Supreme Court of Western Australia - Court of Appeal

Osb Operations Pty Ltd Licensee of the Old Swan Brewery Restaurant v Jansen & Anor [2006] WASCA 270 (8 December 2006)

Last Updated: 19 December 2006

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : OSB OPERATIONS PTY LTD Licensee of the Old Swan Brewery Restaurant -v- JANSEN & ANOR [2006] WASCA 270

CORAM : STEYTLER P

McLURE JA

BUSS JA

HEARD : 26 & 27 JULY 2006

DELIVERED : 8 DECEMBER 2006

FILE NO/S : CACV 139 of 2005

BETWEEN : OSB OPERATIONS PTY LTD Licensee of the Old Swan Brewery Restaurant

Appellant

AND

JOHN JANSEN

DALE JANSEN

Respondents

ON APPEAL FROM:

Jurisdiction : LIQUOR LICENSING COURT OF WESTERN AUSTRALIA

Coram : GREAVES J

Citation : RE OLD SWAN BREWERY RESTAURANT; JANSEN & ANOR - v - OSB OPERATIONS PTY LTD [2005] WALLC 14

File No : LLC 5 of 2005

Catchwords:
Liquor licensing - Complaints about noise and behaviour on licensed premises - Function room in licensed premises directly below respondents' residential apartment - Construction of s 117(1) *Liquor Licensing Act 1988* (WA) - Whether neighbourhood or persons in vicinity "unduly" disturbed - Application of objective test - Whether ongoing breach of Act - Where no evidence from respondents of noise measurements in excess of assigned levels during 2005

Words and phrases - "Neighbourhood" - Whether one apartment may constitute a neighbourhood - "Vicinity" - Whether "vicinity" should have wider construction than "neighbourhood"

Legislation:
Environmental Protection (Noise) Regulations 1997 (WA)
Licensing Act 1967 (SA), s 86(d)
Liquor Licensing Act 1985 (SA), s 62(1)
Liquor Licensing Act 1988 (WA), s 25, s 28 s 29, s 117(1)

Result:
Appeal allowed
Orders of primary Judge set aside
Decision of Director of Liquor Licensing restored

Category: A

Representation:

Counsel:

Appellant : Mr S D Hall SC & Mr R E Sandover

Respondents : Mr M L Bennett & Mr D Mossenson

Solicitors:

Appellant : Jackson McDonald

Respondents : Lavan Legal

Case(s) referred to in judgment(s):

Hackney Tavern Nominees Pty Ltd v McLeod (1983) 34 SASR 207

Hope v Bathurst City Council [1980] HCA 16; (1980) 144 CLR 1

Vandeleur v Delbra Pty Ltd (1988) 48 SASR 156

Case(s) also cited:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1; [1948] 1 KB 223

Executive Director of Public Health v Lily Creek International Pty Ltd [2001] WASCA 410

Geraldton Building Co v Cramer [2001] WASCA 244

Highmoon Pty Ltd v City of Fremantle [2006] WASCA 21

Labbozzetta v Director of Liquor & Gaming [1999] NSWSC 96

Lucas v Mooney [1909] HCA 58; (1909) 9 CLR 231

McPhee v S Bennett Ltd (1934) 8 WCR 372

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24

Parramatta City Council v Pestell [1972] HCA 59; (1972) 128 CLR 305

Re Dunlop Holding Ltd's Application [1979] RPC 523

Scott v Numurkah Corporation [1954] HCA 14; (1954) 91 CLR 300

W375/01A v Minister for Immigration & Multicultural Affairs (2002) 67 ALD 757

Wiki v Atlantis Relocations (NSW) Pty Ltd [2004] NSWCA 174; (2004) 60 NSWLR 127

1 **STEYTLER P**: On 8 February 2005 the Director of Liquor Licensing, Mr H R Highman ("Director"), published his decision in respect of complaints lodged with him by the respondents, Mr John Jansen and Mrs Dale Jansen, concerning noise experienced by them in their apartment in the Old Swan Brewery building near Perth. The noise was said by the respondents to have originated from the function room of the appellant's restaurant, the "Old Swan Brewery Restaurant" ("OSB restaurant"), in the same building. The Director was satisfied that the level of noise and disturbance experienced by the respondents, especially since a site inspection conducted by him in October 2004, was not "undue" for the purposes of s 117(1) of the *Liquor Licensing Act 1988* (WA) ("Act"), under which the complaints had been lodged. He consequently dismissed the complaints.

2 The respondents exercised their right under s 25 of the Act to have the decision of the Director reviewed by the Liquor Licensing Court. The review was heard between June and August 2005 and on 27 October 2005 the primary Judge delivered his judgment. He allowed the application for review, quashed the Director's decision and upheld the complaints. He made orders prohibiting the playing of live or amplified music in the function room between 10.00 pm and 9.00 am seven days a week and required all music and any speeches or announcements to be made through an existing sound system in the function room, as that system had been calibrated on 9 December 2004. The appellant has appealed against that decision to this Court.

Circumstances giving rise to the appeal

3 Before turning to the judgment of the primary Judge, and to the grounds of appeal, it is necessary to provide some background to the dispute.

4 On 31 January 1995 the Director granted six conditional restaurant licences in respect of restaurants to be operated in the Old Swan Brewery building. The licences were granted in favour of a company, Bluegate Nominees Pty Ltd ("Bluegate").

5 At a time when the development of the Old Swan Brewery site was still incomplete, the respondents and Bluegate entered into an agreement for the sub-lease of what became the respondents' apartment in the building. Bluegate was then the lessee under a head lease in respect of the building pursuant to an agreement dated 18 June 1992 made between it, the Minister for Lands and Multiplex Constructions Pty Ltd. The

agreement for sub-lease entered into by the respondents is undated, but we were told that there is no dispute as to the fact that it was entered into in about November 1999. This is so notwithstanding that it was submitted for stamping on 21 November 2000 and was stamped on 20 February 2001. Amongst the annexures to the agreement were plans of the proposed development of the Old Swan Brewery site. These revealed that there were to be three restaurants in the building (notwithstanding that amended

plans had not, by November 1999, been lodged with the Director). There was no notation on the plans concerning the existence of a function room. At about the time of entering into the sub-lease, the respondents were taken through the incomplete building and told that there were to be three restaurants on its ground floor. They regarded that as a positive factor. Nothing was said about a function room.

6 On 24 January 2000 Bluegate lodged amended plans with the Director, asking that three restaurants be substituted for the original six. On 11 February 2000 the Director approved that application, subject to conditions that are not presently relevant. Then, on 25 October 2000 Bluegate lodged with the Director a further application to amend the plans so as to combine two of the restaurants into one. On 14 November 2000 the Director approved Bluegate's application subject to various conditions.

7 On 31 July 2001 the respondents took possession of their apartment. Shortly afterwards, they noticed that a large bar was being built on the ground floor of the building. The respondents and other residents were concerned by this and, it seems, this led to a meeting with the developers in late August 2001. The respondents' evidence at the review hearing ("trial") was that this was the first occasion upon which they learned that there was to be a function room in the building.

8 On 3 September 2001 Bluegate applied for approval to commence development, as part of the OSB restaurant complex, of a restaurant, bar, boutique, micro-brewery, function room, museum and coffee shop. Approval was given by the Western Australian Planning Commission on 1 November 2001. Paragraph 1 of the approval to commence development reads as follows:

> "1. This approval is for the use of the premises for a restaurant, meaning that the predominant use is the sale and consumption of food and drinks, where patrons are seated at tables, and where the consumption of liquor is limited to that permitted in ... premises licensed as a 'restaurant' under the Liquor Licensing Act 1988. The
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> use of the bar, function room, model micro brewery and tourist merchandising area as indicated on the plans submitted is to be ancillary to the predominant restaurant use ... "

9 Evidence was given at the trial in this respect by a town planner, Mr Tony Shrapnel. He said, in his report dated 17 October 2002, that the development occurred in accordance with the approved plans and that "the actual detailed usage" of the function room was "a commercial operational matter, rather than a planning matter".

10 The OSB restaurant began to trade on 13 November 2001. That restaurant, and a second restaurant forming part of the Old Swan Brewery site development ("Zafferano's"), were located in one of three buildings comprising the development ("building 3"). The upper level of that building housed six apartments (one of these being that occupied by the respondents). The balance of the residential apartments in the development (in fact the majority of them) were located in building 1, at the western end of the development, away from the two restaurants.

11 On 18 December 2001 a number of the residents (the occupiers of 16 apartments) lodged a complaint with the Director concerning noise and behaviour at the OSB restaurant. This led, ultimately, to the preparation of a draft memorandum of understanding between the residents and the appellant which was sent to the Director on 17 May 2002. Although that document was not formally agreed, the appellant thereafter operated under its terms. Subsequently, on 19 October 2002, a memorandum of understanding was entered into between all of the residents, Bluegate and the appellant concerning the operation of the OSB restaurant and the function area. This encompassed a number of measures designed to control noise levels.

12 The respondents continued to be concerned at the noise levels from the function room, which was situated immediately beneath their apartment. On 20 December 2002, as a result of a complaint made by the respondents, two security officers went to the respondents' apartment. There was then a wedding function being held in the function room. The report subsequently prepared by the security officers records that, at 22.10 that evening, "No loud noise was emitting into the unit. A slight thumping sound (bass) could be heard occasionally". The report also records that, notwithstanding that the restaurant manager told the officers that the band was playing at a set level agreed with the residents, he agreed to have the sound "turned down a little".

