



## Civil and Administrative Tribunal New South Wales

<b>Medium Neutral Citation:</b>	<b>Potaczek v Discovery Holiday Parks Pty Ltd [2015] NSWCATCD 129</b>
<b>Hearing dates:</b>	22 July 2015
<b>Decision date:</b>	06 November 2015
<b>Jurisdiction:</b>	Consumer and Commercial Division
<b>Before:</b>	W Priestley, General Member
<b>Decision:</b>	The application is dismissed
<b>Catchwords:</b>	Quiet enjoyment
<b>Legislation Cited:</b>	Residential Parks Act 2010 (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Residential (Land Lease) Communities Act 2013 (NSW)
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Kazimierz Tadeusz Potaczek (applicant) Discovery Holiday Parks Pty Ltd (respondent)
<b>Representation:</b>	The applicant in person Cristina Cecere, and Simon Haliburton for the respondent
<b>File Number(s):</b>	RT 15/39088
<b>Publication restriction:</b>	Unrestricted

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### REASONS FOR DECISION

#### The application

- 1 On 12 June 2015 the applicant lodged an application in the Tribunal, seeking orders under section 16 of the *Residential Parks Act* ("the Act") in respect of an alleged breach of his right to quiet enjoyment of his residential premises.

#### Procedural matters

- 2 The hearing took place on 22 July 2015. The applicant was present at the hearing, as was the respondent's park manager, Mr Simon Haliburton. The respondent's General Manager, Ms Cristina Cerece, appeared by telephone.

- 3 Due to problems with the telephone link, Ms Cerece was unable to hear some of the proceedings. Subsequently the respondent asked for an opportunity to obtain a copy of the sound recording, and to provide supplementary evidence and submissions. That application was granted, and orders were made about a timetable for that to occur, and for the applicant to have an opportunity to address any further evidence and submissions. There were delays in that process and the timetable was extended. The Tribunal received the supplementary material from the respondent on 25 September 2015. No further material was received from the applicant.
- 4 At the commencement of the hearing, the applicant was asked by the Tribunal if he was seeking an order that the Landlord restrain other tenants from breaching his peace, to which he replied "that's pretty well it". Later in the hearing the applicant was again asked what he wanted the Tribunal to do in relation to his complaints, and, as is pointed out in the respondent's submissions, he replied "I would like to be able to discuss with management problems and for them to carry out what I'm legally entitled to.....I'm just happy to live quietly and be able to discuss with the management any problems I have and come to an agreement or arrangement.....I just need to be able not to have the door slammed in my face and negotiation is much easier if we can talk it out and find some reason".
- 5 The respondent has submitted that in those circumstances, it is not necessary for the Tribunal to make a formal order to determine the matter. If that submission were accepted, the application should be dismissed. The Tribunal notes the application has not been withdrawn, and does not accept that submission. The correct course is to hear the matter on its merits. If it is found there has been a breach of the terms of the applicant's residential tenancy agreement, the parties could be invited to make submissions as to the appropriate order.

### **Summary of the evidence**

- 6 At the hearing, the applicant gave oral evidence, as did Ms Cerece and Mr Haliburton. The respondent also submitted supplementary evidence about the Byron Shire Council's regulations concerning noise.
- 7 The essential facts are not in dispute and I make the following findings.
- 8 About 3 years ago the applicant bought a cabin in the respondent's park at Byron Bay. The cabin has a rigid annex attached to it. At the time the applicant bought the cabin, he also entered into a residential site agreement with the previous owners of the park, for the site on which the cabin is located. The site agreement was put into evidence by the applicant.
- 9 The respondent took over the park from the previous owner on 29 January 2015. Over the weekend of 6 and 7 June 2015, there was a family gathering or re-union, of about 200 people at the park. Many of those attending the re-union had rented accommodation at the park. A karaoke stand was set up, along with a large projection screen which was about 300 – 400 metres from the applicant's residence.

