Civil and Administrative Tribunal

New South Wales

Case Name:	Chehelnabi v Gourmet and Leisure Holdings Pty Ltd
Medium Neutral Citation:	[2020] NSWCATAP 102
Hearing Date(s):	5 February 2020
Date of Orders:	3 June 2020
Decision Date:	3 June 2020
Jurisdiction:	Appeal Panel
Before:	A Suthers, Principal Member D Charles, Senior Member
Decision:	(1) The appellants' application for leave to rely on the proposed amended Notice of Appeal is allowed. (2) The appeal is dismissed. (3) The respondents are to lodge submissions and evidence in support of any costs application with the Appeal Registry and give them to the appellants within 14 days of the publication of these orders. (4) Any submissions and evidence in response to the costs application are to be lodged with the Appeal Registry and given to the respondents within 14 days thereafter. (5) Submissions on the application for costs are not to exceed five pages in length. (6) The Appeal Panel may dispense with a hearing and determine any application for costs on the basis of the written submissions and evidence provided. If the parties oppose this course they should make submissions on this issue when complying with the directions as to their submissions on any substantive costs application should the respondents elect to pursue such application.
Catchwords:	LAND LAW – Strata Title – Claim of Nuisance – Strata

	Schemes Management Act 2015, s 153 –.Meaning of nuisance – proof of nuisance by noise transmission within Strata Scheme - Adequacy of reasons
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), ss 36, 53 80(2); cl 12(1) of Sch 4 Environment Operations Act 1997 (NSW) Strata Schemes Management Act 2015 (NSW), ss 153, 153(1)(a) Strata Schemes Management Act 1996 (NSW)
Cases Cited:	Bat Advocacy NSW Inc v Minster for Environment Protection, Heritage and the Arts (2011) LGERA 99, [2011] FCAFC 59 Bayliss v Lea [1961] NSWLR1002 Burnham v City of Mordialloc [1956] VLR 239; Harvey v John Fairfax Publications Pty Ltd [2005] NSWCA 255 Cannell v Barton [2014] NSWCATCD 103 Denham v Consolidated Herd Improvement Services Co-Op Ltd [2014] VSC 520 Gisks v The Owners – Strata Plan No 6743 [2019] NSWCATCD 44 Hargrave v Goldman (1963) 110 CLR 40 Kassem v Minister for Home Affairs [2019] FCA 1196 Marsh v Baxter [2015] WASCA 169 Minister for Home Affairs v Omar [2019] FCAFC 188 Minister for Immigration and Multicultural Affairs v Jia (2001) 205 CLR 507 Quick v Alpine Nurseries Sales Pty Ltd [2010] NSWSC 1248 Robson v Leischke [2008] NSWLEC 152 Sedleigh-Denfield v O'Callaghan [1940] AC 880 The Owners Strata Plan No 2245 v Veney [2020] NSWSC 134 Tickner v Chapman [1995] FCAFC 1726; (1995) 57 FCR 451 Torbey Investments Corporated Pty Ltd v Ferrara [2017] NSWCA 9 Weber v Greater Hume Shire Council [2018] NSWSC 667
Texts Cited:	None cited
Category:	Principal judgment

Parties:	Mehdi Chehelnabi (First Appellant) Larissa Landinez (Second Appellant) Gourmet & Leisure Holdings Pty Ltd (First Respondent) Monkberry Moon Pty Ltd (Second Respondent)
Representation:	Counsel: I Chatterjee (Appellant) Solicitors: McCooe Raves & Poole (Appellant) Jane Crittenden Lawyers (Respondent)
File Number(s):	AP 19/46640
Publication Restriction:	Nil
:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	18 September 2019
Before:	P. R. Smith, General Member
File Number(s):	SC 18/49689

REASONS FOR DECISION

Introduction

1 This is an internal appeal under s 80(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) against a decision made in the Consumer and Commercial Division of the Tribunal on 18 September 2019 (the Decision).

2 An application to the Tribunal was brought by Mehdi Chehelnabi and Larissa Landinez (the appellants) against Gourmet and Leisure Holdings Pty Ltd and Monkberry Moon Pty Ltd (the respondents) for orders seeking to ameliorate what the appellants said was noise, smell and vibration which caused a disturbance to their enjoyment of a residential lot in a Strata Scheme which they own and occupy, and which is immediately above a commercial lot in the

scheme which the first-named respondent owns and from which the second-named respondent operates a café.