13 On 24 December 2002 the respondents lodged a complaint with the Director concerning the noise from the OSB restaurant. The difficulties which they had been experiencing with the noise appear to have led to the involvement of a noise level expert, Mr Allan Herring of Herring Storer Acoustics ("Herring Storer"). He made available to the respondents a sound level meter and recording equipment. A recording of noise in the respondents' apartment was made on Saturday, 11 January 2003 and sent to Herring Storer. In a subsequent report dated 14 January 2003 Herring Storer concluded that the recorded noise level exceeded that which was permitted by the *Environmental Protection (Noise) Regulations 1997* (WA) ("EPN Regulations") by 5 dB(A).

14 In or about January 2003, on the advice of Herring Storer, arrangements were made to have noise restricting equipment installed in the function room and also for the installation of air-lock doors at the entrance to the function room. During this time the respondents continued to make recordings of noise and send these to Herring Storer for analysis. This appears to have continued until about February 2003, after which the respondents engaged Mr M N Della Gatta, an acoustical engineer, to act on their behalf.

15 The respondents had also experienced some noise emanating from Zafferano's. On 28 January 2003 they installed double glazing in the window of their master bedroom which, they said, had the effect of preventing the ingress of noise from that source.

16 In February and March 2003 a sound monitor was installed in the function room at a cost of about $6,000. That device was designed to "cut out" amplified music once it exceeded permissible levels. Also, air-lock doors, at a cost of approximately $8,000, were installed at the entrance to the function room. The seals to the double glazed windows and doors of the function room were checked and, where necessary, replaced. Cavities on the eastern wall of the function room were filled in. At about the same time Mr Michael Rasheed, an experienced manager, was appointed by the appellant as a consultant in order to deal with the noise issues concerning the OSB restaurant and function room.

17 On 10 March 2003 Herring Storer carried out further testing of noise recordings that had been made in the respondents' apartment. It produced a report later that month. The first paragraph of cl 2.0 of that report sets out part of the background to it. That paragraph reads as follows:

> "Since occupancy of both tenancies, there have been noise complaints from the occupants of Apartment 1.08 (Jansens) in relation to activities in the Function Area. In recent months, Herring Storer Acoustics have provided a sound level meter and tape recorder to John Jansen at his request, to monitor noise levels over weekends. There have only been a few occasions when meaningful recordings could be analysed, and even so, it has never been clear as to exactly where the meter was located or under what precise conditions recordings had been made. Herring Storer Acoustics had advised the Jansens on previous unrelated noise complaints, and thus were retained by them to advise in this regard. Herring Storer Acoustics were also commissioned by Lion Nathan for the fit-out of this tenancy and in the longer term, by Multiplex for the entire Old Swan Brewery (OSB) redevelopment."

Then, after mentioning the sound control measures which had recently been taken, the report sets out the nature of the complaints that had been made and the analysis that had subsequently been made. The report concluded that ambient noise levels in the respondents' apartment were substantially less than those recommended by *Australian Standard 2107* ("AS2107") in respect of noise levels without airconditioning and within the recommended ranges with airconditioning on. However, the report when on to say that, notwithstanding this, areas had been identified and recommendations had been made to further upgrade the acoustic isolation of the function room.

18 Between July and August 2003 Mr Della Gatta prepared three reports relating to sound level measurements that he had taken at the respondents' apartment. Each report concluded that music emissions from the function room exceeded the assigned noise levels permitted by the EPN Regulations. A fourth report prepared in September 2003 revealed that, on Saturday 20 September, noise emissions from the function room had marginally exceeded the assigned noise levels permitted by the EPN Regulations. Shortly afterwards, on 3 October 2003, the appellant received a quote from Audex Sound Pty Ltd ("Audex") for an entirely new sound system. Then, between 16 October 2003 and 19 October 2003 Mr Della Gatta prepared a further three reports concerning sound level measurements taken by him

at the respondents' apartment. In each case he concluded that noise emissions from the function room exceeded the noise levels permitted by the EPN Regulations. On 23 October 2003 and 4 November 2003 the respondents filed further complaints with the Director. Also, between 6 November 2003 and 25 November 2003 three

additional reports were commissioned from Mr Della Gatta. Once again, each report concluded that the measured noise levels exceeded those permitted by the EPN Regulations (although the last of them said that the assigned noise levels had been "technically" exceeded).

19 In November 2003 the appellant installed a new function room PA system with a number of features designed to minimise noise emission. Most significantly, the system was electronically programmed in order to ensure that amplified sound did not exceed suitable pre-programmed levels. The levels were set by Audex in accordance with settings agreed with by Herring Storer, Mr Della Gatta, the Perth City Council and the Director. Also, test holes were drilled into the function room's western wall in search of hidden cavities and, where cavities were located, these were filled with "Rockwell", a substance having noise absorption qualities.

20 On 9 December 2003, further tests were conducted at the respondents' apartment and in the function room. Mr Della Gatta, representatives from the City of Perth and the Director were invited to attend. Mr Della Gatta and Mr Herring set the sound levels for the sound system. Tests for that purpose had been conducted using an agreed sound track, "Heart of Glass", performed by the band Blondie. This track was considered to be representative of the type of music that would be played in the function room. Once the sound levels had been set, the system was secured by a fixed mesh steel gate. The gate was locked and the keys were given to a representative of Audex who did not thereafter release them to any person. By a subsequent letter dated 19 December 2003, Mr Della Gatta confirmed that "with the current settings, compliance had been achieved with respect to the amplified music system". The letter confirmed that the system had been secured and that all DJs were required to connect through it.

21 Mr Della Gatta was asked by the respondents to take further sound measurements in their apartment on Saturday, 17 January 2004. He prepared a report dated 19 January 2004. His report said that there had, that evening, been a wedding function for about 120 persons in the function room. His opinion was that the music emissions from the function room received by the master bedroom in the respondents' apartment between 22.00 hours and 24.00 hours "did unequivocally comply with the assigned noise levels as allowed under" the EPN Regulations. It had by then been agreed amongst the experts that the appropriate maximum permitted assigned sound level in the respondents' apartment was one of 44 dB(A).

22 However, Mr Della Gatta was again asked to go to the respondents' apartment on the night of Sunday, 29 February 2004. He did so and, having taken measurements, concluded that the assigned noise level was exceeded by 13 dB(A) in the respondents' guest bedroom and by between 1 and 3 dB(A) in their master bedroom. An excess of 13 dB(A) is very significant. Increased sound levels are logarithmic rather than arithmetic and every increase of 3 dB(A) is effectively a doubling of the energy output and hence the sound received. On the other hand, Mr Della Gatta said that an excess of 1 or 2 dB(A) would not be noticeable to the human ear. In his report dated 1 March 2004, prepared in respect of the sound levels recorded on 29 February 2004, Mr Della Gatta expressed the opinion that "skewing, and an inversion" had occurred (I will return to the meaning of these words later in these reasons). He also suggested that the amplifier setting should be inspected in order to ensure that no tampering had occurred. The respondents lodged a further complaint with the Director.

23 On 26 March 2004 the respondents installed Rockwell in cavities in their apartment walls.

24 In September 2004 the respondents lodged a further complaint with the Director concerning the entire history of the noise problems arising from the function centre. The complaint referred to and attached a copy of extracts from an electronic "noise diary" kept by Mrs Jansen in which she had recorded "all the dates and instances that the music noise has happened from 2001 to 2004".

25 The Director visited the respondents' apartment during the afternoon of 22 October 2004. In his later written reasons for his decision dismissing the complaints he described what had taken place as follows:

> "During the afternoon of 22 October 2004, I inspected the premises to assess the potential sources for noise and vibration which might emanate from the function area of the restaurant. I visited Mr & Mrs Jansen's apartment. Both the licensee and the complainants were in attendance, together with their selected noise consultants, an architect, and an engineer from Multiplex Facilities Management (the property manager). The music was played at maximum volume on the in-house sound system during the site visit and a person was asked to yell at the top of his voice during my assessment. At the end of the site inspection, I formed an initial view that ... while there appeared to be potential weaknesses in the sound attenuation qualities of
>
> the building, the volume of noise emanating into the Jansen's [sic] apartment was barely audible. I acknowledged, however, that the level of noise and vibration could accentuate, especially at night time when the surrounding area would be quieter and more noise sensitive for residents."

26 Then, on 20 November 2004, the Director made a surprise visit. He describes this in the following way in his written reasons:

> "I decided to revisit the premises during ... [an] evening function. The licensee was not informed of the timing of my visit. At 10.30 pm on 20 November 2004, I visited both the function area and Mr & Mrs Jansen's apartment. I noticed that there were many guests enjoying a wedding reception and at least six people dancing to a DJ who was playing loud dancing music on the in-house sound system. I visited Mr & Mrs Jansen's apartment and initially could not hear any noise from the function occurring downstairs. However, after I had placed my ear to the interior side wall (adjoining the Freedman's [sic] apartment [the Freedmans were the respondents' immediate neighbours]) and to the window sills in the main bedroom and study of the Jansen's [sic] apartment, I could hear a faint sound of music being played and people socialising. In my opinion, the level of noise and disturbance was neither discernable nor obtrusive. In fact, I formed the view that the complainants' bedroom and study were relatively quiet."

27 On 21 December 2004 a hearing took place before the Director. During it, a draft acoustical assessment report (the final version of the report is dated 19 January 2005) that had been prepared by Mr Daniel Lloyd of a firm known as Lloyd Acoustics was reviewed. The report referred to results of tests using the "Heart of Glass" music track as well as another track titled "Fools Gold". In the case of the "Heart of Glass" music track, noise levels in the main bedroom and spare bedroom of the respondents' apartment complied with assigned noise levels at all times. In the case of the "Fools Gold" track, there was compliance at all times in the main bedroom, but a marginal excess of 1 dB(A) over the night time assigned noise level in the spare room. "Fools Gold" was a heavier bass track than "Heart of Glass".