- 10 The activities of those attending the re-union were conducted with the approval and assistance of the respondent, and the respondent had the authority to control those activities.
- 11 Music from the family re-union was played throughout most of the day of 6 June 2015. It continued until 10.00 p.m. that night. On at least one occasion, the music rattled the windows of the applicant's cabin, and interfered with him watching television with headphones on. At 8.00 p.m. he complained to a security person about the noise. The security person replied with words to the effect of "are you trying to tell me how to do my job?" The music was not turned down.
- 12 The applicant then approached Mr Haliburton about the noise, and Mr Haliburton told him it was not excessive, and that the applicant could call the Police if he believed it was. The applicant returned to his cabin, went to bed and put earplugs in. He was not sure what time the music and other noise stopped, as he thought he went to sleep sometime around 8.30 p.m.
- 13 The applicant had always been able to discuss and resolve these types of issues with the previous owners, and was disappointed he had not been able to do so with the respondent. This was the first time such an issue had arisen with the respondent. The applicant was concerned the respondent was intending to have music festivals at the park.
- 14 As the operator of a tourist facility, the respondent has a policy not to tolerate excessive noise. All music, including the karaoke stand, was shut down at 10.00 p.m. on the night of 6 June. No other residents had complained about the noise from the re-union.
- 15 It is the respondent's intention to provide entertainment for those staying at the site, and it is looking at options including karaoke and live music, but not festivals.
- 16 The respondent complies with all noise regulations, including the Byron Shire Council Local Government Regulations "Noise Annoys" policy. Furthermore, all residents and short term visitors are required to acknowledge their agreement to abide by the park rules, which forbid undue noise.

### **Jurisdiction**

- 17 During the hearing, the applicant said he believed the matter should be dealt with under the *Residential Tenancies Act*, because the cabin on the site he occupies under his residential site agreement has a rigid annexe attached to it. In the Tribunal's view, that belief is incorrect. The applicant's cabin is a "premises .... used as a place of residence", which is located on a "residential site", and the applicant's residential site agreement is a "residential tenancy agreement", as those terms are defined in section 3 of the Act. Accordingly the Tribunal has jurisdiction to determine the matter under sections 5 and 16 of the Act, and sections 28 and 29 of the *Civil and Administrative Tribunal Act*. It is noted the Act was replaced on 1 November 2015 by the *Residential (Land Lease) Communities Act 2013*, and clause 6 of schedule 2 states that this application is to be determined under the (former) Act.

## Application of facts to legal principles

18 Section 20 of the Act states:

“Resident's right to quiet enjoyment

(1) It is a term of every residential tenancy agreement that:

(a) the resident must have quiet enjoyment of the residential premises without interruption by the park owner or any person claiming by, through or under the park owner or having superior title to that of the park owner, and

(b) the park owner or the park manager must not interfere, or cause or permit any interference, with the reasonable peace, comfort or privacy of the resident in using the residential premises.

(2) A park owner or a park manager under a residential tenancy agreement must not, during the currency of the agreement, contravene or fail to comply with subsection (1).

Maximum penalty: 10 penalty units.

19 Section 20 (1) is replicated in the residential site agreement.

20 The words in section 20 (1) (b) “reasonable peace, comfort or privacy”, have been considered in numerous cases, and there is a concise discussion of the topic in Anforth’s text on residential tenancies [\[1\]](#). A far more detailed examination is contained in an article by A M Rissman “The Price of Quiet Enjoyment” [\[2\]](#).

21 An important factor in considering whether the tenant’s right to quiet enjoyment has been breached, is the word “reasonable”. A mere interference with the comfort of the tenant from an annoyance such as noise, is insufficient to breach the tenant’s right to quiet enjoyment. A substantial interference is required.

22 In the Tribunal’s view, while the music and other noise generated by the family re-union was an interference with the tenant’s quiet enjoyment of his premises, and was permitted by the respondent, the evidence does not support a finding it was substantial. It occurred on only one occasion, ceased at 10.00 p.m., and was not in breach of the Council’s regulations about noise. The applicant’s complaint was the only one received by the respondent. The noise did not prevent the applicant from falling asleep (albeit with ear plugs) at about 8.30 p.m. The issue also has to be placed in the context of a caravan park that caters for tourists, in the very popular holiday location of Byron Bay. That is not to say that noise which occurs before 10.00 p.m, and does not breach the Council’s regulations, is incapable of constituting a breach of section 20 of the Act, and clause 10 of the site agreement. However that is not the case here, and accordingly the application is dismissed.

**W Priestley**

**General Member**

**Civil and Administrative Tribunal of New South Wales**

**6 November 2015**

## Endnotes

[1.](#) Anforth, Christensen and Bentwood “Residential Tenancies – Law and Practice, NSW 6th edition at pp 116 – 124.

2. (1999) 7 Australian Property Law Journal 1

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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Decision last updated: 16 December 2015