

Civil and Administrative Tribunal
New South Wales

Case Title: Bill Sheath and Rhonda Sheath v Rick Whitley and Sandra Whitley

Medium Neutral Citation: [2014] NSWCATCD 44

Hearing Date(s): 2 December 2013

Decision Date: 08 April 2014

Before: R F Buckley, Senior Member

Decision: The first respondent, Rick Whitley is not to smoke in an area of the courtyard of lot 8 of SP 47970, as defined in paragraph 24 below, nor allow any invitees or other occupants so to smoke.

Legislation Cited: Strata Schemes Management Act 1996 (NSW)
Smoke-Free Environment Act 2000 (NSW)
Consumer Trader & Tenancy Tribunal Regulation 2009 (NSW) (repealed)
Evidence Act 1995 (NSW)

Cases Cited: Owners Corporation SP49822 v May & Ors
(Strata and Community Schemes [20106] NSWCTTT 739 (6 November 2006)

Category: Principal judgment

Parties: Bill Sheath and Rhonda Sheath (applicants)
Rick Whitley and Sandra Whitley (respondents)

File Number(s): SCS 13/36359

Publication Restriction: Unrestricted

REASONS FOR DECISION

APPLICATION

- 1 This is an appeal brought by the applicants pursuant to s 177 of the *Strata Schemes Management Act 1996* (NSW) (the SSMA), arising from their objection to an Adjudicator's award of 14 June 2013 dismissing a similar application lodged by the applicants in matter SCS 13/08304.
- 2 The matter was called on for hearing on the allocated date set out above. The respondents were not in attendance. The respondents, tenants who occupy lot 8 in the relevant Strata Scheme previously made submissions with respect to the application for an Adjudicator's order. After reviewing the file I was satisfied that the required notices had been sent to the respondents and that they were made duly aware of the hearing fixture. Pursuant to Reg 30 of the *Consumer Trader & Tenancy Tribunal Regulation 2009* (repealed) I was satisfied that it was in the interest of justice that the matter proceed on an *ex-parte* basis.
- 3 The order sought in the appeal was identical the order sought in the adjudication, however during the course of the appeal, before the matter was listed, the applicants sought to extend the ambit of the appeal to seek other orders. The matter came before the Tribunal on the 23 August 2013 wherein it was noted by the Tribunal on that date that, "*the only issue to be dealt with is the issue of smoke transmission to the Sheath's property and the claim this constitutes a nuisance and a health hazard*".
- 4 The applicants are the owners and occupiers of a town house unit, lot 7 in strata scheme SP 47970 at Alexander Court, at Tweed Heads South, New South Wales. The respondents are respectively the lessor and his mother an occupier, of lot 8. Lots 7 and 8 are two level town house units that adjoin each other and share a common party wall boundary, and at the rear of the premises share a fence boundary of 1.445 metres in length which separates adjoining courtyards.

- 5 The specific order sought by the applicants is claimed pursuant to the powers granted by s.138 of the SSMA, specifically alleging a breach of s 117(1) of the SSMA. The order sought is that "*the respondents refrain from smoking in their rear courtyard, particularly within close proximity (four metres) of our boundary fence.*"
- 6 It is alleged by the applicants that they are exposed to health risks associated with the inhalation of second-hand smoke emanating from the courtyard of lot 8.

THE EVIDENCE

- 7 The applicants are the owners of lot 7. They allege that the respondents regularly and continually sit outside in their courtyard and smoke. It is asserted that when the prevailing wind is blowing, which frequently occurs during the spring, summer months, the resultant exhaled smoke then drifts across into their courtyard and home. Evidence has been adduced, which I accept that Mr Bill Sheath suffers with bronchitis and his elder daughter suffers with asthma. I accept that the symptoms of both medical conditions can be adversely exacerbated by inhaling second-hand smoke.
- 8 The original application originally sought the removal of a screen, 1.445 metres long and approximately 1 metre high, which was attached to the top of the boundary fence separating the respective courtyards. Notwithstanding that this intervention by the owner of lot 8 markedly reduced the area through which smoke could drift, the applicants still maintain that the smoke pollution drifting into their courtyard has continued. The applicants no longer seek the removal of the screen. Photographs taken by the applicants on 4 March 2010 note that an area which was once a space of approximately 1.15 square metres, with the installation of the screen was reduced to approximately .15 of a square metre.