3 The basis for the orders sought by the appellants was an alleged breach by the respondents of s 153 of the *Strata Schemes Management Act* 2015 (NSW) (the SSMA).

4 After a hearing which took place over three days in March, May and August 2019, the Tribunal dismissed the application (the Decision). Relevantly, during the periods the Tribunal was adjourned throughout the hearing, the parties continued to negotiate about the alleged nuisance being created by the use of the commercial lot, and the respondents did work to ameliorate the appellants' concerns.

5 In its reasons for the Decision (the Reasons) the Tribunal found that by the time of the finalisation of the proceedings it could not be satisfied that there was any proper basis for it to make the orders sought.

6 The appellants lodged their appeal against the Decision, within time, but sought to proceed by way of an Amended Notice of Appeal filed on 12 February 2020.

7 For the reasons set out below, we have decided to dismiss the appeal.

Background

8 The first-named respondent was the original owner of both the residential lot and the commercial lot in the scheme. It operated a café from the commercial lot for many years. It sold the residential lot to the appellants in 2013.

9 Within a month of the sale, the appellants raised their concerns about the noise emanating from a compressor in the commercial lot.

10 In 2014, the Local Council became involved and advised the appellants that it was satisfied that the compressor noise was offensive and that it had engaged with the first-named Respondent over the issue. It seems, however that no legal action was taken by the Council in this regard.

11 In 2015, the Council gave conditional development approval which altered the use of the commercial lot as a café, with permission to use the rear area for

storage of refrigerated goods and with consent for outdoor seating of patrons, with operating hours of 7am to 6pm, daily.

12 In 2017, the second-named respondent took over operation of the café as lessee of the commercial lot.

13 The parties remained in dispute over the noise emanating from the commercial lot, eventually resulting in them engaging in an unsuccessful mediation through the Department of Fair Trading and then the application to the Tribunal, which was commenced in 2018.

Tribunal proceedings and reasons for decision

14 The appellants acknowledge in their submissions on the appeal that they initially sought orders from the Tribunal on three bases, in that they alleged:

(1) That the operation of compressors in the commercial lot during non-operational hours, and in particular between the hours of 10:00 pm to 7:30 am, resulted in a noise that constituted a nuisance ("compressor noise");

(2) That unreasonable and offensive noise was generated as a result of coffee making activities during café operating hours ("operational noise"); and

(3) That offensive odour and smell emanated from the commercial lot as a result of the operation of the café ("odour and smells").

15 The initial orders sought by the appellants in their application were that the respondents:

> (a) immediately remove the compressors bolted to the common property that forms:
>
> (i) the ceiling/slab of that part of [the commercial lot] and shown as located on the lower ground floor of the strata scheme in strata plan 57075 and currently and for some time passed operating as a coffee shop/café; and
>
> (ii) the floor/slab of that part of [the residential lot] comprising the residential home unit located on the ground floor of the strata scheme in strata plan 57075.
>
> and
>
> (b) Refrain from reinstalling any compressors with the same or other compressors or any other equipment performing the same or similar function or any other equipment utilised for refrigeration or ventilation or otherwise in connection with the use of [the

commercial lot] as a coffee shop/café or similar use by fixing or bolting such equipment to the common property.

(c) refrain from installing in [the commercial lot] or allowing or consenting to any occupier or lessee/tenant installing equipment likely to generate unreasonable noise, vibration, heat or smell from [the commercial lot].

(d) Refrain from installing in [the commercial lot] any equipment likely to generate unreasonable noise, vibration, heat or smell from [the commercial lot].

(e) Within 14 days of the date of these orders allow the Applicant's Acoustic Engineer to access [the commercial lot] for the purpose of preparing a specification for work to be done to [the commercial lot] to prevent noise transmission from [the commercial lot] to [the residential lot] caused by the usage of [the commercial lot] as a coffee shop/café ("the specification").

(f) Within 21 days of the date of receipt of the specification prepared by the Applicant's Acoustic Engineer:

(i) carry out all work stipulated in the specification at the its cost (sic), and

(ii) notify the applicant in writing when such work has been completed.

(g) On completion of all work recorded in the specification, allow the Applicant's Acoustic Engineer further access to inspect the work.

(h) within 14 days of receipt of a written request from the applicant reimburse the applicant for all costs paid by the applicant to the Applicant's Acoustic Engineer for the cost of the specification and all inspections and reports as to completion or non-completion of the work recorded in the specification.

16 During the course of the proceeding in the Tribunal, the respondents undertook work in the commercial lot, which included removing the compressors from a position attached to the roof of the lot (the floor of the residential lot). Further works were undertaken to enclose the compressors.

17 The respondents also carried out the following works in the commercial lot, as recommended by an acoustic engineer:

(1) Installed a new double layer of plasterboard as a suspended ceiling with acoustic spring hangers and acoustic insulation;

(2) Constructed a new solid core doorway with acoustic perimeter seals and an acoustic threshold seal;

(3) Constructed new acoustic barriers above the new doorway to form a continuous acoustic seal throughout the rear service access;

(4) Installed vibration isolation mounts under all fridges freezers and dishwasher units as well as the two main compressor units; and

(5) Installed a vibration pad and mat under the coffee knocking tub and foam around the knocking component of the tube.

18 As a result of the developing circumstances during the proceedings, the orders the appellants sought also changed.

19 In March 2019, they sought to amend their application to seek orders, primarily as follows:

(1) An order that [the respondents] immediately remove the compressors and mechanical refrigeration and air cooling equipment from the Café operating from [the commercial lot].

(2) An order that [the respondents] refrain from re-installing in or upon [the commercial lot] or on the common property of Strata Plan 50705 any:

(a) compressors

(b) mechanical refrigeration equipment

(c) air cooling equipment

(d) any other equipment utilized for refrigeration or ventilation in connection with the use of [the commercial lot] as a coffee shop/café, likely to generate unreasonable noise, vibration, heat or smell from [the commercial lot] or otherwise cause a nuisance or hazard to the owner(s) or occupier(s) of [the residential lot] in the Strata Plan.

20 They sought orders in the alternative; however they were effectively on the same terms, save that they provided that certain conditions should be placed on the respondent before they could undertake any of the works described in the event that the Tribunal was not satisfied that the primary orders they sought should be made unconditionally.

21 Finally, in their written submissions made to the Tribunal after the close of the evidence, the appellants told the Tribunal that what they sought was:

(1) A finding that the respondents are in breach of s 153 of the Strata Schemes Management Act 2015 by using [the commercial lot] in such a manner as to create a nuisance or hazard to the Applicants as the owner and occupiers of [the residential lot],

(2) An order that "the respondents immediately discontinue the use of any compressor units within the [commercial lot] café during non-operational hours of the café", and

(3) An order that “the respondents immediately carry out additional acoustic noise prevention work to the cafe ceiling area directly underneath habitable rooms in [the residential lot] (Note "habitable rooms" do not include the [residential lot] exterior balcony area)”.

The expert evidence

22 The parties engaged acoustic engineers to report on the issues in dispute and make recommendations. The appellants engaged PKA Acoustic Consulting (PKA) and obtained reports authored by Mr Parry-Jones of that company. The Respondents engaged Acoustic Dynamics (AD), and obtained reports authored by Mr Mortimer. Both experts updated their reports during the hearing as works were undertaken within the commercial lot. They were both cross examined on the final day of the hearing.

23 In their final reports, Mr Parry-Jones opined that, in summary, the noise from the commercial lot could be classified as “offensive.”

24 Mr Mortimer opined that it could not.

The difference, in substance, between the positions adopted by the experts

25 Both experts largely considered the issues by reference to the question of whether the noise which they measured in the residential lot which emanated from the commercial lot was "offensive noise" within meaning of the Protection of the *Environment Operations Act 1997* (NSW) (the PEO Act), rather than by direct reference to the statutory criteria under which the appellants claimed, being whether the noise constituted a nuisance under the SSMA.

