IN THE LOCAL COURT
DOWNING CENTRE

MAGISTRATE GRAHAME

TUESDAY 22 FEBRUARY 2011

63913/11 - JEAN WHITTLAM v SARAH HANNAH & JOHN HANNAH

Mr Atkinson for the Applicant
Mr Ton for the Respondents

HER HONOUR: The matter of Whittlam and Hannah, I'll give a brief oral decision now. Your clients aren't here today?

TON: No, your Honour.

HER HONOUR: All right. Application has been made for a noise abatement order pursuant to s 268.4 of the **Protection of the Environment Operations Act** of 1997. An order can be made under s 268 of the Act, if the Local Court is satisfied on the balance of probabilities that the alleged offensive noise exists.

<u>BACKGROUND</u>

The application is made by Mrs Whittlam who lives at 7/532 New South Head Road, Double Bay, a flat she purchased in 2006. She is clearly an occupier pursuant to the legislation. The respondents, a Mr and Mrs Hannah who own, but do not reside in a flat directly above Mrs Whittlam's property, lot #11. Lot #11 has been let out as a furnished rental property for some time. The court heard evidence that over the years there have been numerous different tenants. I note that the tenancy changed during the course of this hearing.

The first question that has been raised is, are the Hannahs properly named respondents? The respondents argued that the Hannahs are not properly named respondents pursuant to s 268(3) of the Act. Subsection 3 sets out that the respondent to the application may be a person alleged to be making or contributing to the noise or the occupier of premises from which the noise is alleged to be emitted. It is common ground, of course, that the Hannahs do not live there. The dictionary of the Act defines occupier as the person who has the management or control of the premises. There may be a sound argument that the Hannahs are occupiers under this broad definition.

However, essentially the applicant puts it on a different basis, arguing that the Hannahs are persons contributing to the noise pursuant to s 268(3) by enabling the noise to occur from unit 11. At paras 13 and 14 of her submissions the applicant says, "The respondents are enabling the noise from

unit 11 to occur, both by their running an illegal backpacker accommodation, by supplying and owning furniture which is causing the noise, and by failing to maintain floor coverings within unit 11 to prevent noise transmission to unit 7 below. Consequently, it is submitted the respondents are persons contributing to the noise as required by s 268(3) of the Act.

The respondents submit, among other things, that the intention of the Act is to capture the party that usually occupies or uses the premises and has the direct capacity to cause or control the source of noise. They argue that the Hannahs or their grandson, Mr Stanton, or presumably the new agent now responsible "do not occupy, use or have the direct capacity to control any noise emanating from the property". They argue the application must fail at the outset as the proceedings have not been brought against the proper respondent pursuant to s 268(3).

I do not accept that is the position. While I imagine in general terms an order may be more effective when made against the party actually making the noise, the legislators have chosen to broaden the field. The Whittlams, I am sure would say with the number of short-term tenants passing through it would be expensive, difficult and indeed, ineffective to commence proceedings against each and every one, even if they could easily find out their names. They have chosen to name the Hannahs respondents, essentially arguing that their chosen business practices, that is, the way they choose to control their rental property contributes to the noise.

I am satisfied that pursuant to the fairly wide definition in the Act the Hannahs are property respondents. The Hannahs are able to control who they lease to and for how long. They can terminate leases if breaches occur. They can vet tenants, and if necessary, make physical changes to the property to decrease noise. I note in recent times they have in fact moved tenants to another of their many rental properties in an effort of conciliation.

The court heard and received a substantial amount of evidence in this matter. The oral and written evidence of Mr and Mrs Whittlam and Mr Ricketts; the oral and written evidence of Mrs Hannah and Neville Stanton; there was also substantial documentary evidence including photographs, video and audio recordings, correspondence, calendars, and other documents. I have carefully considered all of this in coming to my decision.

The second question I come to is, is the noise complained of offensive pursuant to the definition in the Act. Offensive noise is defined in the dictionary of the Act. Offensive noise means noise (a) that by reason of its level, nature, character or quality, or the time at which it is made, or any other circumstances, is harmful to or is likely to be harmful to a person who is outside the premises from which it is emitted, or interferes unreasonably with or is likely to interfere unreasonably with the comfort or repose of a person who is outside the premises from which it is emitted; or that is of a level, nature, character or quality prescribed by the regulations; or that is made at a time or in another circumstances prescribed by the regulations.

The application in this regard is supported primarily by the evidence of Mrs Jean Whittlam and Mr Anthony Whittlam, and documentary evidence a tendered, including correspondence. I note that the material tendered included documents and complaints going back to 1992, although the applicant did not move in until 2006. Some of these documents were obtained through the Strata Committee, and outline past possible breaches of strata bylaws. There were also complaints to the owners corporation and strata management authorities.

Mrs Whittlam's evidence disclosed intrusive noise over a long period, seemingly perpetrated by tenants of Mr and Mrs Hannah or perhaps at times their invitees. She specifically, among other complaints, asserted shouting and singing at night; banging and slamming of doors; playing soccer at 2am; swearing; intrusive music late at night and early in the morning; and the noise of parties late at night and early in the morning.

She was able to give some dates tied to entries she made on calendars and to instances when she made complaints at the time. She also gave evidence of a more general nature of a continuing and ongoing pattern of noise. She struck me as someone genuinely disturbed by the noise over a long period of time. She gave all indications of honesty Demeanour is, of course, notoriously difficult to assess, however she struck me as genuinely concerned about a long-term and recurring problem that went beyond the normal annoyances one might feel overhearing ordinary noise from a neighbouring flat.

She had done what she could to record specific incidents. Her son Anthony Whittlam and Mr Ricketts also gave evidence of this kind of noise. I do not intend to rehearse all the evidence in this lengthy hearing, except to say I was impressed by Mrs Whittlam who appeared honest and unmotivated by anything, except a deep desire to enjoy a peaceful residential situation. I note that the evidence also raised issues which had nothing to do with noise, for example, bedbugs and cockroaches; I have disregarded that evidence as irrelevant.

Generally, I accepted the Whittlams and Mr Ricketts' evidence of a long-standing problem with noise in the building emanating specifically from the Hannah's flat. The respondents say the Whittlams evidence is just broad statements of no particularity. Mrs Whittlam's contemporaneous records are suspect and perhaps fabricated. The respondents say the Whittlams have not complained as much as they now say, and it is exaggerated or embellished.

They say Mrs Whittlam will say anything to advance her matter, essentially, and is perhaps obsessed. Similar suggestions are made about her son's evidence. There was certainly a suggestion that he had behaved in an aggressive manner. The respondents say that both must be either supersensitive or susceptible to noise. Mrs Hannah, at least, saw the Whittlams as dangerous and suggested mental problems of some unspecified sort. I reject this assertion.

If I were to accept the applicant's evidence as true or largely true as I have

indicated I am minded to do, that is that there has been a pattern of noisy tenants living in unit 11. I need to firstly decide, is the noise complained of in all the circumstances truly offensive. Is it offensive? Living closely together in cities can be a difficult exercise. A normal conversation will often be heard when people live in flats coming and going from common areas. Amplified music and TV noise is often heard, even when people live in neighbouring houses. The noise of people walking or moving furniture upstairs is often complained about in units and flats. But to be offensive the noise must be something beyond the ordinary.

The applicant essentially says the noise is offensive because it is occurring during the period of late at night and early in the morning. It is occurring at a level which they say is itself annoying and offensive, that is, it is very loud. The content in itself, that is, it is sometimes rude or swearing, is itself offensive at times and it is occurring at great frequency. Thus essentially it is argued that the time and noise level make it offensive. From time to time there is also the issue that the content itself is offensive. Mrs Hannah argues it is occurring at a time when it is reasonable to expect neighbours would wish to enjoy some peace and quiet; that it is not a one-off situation, but regularly occurring by a steady stream of tenants over a period of years.

The applicant says because of short-term tenancies, which it says have been encouraged by the Hannahs, for example on the internet, Mrs Whittlam has no option but to bring it to court naming the Hannahs as respondents. I should say that many times I urge, practically beg, the parties to come to some kind of settlement. The Hannahs have a business to run, letting out properties for rent. The Whittlams have to live in the building. It is disappointing that so many days have been taken up in hearing and that no mutually acceptable solution could be reached. Nevertheless, there is no settlement of the issues and it falls for me to decide.