- 9 The applicants further contend that the second-hand smoke from the respondents' activities still pollutes their air, and drifts into their living space, causing them to have to move inside when the wind is blowing in their direction and close their windows.
- 10 The respondent, Mr Rick Whitely, is now the sole respondent as his mother Sandra Whitely, has moved out. Mr Whitley contends that he is doing nothing wrong. It is lawful to smoke outside. He does not want to smoke inside, but wishes to continue using his courtyard. He points to the screen and asserts that his landlord has taken steps to minimise any smoke drift into the applicants' home, and maintains that the applicants are wrongly victimising him.
- 11 In the course of his evidence Mr Sheath said that it depended upon the direction of the wind as to whether the smoke was blowing into his home. In accordance with s 144 of the *Evidence Act 1995*, I take general cognisance of the fact that not only would the direction of wind cause smoke to be blown in one direction, but the strength of it would be of importance as to the extent of smoke disbursement.
- 12 The applicants contend that the respondent is in breach of s 117 of the SSMA. Section 117 is in the following terms:

117 Owners, occupiers and other persons not to create nuisance

(1) An owner, mortgagee or covenant chargee in possession (whether in person or not), lessee or occupier of a lot must not:

(a) use or enjoy the lot, or permit the lot to be used or enjoyed, in such a manner or for such a purpose as to cause 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 such a manner or for such a purpose as to interfere 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 such a manner or for such a purpose as to interfere 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.

(2) This section does not operate to prevent the due exercise of rights conferred on a developer by the operation of:

(a) in the case of a freehold strata scheme, section 28L of the [Strata Schemes \(Freehold Development\) Act 1973](#), or

(b) in the case of a leasehold strata scheme, section 52 of the [Strata Schemes \(Leasehold Development\) Act 1986](#) .

(3) In this section,

"**lessee**" of a lot in a strata leasehold scheme means a sublessee of the lot.

SUBMISSIONS

- 13 I have previously recorded the statements of the respondent. He says he is doing nothing wrong, nothing illegal and should not be stopped from enjoying his smoking pastime in his own backyard.
- 14 The applicant states that he and particularly his eldest daughter are exposed to a risk to their health from second-hand tobacco smoke exposure. He recites a summary of medical research material from the Cancer Council that even at a low dosage there are risks to health from the inhalation of exhaled cigarette smoke. The applicants also submit that it is an established, community accepted fact that tobacco smoke is a highly toxic carcinogenic airborne contaminant with no safe level exposure.

- 15 The applicant seeks an order by reference to the changes made, effective from 1 January 2013, to the *Smoke-free Environment Act 2000*. Section 6A of this legislation is in the following terms:-

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 when waiting at a bus stop),

(h) a taxi rank (with

"**taxi rank**" to include any [area](#) where persons queue or gather when 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)),

Note: A place within 4 metres of a [pedestrian access point](#) to licensed premises or a restaurant is not a [smoke-free area](#) until 6 July 2015.

(j) a [commercial outdoor dining area](#),

Note: A [commercial outdoor dining area](#) is not a [smoke-free area](#) until 6 July 2015.

(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 part of the building that is used for residential purposes, or

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

(3) It is a defence to a prosecution for the offence of smoking in a [smoke-free area](#) that is a [light rail stop](#), [bus stop](#), [taxi rank](#) or within 4 metres of a [pedestrian](#)

[access point](#) to a building if it is established that the accused was smoking only while passing through the [smoke-free area](#) and did not remain in the [smoke-free area](#) while smoking.

