higher" than the criterion of 62L'nT,w. A copy of the memo was attached to the papers and it is noted that Mr Temelkoski stated:-

> "This is a minor difference in a room which is not used often and there would only be limited movement in this room mainly associated with the going to bed and getting out of the bed in the morning …
>
> The impact sound was transmitted mainly by movement of furniture items and not by foot fall from people walking. Therefore the marginal exceedance of the limit in the bedroom which is not associated with frequent foot fall or movement of furniture should not be of concern."

37 Mr Temelkoski provided recommendations to mitigate the impact sound in the bedroom by placing padding to the underside of the legs of the bed and installation of carpet runners along the movement pass. These steps have now been undertaken.

38 Further correspondence was received from Mr Kamppi of Acoustic Works in relation to the Palmer report who noted:-

> "the results nominated in the report could vary depending on rounding of raw data, inaccuracies in testing of 1-20b or higher associated with onsite testing equipment and procedures with measured levels possibly influenced by extraneous noise."

39 The report went on to note further that the application of the 2016 BCA criteria did not apply to a 38 year old building which the drawings shown had been dated as 1979 because the slab separating units 4 and 6 was only 140mm thick whereas current floor slabs are 200mm thick with load bearing walls. The report went on to observe that experience with similar developments would indicate the installed timber floor isolation system was achieving a reasonable level of acoustic separation based on the building's construction.

40 The respondent's written submissions claimed that the floor renovation works were not required to comply with the code of 2016. The submissions further argued that there was no need for development consent to be obtained in respect of what was described as "minor developments" which under Division 1 Subdivision 26 of State Planning Policy defined a minor internal building alteration as including "replacement or renovation of … floor lining."

41 The respondent referred to email communications from the Tweed Shire Council where the development assessment and compliance officer of the Council had found that the flooring works and renovation works undertaken in May 2017 were compliant and noted that no further action was required.

42 The respondent submitted that since the applicant's first complaint and, notwithstanding the contention the floor was entirely compliant, he then made various proposals to reduce the alleged noise in an attempt to resolve the issue with the applicant however all proposals were rejected by the applicant. He purchased new carpet runners (despite his wife's medical condition) and placed them along the hallway of the premises. He also purchased new 9mm roller mats and placed them in his son's bedroom to reduce alleged noise. Soft padding has been placed on the underside of the legs of the bed and carpet runners have been installed along the main movement path in the main bedroom.

43 It was submitted that it would be unreasonable to hold an old building such as this to the same standard as a new building. He went on to note that Mr Nascrimento who had been living in unit 2 since 2015, directly below the applicant's unit and observed:-

> "we live in a quite old complex so I can always hear the neighbour, Joseph Nowak who lives in unit 4 which is directly above my unit. Every time he walks from one room to the other and when he goes to the bathroom and the ensuite room I can hear him urinating and flushing the toilet."

The respondent accordingly submitted that the application should be dismissed.

Decision

44 The applicant sought orders enforcing by-laws 1 and 14 relating specifically to noise and floor coverings. He claimed that in April 2017 he received a letter from the respondent indicating an intention to carry out certain renovations to his unit which included "replacing carpet and tiles to glued hardwood floor on acoustic underlay which would comprise of a 15mm thick engineered floor on 5mm cork/rubber acoustic underlay."

45 The flooring works were completed on 11 May 2017 and on about 19 May 2017 the respondent and his family moved in to the unit. It was conceded that Mr Pellicciotti had attempted to remedy noise issues by placing soft padding under the bed legs, placing carpet runners over the path of movement in the bedroom, but it was contended that these attempts were unsuccessful.

46 On 22 September 2017 when directions were made for evidence to be provided, the member proposed that the applicant should obtain an acoustics report and that the respondent should provide access to his unit for the purposes of that report being undertaken. A report was obtained by the applicant from Palmer Acoustics Australia Pty Ltd dated 11 October 2017 where it was found that the timber floor in the living area tested to a total noise level of 62L'nTn,w, whereas the floor in the main bedroom tested at a total noise level of 63L'nTnw being 1 unit over the acceptable level for unit levy in the Building Code of Australia 2016.

47 The respondent engaged an expert to attend upon the test which was being undertaken by Mr Huang, senior engineer, on 4 October 2017, but it is noted that the applicant, Mr Nowak refused to allow the respondent or his expert to enter the unit or to observe the testing process being undertaken. The result of this refusal is that the respondent was prevented from having an expert review testing process or from making any observations concerning the test process itself. In such circumstances procedural fairness may well require the applicant's expert report to be excluded from evidence as the respondent had

been given a proper opportunity to review, through his expert, the testing process or the results obtained.

48 In the present case the Tribunal has deemed it appropriate to allow the report to be admitted into evidence as it was recommended by another member of this Tribunal. It is however appropriate to balance the findings in the report against the observations of other experts on behalf of the respondent, who was not given an opportunity to participate in this testing process or in any testing process which required his expert to gain access to the applicant's unit.

49 Mr Nowak, in his submissions, refers to a letter from ATP Consulting which was provided to the respondent and which noted:-

> "the recommended additional impact sound mitigation measures for the bedroom will ensure full compliance with the impact sound insulation criterion of 62L'nT,w."

He argued that the Tribunal should not place any reliance on the ATP Consulting report concerning existing mitigation measures and ought to be rejected because no additional acoustic testing was commissioned by Mr Pellicciotti to support this evidence or finding. That submission is of no value in the circumstances where the applicant himself refused to allow an expert engaged by the respondent to enter into his unit for the purposes of measuring the effect of sound transmitted from the unit above.

50 In his submissions Mr Nowak seeks to rely on some information from the Association of Australian Acoustics Consultants described as guidelines for apartment and townhouse acoustics ratings. He seeks to assert that the original worn carpet was likely to have achieved a 6 star in impact rating better than 40L'nT,w. There is no evidence or expert report to support this contention.

51 Diary pages have been produced along with a statutory declaration from Kevin Bodens and a further declaration from Peter O'Neill, the occupier of unit 3. This material is subjective in nature and does little to assist the Tribunal in

determining whether by-laws 1 and 14 and the provisions of s. 153(1) of the Act have been breached.

52 Mr Nowak has submitted that an increase in noise emanating from the respondent's unit disturbed his peaceful enjoyment of his unit and he accordingly seeks an order that the respondent, Mr Pellicciotti, be directed to make good the breach of by-laws 1 and 14 by installing an alternate floor that complies with:-

(a) s. 153(1) of the Act

(b) restores the floor coverings (to the previous materials) to a material that produces a star rating of 6 as determined by the AAAC guidelines or which achieves an impact rating of 40L'nT,w or lower.

53 The orders further propose that the timber flooring should be removed in the unit and that carpet and underlay throughout the unit should be reinstated or in the alternative the underlay carpet should be laid over the timber floor and an installation of sufficient acoustic treatment should be undertaken in the living areas and the bedroom. The applicant has also sought an order that the respondent provide an undertaking to the Tribunal that he will not enter into a contract for sale of the property or lease of his property to a third party until such time as the works ordered by the Tribunal are completed.

54 The submissions on behalf of the applicant appear to lose sight of the limited requirements of by-laws 1 and 14 which are applicable to this strata complex.

The Body Corporate by-laws for the strata scheme provide as follows:-

In cl 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 of any person lawfully using common property.

55 The Body Corporate by-laws for the strata scheme provide at cl 14:-

Floor coverings

(i) 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 peaceful enjoyment of the owner or occupier of another lot.

(ii) this by-law does not apply to floor space comprising a kitchen, laundry, lavatory or bathroom.

56 It is also appropriate to consider the provisions of s. 153(1) of the Act which provides:-

> 153(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 of, or for the purpose that causes a nuisance or hazard to the occupier of any other lot (whether that person is an owner or not).

The wording of s. 153(1) of the 2015 Act is identical to the wording of s. 117(1a) of the Schemes Management Act 1996.

57 The proper interpretation of by-laws and 1 and 14 and or s. 153(1) of the Strata Schemes Management Act 2015 are dependent on a consideration of terms such as “peaceful enjoyment of a property” and the causing of a nuisance or hazard.

58 “A person in possession of land is entitled to the use and enjoyment of the land. This implies a freedom from anything that discomposes or injuriously effects the senses or nerves. In *St Helen Melting Co. v Tipping [1865] 11 HSC 562* and *Hargrave v Goldman [1963] 110 CLR 40* the Court held that an unreasonable and substantial interference with ones use of enjoyment and land gives rise to an action in nuisance.

59 "Unreasonable" is not defined in the Act and therefore it is to be understood as it would be in the common everyday meaning of the word. See *Curragh Coals Sales Co. Pty Ltd v Wilcox [1984] FCR 46* the test of what is reasonable is an objective test that requires the existence of facts which are sufficient to reduce that state of mind in a reasonable person (*George v Rockett [1990] 170 CLR 104 at 112*).

60 In words and phrases legally defined there is reference to the discussion of "reasonable" in the Australian context and in the following terms:-

> "the word "reasonable" has been declared to mean "reasonable in all the circumstances of the case". The real question is to determine what circumstances are relevant. In determining this question regard must be paid to the nature of the transaction. A circumstance which has no relation to the property which was the subject matter of the transaction but which depended entirely upon the personal position or personal desires of the owner of the property would not in my opinion be relevant circumstances in determining what was reasonable." See *Opera House Investments v Devon Buildings Pty Ltd [1936] 55 CLR 110 at 116 per Latham J*.

61 The applicant bears the obligation of establishing the facts he seeks to assert on the balance of probabilities and they must establish conduct which would be in breach of the provisions on an objective test. In order to prove that case the Tribunal must be satisfied that the applicant's assertions are more probable than not.

62 The respondent has submitted that the By-laws of the building do not provide any minimum and/or specified sound impact transmission requirements and that he used the Building Code of Australia 2016 as a personal guideline for his floor renovation plans. He indicated that prior to undertaking the renovation he sought advice from a timber flooring specialist as to which insulation would be required in order to achieve a compliant sound impact standard. He was advised that a 5mm cork and rubber acoustic underlay was the best available product and that it would likely comply with the current BCA standards for a new building. Acting on that advice the respondent arranged for the installation of the recommended underlay and 15mm white sand European oak engineered timber flooring. He noted further that following complaints received from the applicant in late May 2017 he proposed that

mats, carpet runners and rugs could be placed in the premises to help with the noise but he claims that this proposal was rejected by the applicant. Notwithstanding this rejection he and his wife purchased new carpet runners and 9mm rubber mats which were placed in the hallway with rubber mats being placed in the boy's bedroom. It was claimed that the applicant commenced to bang on the wall and ceiling creating loud noises, presumably to indicate that he was unhappy with noises emanating from the upstairs unit.

63 Mr Pellicciotti observed that the building was approximately 38 years old and that it was common for one to hear noises coming from the unit above and that this was consistent with a building of this age. He observed further that a number of units have no carpet and to the best of his knowledge the applicant's unit was in that category and the lack of carpet in the applicant's unit caused some disturbance to the unit below as evidenced in a letter from the occupier of unit 2 which was attached to the papers.

64 The respondent produced an expert opinion from ATP Engineers noting that the floor renovations complied with the impact sound insulation requirements under the Building Code of Australia 2016.

65 Following the receipt of Mr Palmer's report from the applicant Mr Pellicciotti referred the report to his expert at ATP Consulting Engineers and it was noted that the living room was compliant and that the bedroom readings were marginally higher but should not be of concern.

66 The report of Palmer Acoustics Australia Pty Ltd was also referred to Mr Kamppi of Acoustic Works who observed:-

> "the acoustic report of Palmer Acoustic has concluded non-compliance of the installed floor system within the master bedroom based on an incorrect application of the 2016 BCA criteria as it does not apply to 38 year old buildings. Review of drawings dated number S259 dated July 1979 for Boundary Street, Tweed Heads, show the slabs separating units 4 and 6 is only 140mm thick (current floor slabs are 200mm thick) with load bearing walls. Experience with similar developments would indicate that the installed timber floor isolation system is achieving a reasonable level of acoustics separation based on the building's construction."

67 The By-laws do not, in this case, require compliance with a specific building code or with specific acoustic limits but the findings of Mr Huang in conjunction with the observations made by Mr Temelkoski and Mr Kamppi provide the Tribunal with some assistance in determining whether on an objective basis the by-laws where the requirements of s. 153 have been breached.

68 It is significant to note that the works were inspected by an officer of the Council in October 2017 and it was indicated the renovation works were compliant. It is also significant to note that the representatives of the executive committee of the Owners Corporation and the strata manager have each declined to interfere in the matter notwithstanding that the Owners Corporation is the primary body responsible for enforcing breaches of by-laws through the operations of s. 146 and 147 of the Strata Schemes Management Act 2015.

69 The applicant submits that the Tribunal has power conferred on it in ss. 232 and 248 of the Act to make an order directing the respondent to remedy breach of By-laws 1 and 14 and of s. 153 of the Act. The person or persons entitled to apply for orders under s. 241 have not been specified in the table to Pt 12 of the Act although I am satisfied that the orders can be made under s. 232(1) of the Act. The extent to which the Tribunal can make orders in accordance with s. 123(2) of the Act was discussed at some length by the Appeal Panel in *Walsh v The Owners – Strata Plan number 10349 [2017] NSW CATAP 230* then the application of s. 232 was limited in a number of ways. In *Felcher v The Owners – Strata Plan number 2738 [2017] NSW CATAP 219* the Appeal Panel was required to consider whether s. 232 of the Strata Schemes Management Act 2015 vested the Tribunal with power to make orders relating to a breach of By-laws 1 and 14.

70 The circumstances of the particular case were very similar to the present case in that the appellant owner of strata premises filed an application seeking orders that the noise emanating from an adjoining unit immediately above his own was such as would constitute a breach of by-laws 1 and 14 which were in

that case identical in terms to the by-laws in the present case. The Appeal Panel observed that the Tribunal in the first instance had held that it had power under s. 232 to consider and make orders if appropriate. The Tribunal at first instance determined that the appellant and unit owner had failed to demonstrate a breach of by-laws 1 and 14 in that particular case. The Appeal Panel accepted that the correct test for determining whether breaches had occurred was whether or not the by-laws had been breached as assessed on an objective basis and not the subjective perspective of the unit owner (see *Gao v Agosti [2009] NSW CTTT 175*). The Tribunal had noted in that case that the noise complained of by the appellant involved normal daily activities including walking on the floor. The Tribunal in that case found that the appellant had provided no expert evidence to demonstrate that the floor was generating an unreasonable amount of noise.

71 On applying those principals and weighing up the subjective complaints of the applicant against the evidence produced by the respondent the Tribunal is not satisfied that the evidence, which includes a consideration of the expert report of Palmer Acoustics Australia Pty Ltd, is sufficient to establish that by-laws 1 or 14 or the provisions of s. 153 have been breached. The readings taken by Mr Huang exceed the required level under the current Building Code of Australia by 1 unit. This testing was carried out with an expert on behalf of the respondent being excluded. The ultimate findings of Mr Huang from Palmer Acoustics Australia Pty Ltd must be taken into account and considered in conjunction with all of the expert opinions which have been put forward in support of the respondent's case.

72 Whilst the Building Code of Australia 2016 provides a method for an objective assessment of noise it is appropriate to note that this relates to new buildings of current building standards. The expectations of occupants in buildings which are much older with a thinner floor slab must necessarily be less than those in a new building where compliance with that standard is required. To the extent that the testing of Palmer Acoustics Australia Pty Ltd provides a guideline, the evidence of a minimal failure in one room does not, in a building of this age, justify the making of the orders sought by the applicant. It is to be

noted that the power to make orders under s. 232 of the Act is a power which can be exercised in a discretionary manner. The Tribunal takes into account all of the expert evidence in the present case together with the age of the building and the offers which have been made by the respondent to endeavour to mitigate what might be some difficulty so far as the applicant is concerned. These offers had all been refused and the application for the orders sought by the applicant must file. It is appropriate that each party should bear their own costs of these proceedings as there is no evidence available of any costs incurred by the respondent in seeking to have an expert available for the testing process.

J A Ringrose
General Member
Civil and Administrative Tribunal of New South Wales

13 April 2018

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