Mrs Whittlam argues, not that the Hannahs make the noise, but that their conduct has contributed to it pursuant to s 268(3) of the Act. Contributed because they have allowed the property to have threadbare carpet. I return to this issue because that is something specifically denied by the respondents. Mrs Whittlam says that it has been rented to backpackers and that the Hannahs have encouraged short-term leases. This is also denied. It is suggested by the applicants that too many people have been crowded into a small space, generally, that the Hannahs have made certain commercial decisions for the profitability of their investment, where they have created an environment where noise has been ongoing and inevitable. They have been unresponsive to complaints and thus their contribution to the noise.

Essentially it would be enough if the noise interferes unreasonably with or is likely to interfere unreasonably with the comfort or repose of the person who is outside the premises from which it is emitted. But Mrs Whittlam has also sought to prove harm, and in that respect tendered two documents which I note that is the document of Dr Kausae of 5 August 2010 and Serena Cauchi of 8 October 2010. Those reports were tendered without objection, I note that the practitioners were not required for cross-examination.

At this stage it is convenient to note the remedies sought: orders in relation to floor coverings, door closers or a hydraulic kind to alleviate slam noise; and an order in relation to musical instruments and amplified sound at night. The first two, if ordered, could be undertaken personally by the Hannahs, the last can be made known to tenants presumably as a condition of rental.

The respondents' position was put to the court in the evidence of Mrs Sarah Hannah and her grandson, Neville Stanton, along with various documents. Mr John Hannah did not give evidence. Essentially, they disputed the existence of the problem. Either there was no noise or if there was noise it was not offensive, just normal noise one might expect in a flat. Mrs Hannah believed the Whittlams were "dangerous people who were causing trouble". This was the only flat in their large property portfolio, she said, where there had been ongoing complaints. There was, of course I should say, some evidence to the contrary. Mrs Hannah suggested that Mr Whittlam was "dangerous" to use her word, and that the Whittlams were essentially bent on harassing them. She specifically denied that the flat was used as a kind of backpacker accommodation, or that it was used for short-term rental.

This was supported by her grandson, Neville Stanton, who for sometime managed the property. I must say I found it difficult to understand his explanation for why the property had appeared on the internet as subject to short-term leases. Mrs Hannah said longer leases were better for their general profitability. I found Mrs Hannah's demeanour troubling. She appeared evasive at times, and certainly dismissive of concerns which had been raised. She appeared loathe to accept even documented concerns with the flat. She was defensive and had trouble asking direct questions.

She gave evidence that the carpet was not threadbare. Looking at the photographs taken by Mr Stanton, and taking into account his evidence, I am inclined to accept her on this issue. It may not be high quality, but it does not look threadbare. Mrs Whittlam it turned out had never inspected the carpet and Mr Whittlam only very briefly. The applicant's evidence on this issue was fairly weak. I have seen photographs of the carpet and heard from Mr Stanton that it is only about five years old. One of the photographs shows a section of underlay, of course, I have no idea if there is underlay throughout.

I note that Mr Stanton attended the mediation services unit of the Department of Fair Trading in relation to a dispute raised by the owners corporation. He made certain undertakings about the carpet at that time. In any event, I am not persuaded that the carpet is threadbare. However, returning to the issue, is there offensive noise? After hearing all the evidence, I accept Mrs Whittlam's evidence that there has been significant noise emanating from the premises on a regular basis since 2006. The noise she described, particularly the timing and level, indicate the noise is offensive. Her evidence was supported by the evidence of Anthony Whittlam, and indeed, Mr Ricketts. I accept she made a number of complaints to the owners, various tenants, the strata corporation, the police and others, and the problem was ongoing.

It now falls to me to decide, having found the respondents are a proper party and on the balance of probabilities that the offensive noise exists, whether some or all of the remedies sought will have the effect of preventing or abating the offensive noise. I firstly look at the issue of floor coverings. The applicant seeks new floor coverings with equivalent to or better than five star rating as set out in the Association of Australian Acoustical Consultants Acoustic Star Ratings for Apartments and Townhouses, a document which was tendered.

I have considered this very carefully and have decided not to make such an order. In my view the applicants have not established the carpet is threadbare or lacking underlay on the evidence that I have before me. It may be less than optimal, but nothing more is established. There is really no evidence before me that if the tenants conducted themselves in an appropriate manner it would still be necessary to change the carpet. The carpet looks a bit basic in the photographs, but it appears to be an adequate floor covering. There is no firm evidence that I can rely on that the carpet, as it exists now, would not be able to absorb noise. There is little before me in relation to the state of the underlay. In fact I am of the view that if the property were being used appropriately the carpet would probably be adequate.

Secondly, the applicant seeks an order in relation to installing hydraulic door closers on all doors in or to the lot. Mrs Whittlam certainly attested to slamming doors. I note, for example, para 3 of her statement of 18 August 2010. It seems a small part of her total complaint, however, given that she also complains of "noisy comings and goings" at all hours of the day and night; it appears to be a relatively inexpensive solution to noise relating to the front door at least. Having considered all the evidence I am prepared to order that a hydraulic door closer is installed on the front door of lot 11. That it is maintained and kept in serviceable condition. There does not seem sufficient material before me to order closers on all the internal doors.

Thirdly, I have considered whether or not to order installing rubber feet on all of the legs of all the furniture within the lot. There is little to support this in the evidence. Certainly, no suggestion that beds or tables are moved around to any great degree. There is in fact little furniture in the flat. In all the circumstances I have concluded it will be of little benefit in abating or extinguishing the offensive noise complained of.

Finally, it is sought that the respondents must not cause or permit any musical instrument or electrically amplified sound equipment to be used in such a manner that emits noise that can be heard within a habitable room in lot 7 of the strata plan, regardless of whether any door or window to that room is open, before 8am and after midnight on any Friday, Saturday or day immediately before a public holiday or before 8am and after 10pm on any other day. This essentially reflects the way the issue is dealt with at reg 51 of the **Protection of the Environment Operations (Noise Control) Regulations** of 2008. It seems given the history of the problem in this block of flats it is not onerous for me to make this order as sought and I intend to make that order as sought in the short minutes of order.

Action, of course, could already be taken pursuant to the Act if this sort of noise were to occur, however, if I make a specific order today binding on Mr and Mrs Hannah it will be especially incumbent upon them to make future tenants aware of the situation. It also gives Mrs Whittlam further information to supply to police should it be necessary to make a complaint.

I MAKE THE FOLLOWING ORDERS, THAT IS, AN ORDER IN RELATION TO A HYDRAULIC DOOR CLOSER ON THE FRONT DOOR IN RELATION TO LOT 11, AND AN ORDER IN THE TERMS SET OUT IN THE SHORT MINUTES OF ORDER PROVIDED BY THE APPLICANT AT NUMBER 3, THAT IS AN ORDER IN RELATION TO MUSICAL INSTRUMENTS AND ELECTRICALLY AMPLIFIED FOUND AT CERTAIN TIMES.

I then must consider costs. Section 273 of the Act allows the court to award costs against a party. Many, many times during the proceedings in the presence of the parties I warn that costs could be awarded. In all the circumstances I am of the view that costs should follow the event. At all times the respondent denied noise and denied that it was offensive. This issue took up most of the time of the hearing. The applicant in my view should not be saddled with the costs that they have been put to because of the way the respondent ran the case.

THE APPLICANT HAS BEEN SUCCESSFUL IN OBTAINING ORDERS FOR NOISE ABATEMENT. THE RESPONDENT IS TO PAY THE APPLICANT'S COSTS ON AN ORDINARY BASIS AS AGREED, IN DEFAULT OF AGREEMENT WITHIN TWENTY-EIGHT DAYS COSTS ARE TO BE ASSESSED.

Is there anything further, gentlemen?

TON: No.

HER HONOUR: All right. I will fill out this paperwork and the parties are free to go.

ATKINSON: May it please.

HER HONOUR: I sincerely hope, Mrs Whittlam, that his has the effect of abating the noise in your block of flats.

APPLICANT: Thank you, your Honour.

HER HONOUR: You're excused from the Bar table. Thank you, Mr Atkinson and thank you, Mr Ton, for your assistance.

ADJOURNED