28 In the course of his report, Mr Lloyd commented on the report that had been prepared by Mr Della Gatta in respect of the measurements taken on 29 February 2004. He said:

> "In the subsequent report by ... [Mr Della Gatta], it was put forward that skewing and/or inversion may have occurred to the sound system and that this may have resulted in the increase in noise levels. LA [Lloyd Acoustics] has considerable experience in the management of music events, and although not familiar with this terminology, we believe that ... [Mr Della Gatta] is referring to someone increasing the bass levels in order to 'trick' the noise-limiting device into allowing higher perceived noise levels inside the function room. However, as the noise is controlled by a compression system, increasing the base levels would result in the mid to higher frequencies being reduced. The result would be a very poor quality of sound in the function, which is unlikely to be acceptable by professional DJ's. In conversations with Audex, it is considered unlikely this would have happened due to the resultant poor quality of music. Audex also commented that the music was 'skewed' during the calibration test and there was no noticeable difference in ... [the respondents' apartment]. Presumably this latter comment relates to the music levels in the Master Bedroom."

29 Mr Lloyd also suggested, in his discussion of the results, that prior to the setting of the limits on 9 December 2003 the higher volumes of music would have been fairly audible in the respondents' apartment (depending upon the actual music level and the background noise in the apartment) and that this might have led the respondents to "become somewhat sensitised to the music". Notwithstanding that he concluded that the results of his assessment generally showed compliance with the regulations in both bedrooms, he recommended that some additional work be carried out in order to reduce noise levels.

30 Significantly influenced by this evidence, the Director informed the parties, on 21 December 2004, of his satisfaction "that the level of noise and disturbance experienced by Mr & Mrs Jansen, especially since ... [the] October 2004 site inspection, is not undue". He dismissed the complaints.

31 Notwithstanding this decision, in February and March 2005 the appellant commenced works on the function room in order to implement the recommendations made in respect of it by Mr Lloyd. However, on

4 March 2005 the respondents filed their application for review of the decision of the Director. Thereafter, the works in the function room that had been recommended by Mr Lloyd in his report were completed on 7 April 2005. The recommended works, in so far as they related to the respondents' apartment, were completed on 27 and 28 April 2005.

32 Finally, before turning to the judgment of the primary Judge I should mention that on 24 June 2005 Mr Lloyd presented to Multiplex Facilities Management Pty Ltd a further report. In it, he confirmed that the works recommended by him had been completed to his satisfaction. The report recorded that additional measurements had been taken in the function room and in the master bedroom and spare bedroom of the respondents' apartment on 9 May 2005 between 10 am and midday. These measurements revealed that in the case of the "Heart of Glass" music track there was compliance with assigned noise levels at all times in the master bedroom and spare bedroom and that in the case of the "Fools Gold" music track there was compliance with assigned noise levels at all times in the master bedroom and a marginal excess of 2dB in the spare bedroom. Consequently, as Mr Lloyd recorded, there was no significant difference between the results of this assessment and those of the previous assessment undertaken in December 2004. However, in the body of his report, Mr Lloyd said:

> "It should be noted that various texts ... and standards state that where the background noise is within 0-5dB of the noise level of interest, an accurate correction cannot be made. Ideally, the source noise should be 10dB more than the background. In this case the difference between the noise source of interest and background noise level was between 1dB and 4dB.
>
> Although the noise source of interest can be adjusted mathematically to take into account the background levels, it does lead to considerable doubt about the reliability of the results. To illustrate this, the measurements undertaken in the Spare Bedroom/Study consisted of playing the same music track (Heart of Glass in this instance) at the same volume, three times. The variation in the adjusted noise level in ... the [respondents' apartment] should be negligible, but the results show that the variation is 2.5dB ranging from compliance with the regulations to an exceedance of 2dB [18.8 dB(A) to 21.3 dB(A)]. This variation is undoubtedly the result of the influence of extraneous noise sources, which were not audible as music on the DAT recording and were out of our control."

33 The conclusion of Mr Lloyd's report reads as follows:

> "Although the results show a marginal exceedance of the Regulations in the Spare Bedroom/Study for the heavy bass music tracks, the background noise level is extremely close to the noise level when the music is being played. As stated ... where the noise of interest is within 0-5dB of the background noise level, the mathematical adjustment cannot be made with confidence. Therefore we would conclude that it could not be reasonably said that the Function Room is non-compliant with the Regulations, even accounting for penalties that assume musical content."

Judgment of the primary Judge

34 In his judgment, the primary Judge noted that the complaints that had been lodged with the Director by the respondents had contained allegations under both limbs of s 117(1) of the Act. That section reads as follows:

> "**117. Complaints about noise or behaviour related to licensed premises**
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> (1) Where, with respect to licensed premises, a complaint under this section is lodged with the Director alleging -
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> (a) that the amenity, quiet or good order of the neighbourhood of the licensed premises is frequently unduly disturbed by reason of any activity occurring at the licensed premises; or
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> (b) that any -
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> (i) behaviour of persons on the licensed premises;
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> (ii) noise emanating from the licensed premises; or
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> (iii) disorderly conduct occurring frequently in the vicinity of the licensed premises on the part of persons who have resorted to the licensed premises,

is unduly offensive, annoying, disturbing or inconvenient to persons who reside or work in the vicinity, or to persons in or making their way to or from a place of public worship, hospital or school,

the Director may, by notice in writing, require the licensee to show cause why an order should not be made under this section."

35 Section 117(2) of the Act provides that a complaint under subs (1) may be lodged by the Commissioner of Police, the appropriate local government, a government agency, a statutory authority or a person claiming to be adversely affected by the subject matter of the complaint who -

> "(i) resides, works or worships;
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> (ii) attends, or is a parent of a child who attends, a school; or
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> (iii) attends, or is a patient in, a hospital,
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> in the vicinity of the licensed premises concerned."

36 Section 117(4) provides that, after having given interested persons an opportunity to be heard, the Director may, if satisfied that the complaints have been made out and could not be settled by conciliation or negotiation, "make an order under this section but otherwise may dismiss the complaint".

37 Section 117(5) reads as follows:

> "For the purposes of this section, whether pursuant to conciliation or negotiation or by way of an order, the Director may -
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> (a) vary the existing conditions of the licence;
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> (b) redefine, or redesignate a part of, the licensed premises;
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> (c) prohibit the licensee from providing entertainment or any other activity of a kind specified by the Director during a period specified by the Director or otherwise than in circumstances specified by
>
> the Director, and impose that prohibition as a condition to which the licence is to

be subject; or

(d) otherwise deal with the matter in such a manner as is likely, in the opinion of the Director, to resolve the subject matter of the complaint."

38 After referring to s 117(1), and to some additional matters, the primary Judge said (at [11]):

"In order to identify the facts in dispute in this case under s 117 of the Act, it is I believe necessary to traverse the chronology of the complaints in order to determine whether on the evidence the amenity, quiet or good order of the neighbourhood of the licensed premises is frequently unduly disturbed by reason of any activity occurring at the licensed premises, or that any behaviour of persons on the licensed premises or noise emanating from the licensed premises is unduly offensive, annoying, disturbing or inconvenient to the complainants who reside in the vicinity of the licensed premises."

39 Then, after referring to the 10 complaints that had been made by the respondents and to some of the applicable cases, the primary Judge turned to the factual enquiry. He started by setting out his understanding of the competing contentions of the parties, as follows ([30] and [31]):

"It is now necessary to consider the evidence in relation to the activity alleged to have occurred at the licensed premises, the alleged behaviour of persons on the licensed premises and the alleged noise emanating from the licensed premises. In this case, the activity complained of is the alleged behaviour of persons on the licensed premises and the alleged noise emanating from the licensed premises. The alleged behaviour complained of may be described as clapping, cheering, shouting, stomping of feet and speeches in the function room below the complainants' apartment particularly during wedding receptions and similar functions in the evenings between approximately 8 pm and midnight, Thursday to Sunday. On such occasions, it is alleged that dance music (in particular the lower frequencies) is audible in the apartment above to the extent that on occasion it has caused vibrations in the structure and the apartment above. It is alleged that the activity I have just described has occurred in the function room at the licensed

premises since the restaurant began to trade and, as I have said, was alleged to continue at the time of the hearing of this review. The evidence, therefore, covered a period of some four years. It should be observed that much of the evidence on behalf of the complainants about the alleged activity in the function room over this period was uncontested.

The case for the licensee was, however, that on 9 December 2003 the licensee installed a compressor sound system in the function room. The licensee alleged that thereafter, if not before, the sound levels emanating from the function room complied with the *Environmental Protection (Noise) Regulations 1997* ("the Regulations"). The licensee further alleged that the music the subject of the complaints emanated not from the function room but either from adjoining apartments or the adjoining restaurant known as 'Zafferano's'. During its case, the licensee raised the question of fact whether the noise or music I have described was transmitted from outside the complainants' apartment through either an airconditioning vent or a disused door remaining in the structure from earlier days. The licensee also put in issue the credibility of the complainants in respect of their evidence about the alleged activities and its effect upon them. The factual inquiry must therefore be directed to the activity alleged to have occurred on the licensed premises and to the factual issues that I have summarised."

40 He went on to consider much of the evidence. Because I have already set out a good deal of the history of the matter as it emerged during the trial, it is necessary for me to highlight only some additional features of significance arising from the primary Judge's judgment.