(4) The regulations may exempt a specified outdoor public place or class of outdoor public places from being a [smoke-free area](#) under this section.

- 16 The proposed order is based upon a comparison with the definition contained within s 6A(1)(i).
- 17 The applicants also rely in their submissions upon the authority of the Tribunal in the matter of *Owners Corporation SP49822 v May & Ors* (Strata and Community Schemes) [2006] NSWCTTT 739. That decision in that case can be distinguished on a factual basis from the present circumstances by reason of the following:

second-hand smoke exposure to all unit owners or occupants of the strata scheme was significantly contributed to by the air conditioning design which allowed for the recycling of smoke polluted air in between units;

the applicant in that case was the Owners Corporation seeking orders against a lot owner;

the circumstances in that matter involved the trapping of smoke and its recirculation;

once the second-hand smoke was exhaled by the smoking lot owners, at least part of the totality of the smoke was inevitably going to be inhaled by some other unit owner or occupant, or at least released into the atmosphere of that unit air space; and

the relief granted by the member in that decision effected all members of the lot property, not just the relevant respondent owners. That is to be

contrasted with the present application which seeks an order against one person only, a lessee of a 12 lot strata scheme.

- 18 As against the circumstances in the *May* decision, the Owners Corporation in this matter specifically by a vote held at an Extraordinary General Meeting on 20 September 2012, rejected overwhelmingly a motion put by the applicants that the strata scheme become a, "*smoke-free owners corporation complex*" to be incorporated into the by-laws applicable for the strata scheme.

DECISION

- 19 There is, in my view no medical or scientific dispute that the inhalation of either primary smoke and second-hand smoke can cause an increased risk of adverse health effects. It is an issue of increased risk, not of the certainty of a health hazard becoming a reality.
- 20 Smoking is not illegal, except as prohibited by various restrictions of smoking in a public area, specifically as referred to in the *Smoke-free Environment Act 2000*, which outlaws smoking within certain public areas both inside and out. There is no legislation which prevents a home owner smoking in his own backyard, bedroom, lounge room, wherever within the boundaries of the home that he either owns or rents. That is not necessarily the case with a strata scheme by virtue of the provisions of s 117 of the SSMA, which is in terms of a mandatory prohibition - "an owner lessee or occupant **must not** **cause a nuisance or hazard to the occupier of any other lot..**" It is not necessary to establish intention. I determine that the risk of exacerbation of respiratory symptoms is a "*hazard*" within the meaning of s 117(1)(A) of the SSMA>
- 21 The four metre standard which the applicant submits as being appropriate is an indication of the relevant risk, as viewed from a public building perspective of the area in which smoking is to be prohibited. Lot 8 has a

courtyard length which varies on its short side, the rear boundary of the dwelling of approximately 9.5 metres to the rear boundary fence which is 10.28 metres in length.

- 22 The inhalation of second-hand smoke is a hazard. It is adjudged as such by public health legislation. It is particularly so with regard to those, like the applicant and his daughter who suffer with respiratory complaints.
- 23 In their submissions lodged with the Tribunal on the 9 September 2013, the applicants enclosed a plan of the strata plan with an area in the courtyard of lot 8 designated as what they say would be the required area of prohibition.
- 24 In my view, the respondents are in breach of the terms of s 117. That breach goes not only to personal smoking, but allowing others, invitees to the property, to smoke in the courtyard area. Adopting the standard submitted by the applicants, which I view as apposite, I make an order that the respondent is not to smoke or allow others to smoke who are invitees or other occupants of lot 8, in an area of a dimension four metres from the boundary with lot 7 along the south west facing wall of the dwelling of lot 8, to a 90 degree line from that point to the rear boundary fence and including the irregular line which then runs to the boundary of lot 7. The prohibition does not therefore extend to the approximate six metre long by 1 -1.5 metre wide area of the courtyard of lot 8 furthest from lot 7.

(signed)

R F Buckley

Senior Member

Civil and Administrative Tribunal of New South Wales

8 April 2014

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar
