

CITATION: *Schinkel v Dennis* [2007] NTMC 019

PARTIES: TIMOTHY SCHINKEL

v

CAROLYN BEVERLEY DENNIS

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20625224

DELIVERED ON: 11th April 2007

DELIVERED AT: Darwin

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JUDGMENT OF: Acting Magistrate Fong Lim

CATCHWORDS:

Undue Noise – Dogs barking - s 53D *Summary Offences Act*

REPRESENTATION:

Counsel:

Complainant: Mr Schinkel
Defendant: Mr Lawrence

Solicitors:

Complainant: Self
Defendant: Cridlands
2nd Defendant: Cridlands

Judgment category classification: C
Judgment ID number: [2007] NTMC 019
Number of paragraphs: 39

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No.20625224

[2007] NTMC 019

BETWEEN:

TIMOTHY SCHINKEL
Complainant

AND:

CAROLYN DENNIS
Defendant

REASONS FOR JUDGMENT

(Delivered 11th April 2007)

Acting Magistrate Fong Lim:

1. The Complainant makes an application pursuant to section 53D of the Summary Offences Act for an order that the Defendant abate the noise coming from her property. The noise complained of is dogs barking in the kennels operated by the Defendant.
2. The background to the dispute is that in 2002 the Complainant purchased the property at 60 Horne Road Bees Creek. They were unaware that the Defendant owned and operated a dog kennels on the property next door. Two weeks after the Complainant and his wife moved into the 60 Horne Road Bees Creek they started to complain to the Defendant about the noise of barking dogs coming from their property. The Complainant and the Defendant could not reach a solution to the problem, a community action group was formed, a petition presented to the local council and the NT Government and the eventually this complaint was made. The Defendant has lived on her property since 1984 and has operated the kennels since that

time. It is also important to note that the kennels were operated by the prior owners of the property as well.

3. Section 53D of the Summary Offences Act provides that:

53D.Noise abatement orders

(1) Where a person occupying premises makes a complaint to a Justice alleging that his occupation of those premises is affected by undue noise, the Justice may issue his summons for the appearance before him or any other Justice of the person who is –

(a) alleged to be making or causing or permitting the noise to be made; or

(b) the occupier or person apparently in charge of the premises or part of the premises from which the noise is alleged to be emitted.

(2) If the Court is satisfied that an alleged undue noise exists, or that although abated it is likely to recur on the same premises or part of the premises, the Court may, where it finds that such noise is not justified in the circumstances, make an order directing the person summoned under subsection (1) to stop or abate the noise or to confine the making of the noise to within such hours as the Court may fix and the Court may, in making the order, impose such other conditions as it thinks fit.

4. Undue noise is defined in section 5 as:

“ any noise that causes unreasonable distress, annoyance or irritation to any person by reason of its level or character or the time at which it is made.”

5. To make the order requested by the complainant the Court has to be satisfied that there is:

(a) Undue noise – that the barking dog causes unreasonable distress annoyance or irritation to any person by reason of its level of character or the time at which it is made,

(b) The undue noise is likely to continue, and

(c) The noise is not justified in the circumstances.

6. If the Court is reasonable satisfied of all of those factors on the balance of probabilities then it may make an order.
7. At the outset I note that there has been evidence of parties to this action acting in an unacceptable way towards one another, there has been aggression and hostility from both sides. This is a dispute which has been going on between the parties for approximately 3 years and clearly emotion runs high on both sides. It is not for the Court to decide in this matter who started what and what was said to whom for whatever reason and that is not a task I will be undertaking. The Court's task is to assess the noise its nature and its effect and then decide whether it is appropriate for an order to be made in all of the circumstances. Whether the Defendant has in the past has refused to address the issue or not is not relevant here what is relevant is whether the noise should be abated and if the court should make an order for the Defendant to do so.
8. **Undue noise** - It is admitted by the Defendant that the kennels can have up to 50 dogs in residence at any one time and that there are episodes of barking during different times of day especially at exercise and feeding times. Clearly the sounds of barking dogs causes an annoyance to humans otherwise there would not be legislation specifically about dogs barking all over Australia an example is Darwin City Council by law 71:

71. Dogs causing nuisance

(1) The owner of a dog that, either by itself or in concert with other dogs, is a nuisance is guilty of an offence.