41 One of these related to the question whether or not the noise problems were still ongoing. The primary Judge pointed, in that respect, to evidence that had been given by Mrs Jansen to the effect that there was still noise in the apartment, notwithstanding the carrying out of the work recommended by Mr Lloyd

which, she said, had led to some improvement. She said that she could still hear "the shouting, the screaming", that "the noise is still audible" and that she could "still hear the bass noise coming through" (transcript 132 and 216). While Mrs Jansen agreed that she and her husband had previously had problems with music from outside speakers at Zafferano's, her evidence was that this problem had been resolved by the installation of the double glazing

and that, in any event, the music in the function room was different from that played at Zafferano's (at [42] of the judgment).

42 The primary Judge also referred to evidence from Mr Jansen (transcript 247 - 248) to the effect that, "our biggest problem was and still is, we've got a noise issue, and the stomping and the clapping issue that to me cannot be resolved because you can't control those sorts of noises through any system". The primary Judge noted (at [55]) Mr Jansen's acknowledgement that the respondents could produce no evidence of measurements of noise levels in the master bedroom in excess of the regulatory level since the remedial work recommended by Mr Lloyd had been carried out. However, he mentioned that Mr Jansen had gone on to say (transcript 355):

> "Not readings but we still do get the noise from the clapping and the shouting and the ballyhooing from all the weddings. That's still audible."

He added that, in re-examination, Mr Jansen had emphasised (transcript 360) that:

> " ... the clapping, shouting and stomping which doesn't go through any machines, that is an ongoing issue that has been there all that time as well."

43 The primary Judge also referred to Mr Della Gatta's evidence concerning "skewing" and "inversion" and as regards visits that he made to the respondents' apartment on 21 and 28 May 2005. On the first of those occasions Mr Della Gatta found, without needing to take any measurements, that the noise was within the assigned level. On the second occasion he found that in the spare bedroom the noise level exceeded the assigned noise level by 1 dB(A) on one reading and, on a second, that the reading met the assigned noise level. The primary Judge mentioned (at [66]) that, when asked about Mr Lloyd's June 2005 report, Mr Della Gatta had said (transcript 419) that the background noise during the daytime is higher than that at night and that calibration or testing should be carried out at night. Mr Della Gatta agreed with the conclusion reached by Mr Lloyd that the noise control treatment had reached the limits of practicability (transcript 423).

44 The primary Judge also mentioned (at [73]) the evidence of Mr Lloyd to the effect that, in a mixed use development, the calculation of the assigned noise level is not at all clear and is open to a lot of interpretation. He said that Mr Lloyd had said that a 1 decibel exceedance

of the assigned noise level was not significant and that the 13 decibel difference found by Mr Della Gatta on 29 February 2004 raised the question whether the noise level at that particular time had been influenced by another source outside the function room.

45 The primary Judge referred, at some length, to evidence that had been given by Mr Rasheed. Most significantly, for present purposes, he referred to Mr Rasheed's evidence that weddings were a very important part of the appellant's business (transcript 774). Also significant for present purposes is evidence that was given by Mr Rasheed (referred to in the judgment at [89]) to the effect that the existence of the old barn door and an airconditioning vent on the outside wall of the respondents' apartment (mentioned at [31] of the judgment, quoted above) were transmission paths for noise to travel into the apartment from outside the building (making it easier for noise from Zafferano's to penetrate the apartment). Mr Rasheed said that, because, in his opinion, the function room was compliant with noise requirements, the source of the noise penetrating the respondents' apartment must have been elsewhere.

46 It is worth mentioning in this respect that, in the course of his oral evidence, Mr Della Gatta agreed that the 13 decibel difference between the reading taken on 9 December 2003 and that taken on 29 February 2004 could not be wholly attributable to skewing but said that (transcript 462) there was nothing to suggest that the noise was coming from any other location than the function room. He said that the only conclusion he could draw at the time was that the sound system had been bypassed or tampered

with (although the primary Judge held, during the course of the trial (transcript 683), that there was no evidence of tampering with the system).

47 The primary Judge rejected the suggestion that noise from elsewhere had entered the respondents' apartment through the airconditioning vent or the barn door. He said, in this respect (at [91] - [93]):

> "It must also be observed that Mr Della Gatta, Mr Lloyd and Mr Herring are all experienced acoustical engineers and none detected the airconditioning vent or the barn door as a possible noise path. It might also be observed that the frequent allegations of vibrations occurring in the apartment while the function room is trading can only be explained by noise emanating from the function room and not from outside the building.
>
> Given the evidence for both the complainants and the licensee about the function room as a source of noise principally during 2002, 2003 and 2004, it seems to me reasonable to conclude that until Mr Rasheed suggested an alternative source of noise in the complainants' apartment during these proceedings, the parties and their expert advisors all identified the function room as a source of both musical and human noise in the complainants' apartment.
>
> I find the evidence for both the complainants and the licensee establishes on the balance of probabilities that the function room has at all material times been a source of both musical and human noise in the complainants' apartment. In my opinion, the complainants have discharged the onus on them to establish that the noise complained of emanates from the function room in the licensed premises and not elsewhere. In the light of the evidence upon which this conclusion is based, I am of the opinion that the licensee has not discharged the evidentiary onus upon it to establish the barn door or airconditioning vent as an alternative source of the musical and human noise complained of. In my opinion, the evidence for the complainants, the licensee and the expert evidence all points unequivocally to the function room being a predominant source of noise in the complainants' apartment. In these circumstances, it becomes unnecessary to examine the further expert evidence led by the licensee in support of its contention that the barn door and airconditioning vent constituted a possible alternative source of noise in the complainants' apartment. Whatever conclusions that evidence might lead to, the evidence cannot displace the primary facts established by the complainants and the expert opinion in relation to those facts of Mr Della Gatta, Mr Herring and Mr Lloyd."

48 The primary Judge then turned his attention to the complaints. He found that these (they covered the period December 2002 until late 2004) had all been proved. In the course of dealing with the complaints he said (at [96]) that, while certain entries in Mrs Jansen's diary had been shown to be in error, it otherwise constituted a subjective personal record from December 2002 until December 2004 and that much of its contents had not been contested.

49 So far as the complaints made after 9 December 2003 were concerned, the primary Judge said (at [99]):

> "Some considerable attention was given to the 13 decibel difference between the calibration of the compressor on 9 December 2003 and the reading on 29 February 2004. Mr Lloyd remained of the opinion that his tests confirmed that at the time they were taken the sound penetrating the apartment did not exceed the regulatory level. He accepted that 'marginal' exceedance with bass music occurred on subsequent testing. Finally, he pointed out that in a mixed use development the calculation of the assigned noise level is not at all clear and is open to a lot of interpretation. It is in my opinion most significant that Mr Lloyd's opinion in this case, expressed in terms that the function room itself complies with the Regulations, is founded on the results of testing music 'with a normal bass component' and does not exclude the likelihood that music is played in the function room that has a higher than normal bass component. It equally does not exclude the possibility that on occasion the bass component in the music is increased, but not to an extent that the music becomes distorted. These considerations lead me to conclude on balance that the complainants have been disturbed by low frequency music as alleged in the sixth to tenth complaints, notwithstanding the

installation of the compressor. I also find that they have frequently been disturbed by noise created by guests in the function room of the nature I have described, noise that is not controlled by the compressor."

50 The primary Judge then turned to the determination of the issue under s 117(1) of the Act. It is necessary to quote from his judgment at some length in this respect. He said (at [100] - [105]):

"I have already explained that the onus is on the complainants to establish on the balance of probabilities that the licensee was at the date of the re-hearing in breach of s 117(1) of the Act. I turn, therefore, to the evidence in relation to the first half of 2005. I have referred to the evidence of Mrs Jansen at T216 and Mr Jansen at T355 and T360. That evidence is representative of their case. They acknowledged some reduction in disturbance from amplified music in their apartment over that occurring in previous years the subject of the 10 complaints.

I find that during the first half of 2005 the complainants were regularly disturbed by the low frequency component of music

emanating from the function room and by the behaviour of people in the function room singing, shouting, clapping and stamping. In my opinion, this finding is on the evidence of Mr Jansen consistent with the concession that the complainants produced no evidence of music noise levels in the master bedroom of their apartment in excess of the regulatory level since the remedial work recommended by Mr Lloyd was carried out.

I find that the test undertaken by Mr Lloyd on 9 May 2005 and the measurements taken by Mr Della Gatta on 28 May 2005 were both at or about the agreed assigned noise level of 44 dB(A). This finding must be considered in the light of the following factors. Firstly, Mr Lloyd asserted that in a mixed use development, calculation of the assigned noise level is an imprecise exercise. Secondly, the measurements I have just referred to were close to the assigned noise level of 44 dB(A). Thirdly, the measurements do not take account of the human activity in the function room complained of which the complainants were adamant continued at the time of the rehearing during functions in the function room. Fourthly, the measurements do not take account of the fact asserted by Mr Della Gatta and accepted by Mr Herring that low frequencies are likely to be more audible to the human ear when background noise is at a minimum in the later evening, and further that low frequency sound transfers more readily through the structure.

I have already observed that the parties were agreed in this case that the ultimate issue is not whether the licensee is in breach of the Regulations. It is whether on the evidence the court should conclude that activity occurring at the licensed premises frequently disturbs the amenity, quiet or good order of the neighbourhood by interrupting the complainants' regular enjoyment of their property, to such an extent that it may in the circumstances of the case be regarded as undue, and that the behaviour of persons on the licensed premises or the noise emanating from the licensed premises is unduly offensive, annoying, disturbing or inconvenient to the complainants. It is, therefore not necessary for the court to determine the assigned noise level at these premises in accordance with the Regulations and indeed on the evidence it is not possible to do so. The only

conclusion open is that the agreed assigned level of 44 dB(A) is conservative and likely to be in favour of the licensee.

On the evidence, I find that in a mixed use development the calculation of the assigned noise level under the regulations is not at all clear and is open to a lot of interpretation. On the facts as I have found them, the repeated assertions by Mr Rasheed and Mr Lloyd that the function room is 'compliant' is [*sic*] not alone determinative of the ultimate issue.

The determination of the ultimate issue requires the court to consider whether in the past and currently the activity occurring at the licensed premises frequently disturbs the amenity,

quiet or good order of the neighbourhood by interrupting the complainants' regular enjoyment of their property, to such an extent that it may in the circumstances of the case be regarded as undue and whether the behaviour of persons on the licensed premises or the noise emanating from the licensed premises is unduly offensive, annoying, disturbing or inconvenient to the complainants. Counsel for the licensee submitted that the word 'undue' and 'unduly' in s 117(1) of the Act requires the court to determine whether in the circumstances of the case the activity complained of is disproportionate. He submitted and I accept that the measure is not the sensibilities of a particular individual, but rather what is reasonable in the given circumstances. It is, therefore, necessary to identify the circumstances revealed by the evidence relevant to the determination whether the activity complained of at the licensed premises is to be considered disproportionate and therefore undue."

51 Then, after referring to the evidence that had been given by Mr Shrapnel to the effect that the provision of mixed use developments provided a choice of lifestyle and environment to people, and that it was not intended that the residential component of mixed used developments would have the same qualities as residential developments in suburbia, he went on to say (at [107] - [110]):

"The evidence of Mr Rasheed was that the function room is not operated 'for casual dining'. (T810) In my opinion the evidence establishes that the function room cannot be described as 'ancillary to the predominant restaurant use' in accordance with the planning approval. The licensee carries on business under

the restaurant licence in the licensed premises as a whole. It is clear that the business conducted at the licensed premises consists primarily and predominantly of the regular supply to customers of meals to be eaten there and that liquor is consumed on the licensed premises ancillary to such meals. It is equally clear and I find that the customers whose requirements are provided for in the function room are not engaged in casual dining in small groups but attend functions in groups of up to 100. I find this is a substantial part of the licensee's business carried on under the licence. I find that the function room is in the immediate proximity of the complainants' apartment. In my opinion, it is open to conclude in accordance with the evidence of Mr Shrapnel that the conduct of a restaurant business providing for casual dining in these premises is proportionate to the circumstances of the mixed use development. In my opinion, the conduct of a function room in close proximity and below the complainants' apartment is not when the activity occurring at the licensed premises frequently disturbs the quiet of the neighbourhood by interrupting the complainants' regular enjoyment of their property, and further the behaviour of persons on the licensed premises or the noise emanating from the licensed premises is annoying or disturbing to the complainants.

It was submitted for the licensee that the absence of current complaints by other residents [there had been none after 9 December 2003] should lead the court to give less weight to the evidence of the complainants. Given the findings of fact I have reached, I do not accept that submission. Mr Shrapnel observes 'relatively few' residents reside in the immediate vicinity of the function room and no others reside immediately above it. I accept the evidence of Mr Pardoe [*sic*] that he is not disturbed by activity in the function room, but on all the evidence that does not detract from the conclusions I have expressed.

I have found that the complainants have frequently been disturbed by low frequency music and noise created by guests emanating from the function room since the premises opened and that they continue to be so disturbed. For the reasons I have given, I consider that disturbance should be regarded as undue,

in terms of s 117(1) of the Act, in the circumstances as I have described them and on the facts as I have found them.

On the balance of probabilities, I conclude that the complainants have discharged the burden upon them under s 117(1) of the Act and established that the quiet of the neighbourhood of

the complainants' premises is frequently unduly disturbed by activities in the function room at the licensed premises and that the noise emanating therefrom is unduly disturbing to the complainants."

Original grounds of appeal

52 There were originally nine grounds of appeal. Omitting particulars, these read as follows:

"1. The learned trial judge erred in law in that he held that the appellant had an evidentiary onus to establish the existence of other possible sources of noise and had not discharged that onus.

2. The learned trial judge erred in law by failing to afford the appellant procedural fairness in excluding from his consideration the evidence that there are other sources of noise and entry points for that noise into the respondents' apartment, or, in the alternative, if he did take this evidence into account, in failing to give any or any adequate reasons for rejecting it ...

3. The learned trial judge erred in law in finding that the respondents continue to be unduly disturbed by low frequency music and noise created by guests emanating from the licensed premises in that -

(a) such a finding in relation to low frequency noise is unreasonable, in the sense that it is so unreasonable no reasonable person properly considering all of the relevant evidence could have made it; and

(b) further or alternatively, in making such a finding in relation to either low frequency noise or noise created by guests, the learned trial judge failed to afford the appellant procedural fairness in not

taking into account evidence that there had been no complaints nor any cause for complaints in the six months prior to the hearing or, if he did take this evidence into account, in failing to give any adequate reasons for rejecting it.

4. The learned trial judge erred in law by failing to afford the appellant procedural fairness in not taking into account the evidence that put into issue the question of whether the complaints were objectively reasonable, or, in the alternative, if he did take this evidence into account, in failing to give any or any adequate reasons for rejecting it ...

5. The learned trial judge erred in law by failing to afford the licensee procedural fairness by failing to acknowledge or address or provide any or any adequate reasons resolving fundamental conflicts in the evidence between the expert witnesses called by the respondents and the expert witnesses called by the appellant ...

6. The learned trial judge erred in law by failing to afford the appellant procedural fairness by failing to consider evidence which cast doubt upon the accuracy of the respondents diary of offensive events and whether its contents can be relied upon as being objectively reasonable or, in the alternative, if he did take such evidence into account, in failing to give any adequate reasons for rejecting it ...

7. The learned trial judge erred in law by failing to afford the appellant procedural fairness in permitting the hearing to proceed in circumstances where the respondents did not disclose the details of alleged incidents that they relied upon until the commencement of the hearing, sought and were permitted to rely upon alleged incidents that had never been the subject of complaints to the Director and of which the appellant had no or no adequate notice and recast their case in closing ...

8. The learned trial judge erred in his interpretation of the 'neighbourhood of the licensed premises' under s 117(1)(a) in finding that undue disturbance to the respondents alone was

sufficient to establish a complaint under s 117(1)(a).

9. The learned trial judge erred in law by -

(a) failing to afford the appellant procedural fairness in not taking into account evidence that the respondents knew or ought to have known of the likelihood of noise emanating from the licensed premises at the time of purchasing their apartment or, in the alternative, if he did take this evidence into account, in failing to give any adequate reasons for rejecting it;

(b) failing to take account of a relevant consideration, namely whether the respondents knew or ought to have known of the likelihood of noise emanating from the licensed premises at the time of purchasing their apartment;

(c) thereby failing to apply the proper threshold test as to whether the noise and activity complained of by the respondents was 'undue', having regard to their expectations at the time of purchasing their apartment."

53 During the course of the hearing the appellant sought to add an additional ground of appeal to the effect that the primary Judge had erred in misinterpreting s 117 as providing for a subjective rather than an objective test. Directions were made to the effect that a minute of the additional ground should be provided to the Court and to counsel for the respondents, together with written submissions in support of the amendment. Directions were also made allowing the respondents the opportunity to make written submissions on the question of whether or not the amendment should be allowed and also as regards the substance of the additional ground (notwithstanding that a good deal of discussion during the hearing of the appeal itself had been directed to the proper construction of s 117 and to the approach adopted in respect of it by the primary Judge). The proposed ground has since been formulated as follows:

"10. The learned trial Judge erred in law in that he misinterpreted s117 as providing for a subjective rather than an objective test, in particular;

(a) he interpreted section 117(1)(a) as being satisfied if the Respondents were frequently unduly disturbed by reason of activity occurring at these licensed premises consisting of a restaurant and associated function room, rather than requiring him to consider whether the amenity, quiet or good order of '*the neighbourhood*' was so disturbed; and

(b) he interpreted section 117(1)(b) as being satisfied if the Respondents found noise emanating from these licensed premises consisting of a restaurant and associated function room to be unduly offensive, annoying, disturbing or inconvenient, rather than requiring him to consider whether '*persons who reside or work in the vicinity*' were so affected."

54 In my opinion the appellant should be given leave to make this addition to the grounds of appeal. As is apparent from the submissions which have been lodged in respect of it, the question is one of law only and is fundamental to any proper consideration of the approach adopted by the primary Judge. Moreover, it is in my opinion relevant to any adequate consideration of grounds 3, 4, 8 and 9.

55 Given that the question is one of law only, I am not persuaded that there is any prejudice to the respondents, arising out of the amendment, that could not be catered for by an award of costs, should that be appropriate. The only prejudice that was pointed to by counsel for the respondents in this respect was that the amendment would further delay the resolution of the appeal in circumstances in which there is, by virtue of s 29 of the Act, an automatic stay of the orders made by the primary Judge. We were invited to have regard, in this respect, to an affidavit sworn by Mr Jansen on 6 February 2006, in support of an application (not subsequently proceeded with) for interim orders under s 29 of the Act, in which he deposes to ongoing disturbance from the function room since the time of the primary Judge's judgment. However, the delay that was brought about by the need for additional submissions to be lodged in writing was one of only weeks. That being so, it seems to me to be unnecessary to have regard to Mr Jansen's

affidavit. I should mention that counsel for the appellant objected to that affidavit, pointing out (correctly) that it was not evidence in the appeal and saying that it dealt with controversial issues and that, had the application for interim orders been pursued, the appellant would have filed a number of affidavits in response. The only basis upon which Mr Jansen's affidavit could now be received is for the purpose of reciting what are said to be the ongoing consequences of any delay brought about by the application to amend. Given that the delay is minimal, as I have said, the affidavit does not advance the respondents' position in that regard.

Grounds 1 and 2

56 I will deal with grounds 1 and 2 together.

57 As to ground 2, I am not persuaded that there was any failure of procedural fairness in excluding evidence of other sources of noise and entry points for that noise into the respondents' apartment or that there was any failure to give any adequate reasons for rejecting that evidence.

58 It is plain from what was said by the primary Judge that he was satisfied that the function room was the source of the noise relevantly complained of by the respondents. He said so at [93] of his reasons. He also said (at [91] of his reasons) that each of Mr Della Gatta, Mr Lloyd and Mr Herring were experienced acoustical engineers and that none of them paid any regard to the airconditioning vent or the barn door as an alternative source of noise ingress. It is also apparent from what he said that he accepted evidence that had been given by Mr Della Gatta as regards the existence of vibrations in the apartment caused by the noise and of the fact that those vibrations could only be explained as having been caused by noise emanating from the function room below (Mr Della Gatta had also offered a number of other factors in support of his conclusion that the noise in question came from the function room). Having made those findings, it was unnecessary for the primary Judge to examine evidence of alternative sources of noise in the respondents' apartment. Even if there were such sources, his finding necessarily carried with it the conclusion, based upon the evidence accepted by him, that they were not the sources of the noise relevantly complained of and that evidence concerning them was consequently of no assistance. If he erred in his conclusion that the evidence relied upon by him established conclusively that the noise in question originated from the function room, that was an error of fact and not of law. By s 28(2) of the Act no appeal lies against a decision of the Liquor Licensing Court except upon a question of law.

59 As to ground 1, it is true that the appellant bore no evidentiary onus "to establish" an alternative source of the music and human noise complained of. If there was an issue as to alternative sources of noise, the onus always rested upon the respondents, as the complainants, to establish that the noise complained of by them originated from the function room and not elsewhere: see *Cross on Evidence*, 7th Australian ed, 2004, at [7015] and the authorities there cited. However, it is plain from the reasons of the primary Judge, read as a whole, that he was satisfied that the respondents had discharged their legal burden of proof by establishing that the relevant instances of noise complained of by them originated from the function room even if, as the appellant contended, the airconditioning vent and barn door enabled noise from other sources to reach the apartment: see, in particular, [93], [109] and [110] of the judgment.

60 It follows that grounds 1 and 2 have not been made out.

Grounds 3, 4, 8, 9 and 10

61 It is convenient to deal with grounds 3, 4, 8, 9 and 10 together, as these raise overlapping issues.

62 Ignoring asserted errors of fact that are dressed up as errors of law, and putting to one side a complaint concerning the adequacy of the primary Judge's reasons, these grounds, together, come down to the proposition that the primary Judge misconstrued s 117(1) of the Act and that it was not open to him, having regard for the whole of the evidence and on the proper construction of s 117(1), to find that in the six months preceding the hearing (the first half of 2005) the noise emanating from the function room was such that it:

(a) frequently unduly disturbed the amenity, quiet or good order of the neighbourhood of the licensed premises; or

(b) was unduly offensive, annoying, disturbing or inconvenient to persons who reside in the vicinity of the licensed premises.

63 I propose, first, to deal with the proper construction of s 117(1) and then with the primary Judge's application of it to the facts found by him. It is important to bear in mind in this exercise that, if there was no continuing breach of s 117(1), it was inappropriate to impose the limitations upon the appellant's licence that were ordered by the primary Judge.

64 As to the first limb of s 117(1), the Act provides no definition of "neighbourhood". Both parties were content to rely upon the meaning attributed to that word by the New Shorter Oxford Dictionary, being "a district or portion of a town, city, or country, esp. considered in reference to the character or circumstances of its inhabitants; a small but relatively self-contained sector of a larger urban area". However, they differed as to the application of that definition. Counsel for the appellant contended that only one of a number of neighbouring apartments could not amount to a "neighbourhood". Counsel for the respondents contended that one apartment could amount to a neighbourhood in circumstances in which it was the only apartment with its bedrooms directly above the function room.

65 The word "neighbourhood" must necessarily take its meaning from its context. Here, the legislature has chosen to distinguish between the "amenity, quiet or good order of the neighbourhood", on the one hand (s 117(1)(a)), and the effect of conduct or noise on "persons who reside ... in the vicinity", on the other (s 117(1)(b)). It seems to me in that context that, in a case such as this where several apartments are proximate to the licensed premises and form, with them, a small and self-contained sector, it is the whole of that sector that comprises the neighbourhood and not merely the apartment that is most immediately affected. It consequently seems to me that the "neighbourhood" for the purposes of s 117(a) comprised at least the whole of building 3. That conclusion is not affected by the fact that a complaint under s 117(1) may be lodged, amongst others, by a person claiming to be adversely affected who "resides ... in the vicinity of the licensed premises concerned": s 117(2) of the Act. The fact that a complaint may be made by only one affected person does not alter the test that is required to be satisfied under either of the limbs of s 117(1).

66 As to the second limb of s 117(1), counsel for the appellant contended that the word "vicinity", in its context, has a meaning that is wider than "neighbourhood". He supported this contention by reference to the fact that subs (b) is directed to persons residing or working in the "vicinity" (who, he suggested, might consequently have to pass through the "neighbourhood") and to persons who are making their way to or from a place of public worship, hospital or school. However, the subsection is directed at any one or more of behaviour, noise and disorderly conduct and I doubt that the legislature would have intended it to operate only in circumstances in which the persons identified are passing the premises and not in the case of persons, not themselves amounting to a "neighbourhood", who, as adjacent residents, are permanently close to the source of the behaviour, noise or disorderly conduct. If I am right in the construction that I have put upon s 117(1)(a) (and it seems to me that the protection afforded by subs (a) in respect of "amenity, quiet or good order" is more suited to a neighbourhood than it is to individual residents) and as regards the distinction drawn by the legislature between a neighbourhood, on the one hand, and individual persons living in the vicinity or passing through it, on the other, there is no basis for giving the word "vicinity" a wide construction. Nor, in my opinion, is there any good reason for reading subs (b) as being inapplicable to the occupants of only one adjoining residence.

67 That construction, which seems to me to be conveyed by the ordinary meaning of the words used, does not leave a licensee at risk by reference to the subjective sensibilities of its immediate neighbours. The noise or conduct must be "unduly" offensive, annoying, disturbing or inconvenient, relevantly, to persons who live in the vicinity. That, it seems to me, necessarily conveys an objective test of what could reasonably be expected to be tolerated by such persons.

68 Counsel for the respondents, in his written submissions, contended that the test of what is "undue" must be determined in the light of the effect of the behaviour, noise or conduct on the respondents in their capacities as the persons complaining. He also suggested that the test must vary depending on the complaint of the person claiming to be adversely affected by the subject matter of that complaint and the capacity in which that person is affected. While it is true that, in considering whether a disturbance etc is "undue", regard may be had to the circumstances of the complainant and the nature of the complaint, the

test remains objective, in the sense that the disturbance etc must be one that would be regarded by a reasonable person as "undue", having regard for all of the relevant circumstances and taking into account what might reasonably be expected from premises of the kind licensed.

69 That is the approach that was adopted by King CJ (with whom Legoe J and Prior J were in agreement) in ***Vandeleur v Delbra Pty Ltd*** (1988) 48 SASR 156. That case involved the rather different circumstance of an application for the grant of a liquor licence. However, what was said by King CJ in respect of the provisions of s 62(1) of the *Liquor Licensing Act 1985* (SA) is of some assistance. The applicant was required by that section to satisfy the Licensing Court "that the grant of the licence is unlikely to result in undue offence, annoyance, disturbance or inconvenience to those who reside, work or worship in the vicinity of the licensed premises". King CJ said (at 159) that those provisions were designed to protect the persons identified from offence, annoyance, disturbance or inconvenience "which exceeds the degree reasonably to be expected from the licensed premises". He also said (at 160) that the remedies provided for by the Act would only be available where the noise or behaviour "goes beyond what is naturally to be expected and where the consequent offence, annoyance, disturbance or inconvenience exceeds what those who reside, work or worship nearby can reasonably be expected to tolerate".

70 In ***Hackney Tavern Nominees Pty Ltd v McLeod*** (1983) 34 SASR 207 the Full Court of the South Australian Supreme Court dealt with an appeal concerning the effect of s 86(d) of the *Licensing Act 1967 - 1982* (SA). The relevant part of subs (1) of that section reads as follows:

> "Where it appears to the court, upon the complaint of a person referred to in subsection (4), that -
>
> > (a) a licensee is conducting business on licensed premises in a manner that unduly disturbs or inconveniences persons who reside in the vicinity of the licensed premises;
> >
> > ...
>
> the court may, by summons served on the licensee, require him to show cause why an order should not be made under this section."

The orders referred to encompass suspension of the licence or the attachment of conditions to it. The appeal was from a judgment of an acting Judge who, in considering the word "undue", had said that residents living near to a hotel must expect a certain amount of noise and disturbance which naturally occurs and that "disturbance such as loud talking, swearing, perhaps even the odd screaming, perhaps even a fight or two, even on a relatively regular basis might not in many cases be classed as undue". His judgment was upheld on the appeal and Wells J (with whom Zelling J and Bollen J were in agreement), said (at 214) that the tests applied by the acting Judge "flowed from a straightforward and commonsense interpretation of s 86(d), according to its ordinary and natural meaning" and that he was correct in the terms in which he directed himself on the law.

71 I have said that in the present case the respondents knew, at the time of acquiring their lease, that they would be living above a restaurant. However, as I have earlier mentioned, they were not aware that the licensed premises would encompass a separate function room. Accepting that that is a material consideration and that the issue should be approached by treating the function room as if it had moved in adjacent to the respondents rather than that they had moved in adjacent to the function room, the respondents' onus remained that of demonstrating that the noise to which they were subjected was unreasonable in the circumstances.

72 I should mention, in this respect, that the respondents relied upon the finding by the primary Judge (at [106] and [107] of his reasons, quoted in part above) that, notwithstanding that the licence held by the appellant required that the function room be ancillary to the predominant restaurant use, the evidence established that the use to which the function room was put could not be described as ancillary and that, while the conduct of a restaurant business providing for casual dining was proportionate to the circumstances of the mixed use development, "the conduct of a function room in close proximity and below the complainants' apartment is not when the activity occurring frequently disturbs the quiet of the neighbourhood ... ". The finding that the use of the function room could not be described as ancillary to a

predominant restaurant use is not challenged by the appellant. Consequently, the question of whether the noise is "unduly" offensive, annoying, disturbing or inconvenient to the respondents must be considered in the light of the fact that the function room is being used to a greater degree than was contemplated by the licence (it seems to me that the reference by the primary Judge to "planning approval" was an error). However, that does not alter the fact that the respondents bore the onus of demonstrating that the noise experienced by them was objectively "undue", having regard for what could reasonably be expected from a facility of the kind licensed, had it traded in accordance with its licence.

73 That brings me to the manner in which the test was expressed and applied by the primary Judge.

74 He said, correctly in my respectful opinion, that the onus was on the complainants to establish on the balance of probabilities that the licensee was, at the date of the trial, in breach of s 117(1) of the Act (at [100] of his reasons). He also said that the question to be decided by the Court was not that of whether the noise level was in accordance with the EPN Regulations (although that seems to me to be a relevant factor) but rather whether the noise was such as to infringe either or both of the limbs of s 117(1). That, too, is correct. Finally, so far as the test is concerned, the primary Judge rightly accepted that the word "unduly" in s 117(1) required the Court to determine whether, in the circumstances of the case, the activity complained of was disproportionate and that the measure was "not the sensibilities of a particular individual, but rather what is reasonable in the given circumstances" (at [105]).

75 However, and as to the first limb of s 117(1), it seems to me that the primary Judge wrongly equated disturbance of the respondents with disturbance of the neighbourhood. When he posed the question for decision under this limb (at [103]) he said that the issue was whether the activity at the licensed premises frequently disturbed the amenity, quiet or good order of the neighbourhood "by interrupting the complainants' regular enjoyment of their property, to such an extent that it may in the circumstances of the case be regarded as 'undue'". In [105] of his reasons, he posed the same question in the context of the past and current activity occurring at the licensed premises (see also [107] and [110] of his reasons, quoted above). As will be apparent from what I have already said, he was, in my respectful opinion, in error in adopting this approach. Had he adopted what I take to be the correct approach, he would, in my opinion, necessarily have concluded that no continuing breach of s 117(1)(a) had been made out, because the respondents were the only ones in the neighbourhood who continued to experience or complain of any disturbance and because, as I have said, their apartment did not, of itself, amount to a neighbourhood on the proper construction of that section. There was consequently no basis for a finding that the amenity, quiet or good order of the neighbourhood of the licensed premises was frequently unduly disturbed by reason of any activity occurring at the licensed premises.

76 It also seems to me that, having correctly stated the test under the second limb, the primary Judge went on to misapply it. He said (at [107]) that the conduct of a function room in close proximity and below the respondents' apartment was not proportionate "when ... the behaviour of persons on the licensed premises or the noise emanating from the licensed premises is annoying or disturbing to the complainants" (see also [11] of his judgment). Lack of proportionality (which might be equated with objective unreasonableness in the circumstances) was not made out merely because the complainants were subjectively annoyed or disturbed. The disturbance had to be objectively "undue".

77 Similarly, what was said by the primary Judge at [109] of his judgment (quoted earlier in these reasons) focused, once again, upon the subjective effect of the noise on the respondents. The primary Judge said only that he found that the respondents had frequently been disturbed by the noise, that they continued to be disturbed and that the disturbance should be regarded as undue for the purposes of s 117(1) of the Act, in the circumstances as he had described them and on the facts as he had found them. At [110] of his judgment he concluded that the complainants had discharged their onus and established "that the noise emanating therefrom is unduly disturbing to the complainants".

78 While what was said by the primary Judge followed the wording of s 117(1)(b), having regard for the fact that, as he had found, the respondents were the relevant persons residing in the vicinity of the licensed premises, and notwithstanding that he had earlier accepted that the word "unduly" imported a concept of objective unreasonableness, it seems to me that his finding that the disturbance was "undue" depended solely upon his finding that the respondents had frequently been disturbed and continued to be so. In my respectful opinion the proper application of the test to which I have referred required a careful

analysis of all of the evidence which bore upon the questions of how often noise was experienced by the respondents, what were the noise levels and whether or not the annoyance, disturbance or inconvenience caused by the noise to the respondents as persons living in the vicinity was, and remained, objectively "undue" in all of the circumstances, including that of what might reasonably be expected from licensed premises of that kind, operating in accordance with the conditions of the licence. However, the primary Judge made no analysis of the kind contemplated by this last question, reinforcing the notion, conveyed by what was said by him (at [107]), that he regarded it as sufficient for the purposes of s 117(1)(b) that the respondents had frequently been annoyed or disturbed by the noise. Moreover, it seems to me that if the primary Judge had correctly applied an objective test he must necessarily have concluded, on the whole of the evidence, that the disturbance caused to the respondents had not continued to be undue after the remedial measures undertaken in April 2005 or, indeed, after the sound limits were set on 9 December 2003.

79 I have said that, by letter dated 19 December 2003, Mr Della Gatta confirmed that, with the current settings (and it is significant that these had been agreed upon by the respondents), compliance with the EPN Regulations had been achieved with respect to the amplified music system. That was confirmed by the sound measurements taken by him in the respondents' apartment on 17 January 2004. While he found that assigned noise levels were exceeded on 29 February 2004, the excess in the master bedroom on that day was limited to readings between 1 and 3 dB(A) and, as I have mentioned, Mr Della Gatta said that an excess of 1 or 2 dB(A) would not be noticeable to the human ear. The excess of 13 dB(A) measured in the guest bedroom was, as I have also said, very significant. However, that result seems, in many respects, to have been a surprising one that was not subsequently repeated. Indeed, Mr Della Gatta himself appears to have been somewhat surprised by the outcome and his explanation of skewing or inversion is in some respects problematic.

80 I have earlier mentioned that, in his report dated 19 January 2005, Mr Lloyd doubted that skewing was a satisfactory explanation. Mr Della Gatta accepted during the course of cross-examination that, if the system had not been tampered with (and I have earlier mentioned that the primary Judge held during the trial that there was no evidence of any tampering with the sound system), in order to get an excess of 13 dB(A) the skewing of the sound to bass would have to be to an extent which left the music unrecognisable as such "because it would just be a blur with heavy bass" (transcript 461). He acknowledged that this would be very unpalatable to persons in the function room. He also regarded the difference in sound levels between the master bedroom and guest bedroom as being surprising, as he would have expected the noise in the guest bedroom to be only 4 dB(A) higher than that in the master bedroom (although he added that the music had changed as between the two measurements) (transcript 461). Mr Herring said, in his evidence (transcript 632), that he had never measured a 12 dB(A) difference between the main bedroom and the spare bedroom. Mr Della Gatta also said that noise from voices or clapping was not discernible on the night of 29 February 2004 and that the work done under Mr Lloyd's direction had reduced that part of the noise level to the point where it was "virtually not discernible" (transcript 471; and see also transcript 446). He said that he could not hear any noise from "foot stomping" (transcript 472). Mr Della Gatta accepted that inversion was unlikely to have been the reason for the unusual result recorded by him in the guest bedroom.

81 All of this leaves open the prospect that, on this occasion, the increased level recorded in the guest bedroom was either an error (especially when compared with the very different reading obtained in the master bedroom, even allowing for a change in music) or was influenced by some other source of noise. It may be relevant, in this last respect, that the evidence established that noise can be heard from neighbouring apartments and that there had been occasions upon which complaints of noise emanating from the function room had in fact come from elsewhere (some of these complaints had been made by the respondents).

82 In any event, additional remedial steps were taken after that reading had been obtained. I have said that the respondents installed Rockwell in cavities in their apartment walls on 26 March 2004 and that Mr Lloyd's recommendations, made in his report dated 19 January 2005, were implemented. Even prior to the implementation of Mr Lloyd's recommendations, the Director, in the course of his visit on 20 November 2004, could hear no noise from the wedding function then being held in the function room until such time as he placed his ear to the interior side wall adjoining the Freedmans' apartment and to the window sills in the main bedroom and study of the respondents' apartment. Even then, the sound that he

heard was faint and he considered that the level of noise and disturbance was neither discernible nor obtrusive. As I have said, in the hearing before him on 21 December 2004 the Director accepted the findings of Mr Lloyd to the effect that his tests had shown general compliance with the EPN Regulations in both bedrooms in the respondents' apartment.

83 The respondents could produce no evidence of measurements of noise levels in their apartment significantly in excess of the assigned levels agreed upon by the experts at any time during 2005, notwithstanding that assessments were made by Mr Lloyd on 9 May 2005, by Mr Della Gatta on 21 and 28 May 2005 (on 21 May he made no measurement as he "could just hear from the noise levels that they were within limits" (transcript 466)) and by the City of Perth on two occasions prior to June 2005. It is important to bear in mind, in this respect, that Mrs Jansen, in her evidence, said that she could still hear "the shouting, the screaming" and the "bass noise" and that Mr Jansen said that their biggest problem was "the stomping and the clapping issue". The primary Judge, in arriving at his conclusion, appeared to rely heavily both upon the possibility that, on occasions, the bass component in the music was increased, but not to an extent that the music became distorted, and upon the fact that the respondents had frequently been disturbed by noise created by the guests in the function room (at [55] and [99] of his judgment). As to the former, this appears to be directly inconsistent with the evidence of Mr Lloyd (and it is noteworthy that, when the music was "skewed" during the calibration test on 9 December 2003, there was no noticeable difference in the respondents' master bedroom) and, to a lesser extent, that of the respondents' own expert, Mr Della Gatta. There was no evidence to support the primary Judge's conclusion in this respect other than that of the respondents themselves. As to the latter, I have said that Mr Della Gatta acknowledged that the noise from the guests had been reduced by the remedial work to a point where it was "virtually not discernible".

84 Consequently, even accepting the primary Judge's finding (at [101]) that the respondents were regularly disturbed by noise during the first half of 2005 and accepting, also, that that finding must be considered in the light of the factors identified by him in [102] of his judgment, the evidence pointed strongly to the conclusion that the noise was not such as to be objectively undue, raising the prospect (identified by Mr Lloyd) that the respondents might, perhaps not surprisingly, by then have become somewhat sensitised to the noise from the function room.

85 It is also noteworthy that, in his evidence at the trial, Mr Herring said that, during calibration tests conducted on 14 November 2003, music from the function room could not be heard in the respondents' apartment (transcript 619). In his report prepared in respect of the measurements carried out on the evening of 9 December 2003 he concluded that he was satisfied that "compliance" had been achieved with respect to the amplified sound system in the function room.

86 It may also be significant that, in about November 2003, the respondents informed a prospective purchaser of their apartment that there was no problem with noise. They went so far as to invite the prospective purchaser to stay in their apartment for a week so that that person could be satisfied as to the truth of what had been said, although Mrs Jansen said (transcript 196) that this was done upon the assumption that there would not be any more noise "because of the noise eliminator being put in".

87 Finally, there is no evidence of any concern on the part of any other resident than the respondents during 2005. The respondents' two closest neighbours are Mr and Mrs De Pardo and Mr and Mrs Freedman. The primary Judge accepted Mr De Pardo's evidence that he was not disturbed by activity in the function room (at [108] of his reasons). The evidence revealed that Mr and Mrs Freedman lodged no complaints after December 2003.

88 In my opinion, taking into account that the overwhelming weight of evidence established that, during 2005 (indeed, after 9 December 2003), the maximum sound levels were ordinarily at or about the assigned levels permitted by the EPN Regulations (and the experts appear to have accepted that these reflected reasonable noise limits, although, as has been mentioned, Mr Lloyd said that, in a mixed use development, calculation of the assigned level is an imprecise science), that noise at that level (which generally occurred only when wedding functions were held) was barely discernible in the respondents' apartment, that no other tenants had any complaint and that there was only one occasion upon which there was an increased level of noise (for reasons which are not readily explicable), I am unable to accept that, had the primary Judge correctly applied s 117(1)(b), it would have been open to him to find that the

requirement that the disturbance be objectively "undue" continued to be satisfied during 2005 (or even after 9 December 2003), even taking into account his finding that the function room had been put to greater use than was contemplated by the licence.

89 This conclusion, of itself, is sufficient to warrant setting aside the conditions imposed by the primary Judge upon the licence granted to the appellant (see, in this respect, ***Hope v Bathurst City Council*** [1980] HCA 16; (1980) 144 CLR 1 at 7, per Mason J). The absence of any ongoing breach of s 117(1) necessarily had the consequence that orders of that kind, or any other orders contemplated by s 117(5) of the Act, could not be justified even if earlier complaints had been made out. It is plain from the nature of the orders provided for by s 117(5) and from the reference, in that section, to conciliation or negotiation that the legislature contemplated that the orders referred to should be made only if the breach of s 117(1) was ongoing or likely to be repeated. In these circumstances, in my respectful opinion, the appropriate order was that made by the Director, being the dismissal of the complaints.

Ground 5

90 Ground 5, so far as it asserts a denial of procedural fairness by failing to acknowledge, address or resolve conflicts between the expert witnesses, dresses up a factual challenge as one of law. The conflicts relied upon are essentially disagreements between Mr Della Gatta and other experts. The appellant refers, in the particulars to ground 5, to disagreements between Mr Della Gatta, on the one hand, and Mr Lloyd and Mr Herring, on the other, as regards noise qualities of the slab between the function room and the respondents' apartment, as regards the question whether the function room was compliant with the EPN Regulations and as regards the appropriate measure of the calculation of the assigned noise level. Next, the appellant refers to disagreement between Mr Della Gatta and Mr Herring as regards the question whether the function room met the requirements of Australian Standard 2107. Finally, the appellant points to disagreement between Mr Della Gatta, on the one hand, and Mr George and Mr Healy on the other, concerning the question whether or not the airconditioning vent and barn door were possible noise transmission paths.

91 Having regard for the conclusions arrived at by the primary Judge, it was unnecessary for him to address these issues to any greater extent than he did. It is apparent from his reasons that he was satisfied that the noise relevantly complained of by the respondents originated from the function room. He regarded the reason for the transmission of the noise from the function room to the respondents' apartment as being a matter of no great significance. Similarly, while he did make some findings concerning the assigned noise level and the extent to which it complied with the EPN Regulations, he made it plain that his decision was not based upon the question of compliance or non-compliance with the EPN Regulations. As I have mentioned, he observed (at [103] of his judgment) that the ultimate issue was not whether the licensee was in breach of the EPN Regulations but whether or not the Court should conclude, on the whole of the evidence, that either or both limbs of s 117(1) of the Act had been contravened. Indeed, he concluded that it was not possible to answer the question whether or not the assigned noise levels in the respondents' apartment was in accordance with the EPN regulations (at [103] of his reasons, quoted above). For similar reasons, it was unnecessary for the primary Judge to decide whether or not the function room met the requirements of Australian Standard 2107. Nor did he need to determine whether or not the assigned level was properly calculated. As I have said, the parties appeared to accept, for the purposes of the litigation, that the assigned level was one of 44 dB(A). Finally, as I have said, given the primary Judge's acceptance of evidence to the effect that the function room was the source of the noise relevantly complained of, it was unnecessary for him to resolve the disagreement between Mr Della Gatta, on the one hand, and Mr George and Mr Healy, on the other, concerning the question whether and to what extent the airconditioning vent and barn door were possible noise transmission paths for other noise. Any error that the primary Judge might have made in any of these respects was one of fact.

92 So far as ground 5 complains of an inadequacy of reasons, it has not been made out. The primary Judge's reasoning process as regards the conflicts identified by ground 5 was that which I have described. In my respectful opinion, it sufficiently appears from the reasons given and there is no cause for complaint in that regard.

Ground 6

93 Ground 6, too, dresses up as a question of law what are, in reality, errors of fact said to have been made by the primary Judge. The error of law is said to have been a failure to afford the appellant procedural fairness by failing to consider evidence which cast doubt upon the accuracy of the respondents' diary and upon the objective reasonableness of its contents or by failing to give any adequate reasons for his rejection of that evidence.

94 It seems to me, firstly, that the primary Judge did consider evidence which cast doubt upon the accuracy of the respondents' diary. If he did not refer to all of that evidence that was because he regarded it as unnecessary to do so. As will be apparent from what I have earlier said, he was prepared to accept that, on at least a number of the occasions complained of by the respondents, the noise levels had been such as to infringe s 117(1) of the Act. There was no failure of procedural fairness.

95 The appellant complains, in this respect, that the primary Judge wrongly assumed that the truthfulness and reliability of much of the diary was not contested. I have mentioned that he said (at [96]) that, while some entries in Mrs Jansen's diary had been shown to be in error, much of its contents had not been contested. As I read his judgment, he meant, by that, that no evidence had been led specifically to contradict many of the complaints made in the diary and that such inaccuracies as had been proved were not sufficient to cast doubt upon the whole of the diary. If he erred in that finding, his error was one of fact.

96 So far as ground 6 complains of inadequacies in the primary Judge's reasons, it will be apparent from what I have said that in my opinion his reasoning process in this respect was sufficiently disclosed.

Ground 7

97 Ground 7 contends that there was a failure of procedural fairness in permitting the hearing to proceed in circumstances in which the respondents did not disclose details of alleged incidents relied upon by them until the commencement of the hearing, but were nevertheless

permitted to rely upon these incidents even if they had never been the subject of complaints to the Director in circumstances in which no, or no adequate, notice had been given. It is enough to say, in respect of this ground, that no adjournment was sought by the appellant in order to investigate the additional matters, to the extent to which they were relied upon by the respondents. That being so, I would not be prepared to uphold this ground.

Conclusion

98 It follows from what I have said that, for the reasons given while dealing with grounds 3, 4, 8, 9 and 10, I would uphold the appeal, set aside the orders made by the primary Judge and restore the decision of the Director.

99 **McLURE JA**: I agree with Steytler P.

100 **BUSS JA**: I agree with the President.