(2) For the purposes of this by-law, a dog is a nuisance if it is injurious or dangerous to the health of the community or of an individual, or behaves repeatedly in a manner contrary to the general interest of the community or an individual.

(3) Without limiting the generality of clause (2), a dog is a nuisance if it –

creates a noise, by barking or otherwise, that persistently occurs or continues to a degree or extent that has a disturbing effect on the state of reasonable mental, physical or social well-being of a person;

9. There are similar by-laws in most metropolitan areas of Australia.
10. Of course this by-law does not apply to the Litchfield shire in which the subject property is situated and the fact that the subject area is not a metropolitan area is relevant and that will be discussed later.
11. The question is whether the level nature or character of the barking emanating from the kennels causes unreasonable annoyance, irritation or distress.
12. The test is an objective test that is to say it is not enough for the noise to cause annoyance irritation or distress to the complainant that annoyance irritation or distress must be unreasonable. It must be enough to cause annoyance irritation or distress to the ordinary person.
13. The Court was presented with a body of evidence from various householders of the area some currently living there others not. Witnesses for the complainant gave evidence that they were substantially irritated by the barking so much that it has disturbed their sleep and their enjoyment of their outdoor living on their property. Witnesses for the Defendant gave evidence that although they could hear the dogs the noise did not disturb them. Interestingly James Osborne, for the defendant, gave evidence that his friend who sold him the property told him of the kennels and made a point to offer he visit to listen to the barking before he bought the property but he declined. That offer indicates that Mr Osborne's friend thought the noise may be an issue for Mr Osborne. Ms Amiet, former neighbour on the other side of the kennels, gave evidence that although the dogs barking didn't annoy her while living there other people had commented on it to her. Ms Jabour a shift worker gave evidence that even though she could hear the

dogs in the distance it was never enough to stop her from going to sleep nor wake her from sleep.

14. Most of the witnesses for the Complainant gave evidence that they had complained to Ms Dennis about the noise at one stage or another. Notably Mr Ellis gave evidence that he had complained so many times and had contemplated filing for a noise abatement order but decided against that course of action.

15. It is clear that the dogs barking has caused the complainant and his wife substantial annoyance irritation and distress, they have moved their bedroom to the other end of their house, they have soundproofed their room and give evidence that they cannot enjoy their outdoor living area. Mr Schinkel stated that he has suffered depression and suicidal thoughts because of the constant noise. The fact that they have laid this complaint indicates the strength of their frustration with the situation. Ms Tobin gave evidence that she has been disturbed from her sleep by the dogs in the morning and has recorded her frustration at that in her diaries, while she was evasive in her evidence in cross examination I accept she has been truthful in her evidence that the dogs barking is of substantial annoyance to her. The evidence from the Defendant herself is that she has had complaints and threats from Ms Tobin. Mr Ellis gave evidence of a long history of complaints to the Defendant about the dogs and said that he had considered making an application for a noise abatement order himself but didn't go through with it. Ms Shugg gave evidence that her husband is woken in the middle of the night by the dogs and then goes to work that causes him to be grumpy when he comes home, she also closes her windows and puts the airconditioner on at night to keep the noise out. Ms Tolomei gave evidence that for her the dog noise has been a problem since they have lived on their property, she has modified the way by using the airconditioner more and using her outdoor areas less. Ms Tolomei also gave evidence that her guests always commented on the noise.

16. It is clear from the variance in the evidence of the people who live and have lived in the area that different people have different levels of tolerance to noise and that type of noise in particular. I accept the evidence of all the witnesses about their personal experience with the noise.
17. The Counsel for the Defendant made much of the fact that there were very few complaints to the Defendant about the dogs barking until the Complainant and his wife moved into the neighbourhood. It was submitted that this complaint was part of a campaign by the complainant and his wife because they were upset to find out that they had bought a property next to the kennels. I accept that there certainly has been a bit of a campaign to try and do something about the dog noise and I accept that the Complainant and his wife were two of the main proponents of the campaign however that does not necessarily lead to the conclusion that there is no problem with regards to the dogs barking.
18. The court heard two recordings of the dogs barking taken by the complainant and his wife. The first was played to Ms Tolomei who agreed that the sample played was indicative of the noise complained of at its worst. That recording was not tendered. The second was played in Ms Ainsworth's evidence and that was exhibited. The recording played to the Ms Tolomei was higher in volume than that played in Ms Ainsworth's evidence.
19. The Court was also provided with the evidence of two experts, Mr DeSylva for the complainant and Mr D'Toro for the Defendant. Mr DeSylva is a qualified mechanical engineer who has been employed by the NT Government on several projects to assess the noise levels for the work environment and the public environment and is well qualified to give evidence of the noise levels caused by the dogs at the Defendant's kennels and gave clear concise evidence. Mr D'Toro is a sound engineer who has had some experience in measuring noise level for one industrial noise

complaint and other assessments for the hospitality industry. Both experts agree that the frequency of a dog's bark is at 1000 Hz and that dog's barking was an "impulsive" noise, a noise that is inconsistent in its levels and volume over time therefore one which is difficult to measure. Mr DeSylva took two lots of measurements at different times of the day one set of measurements was taken during the peak period, the school holidays. Mr D'Toro also took two sets of measurements none at the peak period. Nevertheless both experts' measurements showed that the difference between the ambient level of noise at the boundary of the two properties and the noise level at its source was about 20 decibels.

20. Mr D'Toro agreed in his evidence that Mr DeSylva's methodology in his report was good and did not question it. The court was not provided with Mr D'Toro's report only the summary of his data. The only opinion offered by Mr D'Toro was that in his opinion the difference between the ambient level and the peak reading when the dogs were agitated was not significant and any level of annoyance would be subjective. Mr DeSylva differs in his opinion. He sees the difference of 20 Dba as a significant variance to the normally quiet environment. Mr DeSylva opines that the unharmonic and inconsistent nature of the noise causes it to be more irritating when it breaks the normal quiet environment. He accepts that the readings of the level of noise was below the 60Dba which is the "benchmark for contention of the NT authorities" however distinguishes this situation from those usually considered against that benchmark. Mr DeSylva opines that benchmark is not appropriate when considering dog barking noise because its impulsive nature combined with the variable amplitude noise makes it less tolerable at lower volumes. Mr DeSylva then did some calculations to adjust the readings and came to the conclusion that the reading of 50 Dba at the Complainant's residence was not acceptable. Notably Mr D'Toro did not dispute this methodology.

21. I accept Mr DeSylva's analysis of the noise levels he has assessed at the Complainant's house and that in combination with the lay evidence of the neighbours to this property and having heard the recording of a sample of the noise "at its worst" I am reasonably satisfied that the noise emanating from the Defendant's property to be noise which at the times causes unreasonable distress, annoyance or irritation. I am reasonably satisfied that in the school holidays, exercise times, feeding times and anytime after 9:00pm at night if the level of barking is that which was measured by Mr DeSylva in July and continues for more than 15 minutes that noise is undue noise as defined by the Act and is likely to recur without measures being put in place.
22. Is the noise justified in the circumstances? - having found that the dogs barking at particular times is undue noise the Court must now consider if the circumstances in this particular case justifies the noise. In my view the circumstances to be considered in this matter are the nature of the neighbourhood, the nature of the noise, the fact that the kennels have been operating in the area for a good 25 – 30 years, and that the noise is made by animals not machines or humans.
23. A common thread through the evidence of all of the residents of the area who gave evidence was that one of the reasons they live in the rural area is for the quiet environment. They accept that there will be the occasional noise from light aircraft, quad bikes and traffic but maintain that it is still quieter than living in the suburbs. Quietness and peacefulness is a premium aspect of the area. The noise complained of is clearly fairly consistent throughout the day with peak periods around the exercise and feeding times and of greater volume in the school holidays.
24. The Court should take into account that kennels are a fact of modern living and their existence in the less populated area surrounding the town of

Palmerston and city of Darwin is more logical than having kennels in the middle of suburbia.

25. Other circumstances to consider are that the Defendant has been operating the kennels for approximately 23 years and they are her only source of income. She has put in place some measures to ameliorate the noise, she has planted trees on boundaries, put a radio speaker system into the kennels and restricted the hours her customers can pick up and drop off animals, she has even taken the drastic step of debarking her own dogs. Some of these measures might have been successful in lessening the noise as it is the evidence of both the complainant and his wife that the noise levels have improved over the past few months.
26. It must be accepted that dogs will bark and that there will be times that all dogs in a kennel situation will bark together that is just in their nature. Any kennel will produce dogs barking noise and given the Defendant has been operating this business for 23 years it is justifiable that she be allowed to continue to do so.
27. However I am reasonably satisfied that the level and nature of the noise that continues from her kennels cannot be justified at its present levels.
28. Given the above I am of the view that an order should be made however given the nature of the Defendant's business that order will not be prohibitive to the Defendant's business continuing.
29. The Defendant's husband is a qualified vet and his evidence was the only evidence which gives any insight into the behaviour of dogs and the modification of their behaviour. Mr Dennis took the drastic measure of debarking 4 of his own 7 dogs to decrease the level of barking and that is an indication of how difficult it is to stop dogs from barking by other means. Mr Dennis accepted that the dogs would bark at visual stimulus but did not accept that the horses stabled next to the kennels would be such a stimulus.

He also gave evidence that dogs would hear something before they could see which would indicate that they could start barking at something they heard, eg a dog up the street barking, before they actually saw the dog walking by. He gave no evidence about the effectiveness of any of the measures suggested by the Complainant.

30. The Defendant also gave evidence that she had contacted other kennels as to their techniques in keeping the dogs quiet and the only techniques that are employed elsewhere that she does not use are muzzling, barking collars and banging things and yelling at the dogs. The Defendant refused to muzzle the dogs and use barking collars on them because she considers both of those techniques cruel on the dogs, the muzzles because they would have to be so tight that the dog could not open its mouth and the collars because the dogs receive electric shocks. Of course there is also the added issue of the consent of the dogs owners to use that equipment on the dogs.
31. It is clear that the Defendant accepts that dogs in the kennels will be disturbed by people dropping off and picking up their animals as they have now restricted their hours for that activity. The Complainant is asking that the Defendant further restrict those hour to Monday – Saturday only taking away at least that stimulus for the dogs barking on Sundays. The Defendant did not give any evidence of how that further restriction might affect her business. The Complainant has also requested that the Defendant erect some sort of barrier such as shade cloth on the fence facing Horne Road to stop the dogs from seeing out onto the road and barking at passing traffic pedestrian, animal or vehicular. The Defendant accepted that the dogs would bark when people walked by or other dogs and at some vehicles. The Defendant's answer to that suggestion is that any such a barrier would stop the airflow ventilation into the kennels and cause health problems for the dogs. I cannot accept that explanation from the Defendant as the distance of the kennels from the road is clearly large enough for airflow to occur over any barrier high enough to limit the sight of a dog.

32. The Complainant also suggests that the Defendant be ordered to employ technology such as citronella collars and something called “dogdazzlers” however given that the animals are not owned by the Defendant this court cannot order the Defendant to employ those methods without the consent of the owners nor has the court been provided with any evidence that those devices are effective in stopping dogs in a kennel situation from barking.
33. Given the above my orders are:
34. Pursuant to section 53D(2) the Complainant is order to abate the noise of dogs barking in her kennels in the following manner:
35. Between the hours of 10:00pm and 7:00am by taking all reasonable steps to stop the dogs barking between those times including the use of citronella collars with the dog owner’s permission.
36. To erect a barrier such as shade cloth on the fence to screen the kennels from Horne Road within 14 days.
37. To continue to restrict the times at which people can drop off or pick up their dogs to 8:00 –10:00am and 4:00 –5:00pm
38. To restrict feeding and exercise time to 8:00-10:00am and 4:00 –5:00pm daily.
39. To further restrict times at which people can drop off or pick up their dogs on Sundays to 4:00 –5:00pm.

Dated this 11th day of April 2007.

Tanya Fong Lim
ACTING MAGISTRATE FONG LIM