26 Under the PEO Act, offensive noise is defined as noise:

(a) that, by reason of its level, nature, character or quality, or the time at which it is made, or any other circumstances:

(i) is harmful to (or is likely to be harmful to) a person who is outside the premises from which it is emitted, or

(ii) interferes unreasonably with (or is likely to interfere unreasonably with) the comfort or repose of a person who is outside the premises from which it is emitted, or

(b) that is of a level, nature, character or quality prescribed by the regulations or that is made at a time, or in other circumstances, prescribed by the regulations.

27 A related concept to that of offensive noise is that of intrusive noise. That term is not defined, and does not appear in the PEO Act, but is found in various

guides and policies produced by the Environment Protection Agency ("EPA"), including the Noise Guide for Local Government and Noise Policy for Industry("NPFI"). Both of these documents were cited by each expert, though the respondents' expert queried the applicability of the NPFI.

28 It is relevant that:

(1) Neither of these documents have regulatory force; and

(2) The concepts of intrusive noise and offensive noise are not interchangeable; rather the question of whether noise is intrusive is relevant primarily as a factor in assessing whether the noise is offensive.

29 The appellants' expert relied in effect on certain measurement criteria in the NPFI to determine that the noise emanating from [the commercial lot], weighted for certain "tonal" and "annoyance" factors, was intrusive. On that basis they opined that the noise was offensive. The respondents' expert disagreed with whether certain weightings identified in the NPFI were applicable in the factual circumstances of this case, and thereby the conclusions of the appellants' expert.

30 In the Reasons, the Tribunal dealt with the competing evidence, as follows:

(1) The Tribunal was satisfied that the expert evidence for both parties was comprehensive and carried out with proper regard to the Tribunal's practice directions: at [24] of the Reasons.

(2) At [27], the Tribunal noted that under cross-examination Mr Parry-Jones acknowledged that he did not find plant noise which breached the standards set out in the NPFI and acknowledged there were no emissions shown in his last report which showed a 15dB or greater variation on adjacent bands of the readings which he took (a reference to the indicators in the policy which allow for adjustments to be made for noise that is 'tonal').

(3) Notwithstanding that, the Tribunal noted, at [28], that Mr Parry-Jones was satisfied that the noise intrusion from the commercial lot could be considered to be "tonal" due to some subjective factors he applied and that regard should be made for the NPFI modifying factors for intermittent noise. Mr Parry-Jones opined in his cross-examination that the noise emitted from the commercial lot is intermittent and that this may result in a changing noise level as the switching on and off of the compressor disclosed a change of over 15dB into individual "third octave bands". On that basis, it was Mr Parry-Jones' opinion that the intermittent noise correction factor should be applied in respect of that equipment.

(4) The Tribunal referred, at [29], to other evidence from Mr Mortimer that the NPFI "corrections for annoying noise characteristic" provides for corrections which may cause the measured noise emissions to exceed the project noise trigger level when the noise emission alone would not be considered as exceeding the standard. The submission on that basis for the respondent was that a tonal noise correction should not be applied as the noise emission at low frequency is spread across the third octave bands and that, hence, a single third octave frequency does not stand out significantly.

31 In the appeal, the respondents took us to the cross examination of Mr Parry-Jones where, relevantly, he agreed in that he made a tonal adjustment for the noise levels he recorded as emanating from the commercial lot which did not strictly comply with the requirements of the NPFI, and that "if we boil it down to the Standards, it well and truly complies with the Standards".

32 The Tribunal recorded its findings in relation to the competing expert evidence in the Reasons, from [30] to [35] as follows:

> [30] The onus of proof is on the [appellant] to satisfy the Tribunal that the respondents are in breach of [the] Strata Schemes Management Act, Section 153 in creation of nuisance or hazard affecting the owners of [the residential lot].
>
> [31] The respondent has carried out substantial remedial works since the matter came before the Tribunal on 5 March, 2019.
>
> [32] The extensive Acoustic Testing establishes that there is no 15dB variation on the adjacent bands on both sides of the graph readings to establish a Tonal Noise Factor. The [appellant] submits that the Tonal Noise Factor is routinely difficult to strictly apply and there is an option to conduct further narrow band analysis to establish an NFPI Modifying Factors to establish a correction for intermittent noise.
>
> [33] The Tribunal is not satisfied that it is appropriate to break down the data to such a degree to apply modifying factors to establish an exemption to the NFPI (sic) Guidelines to prove a breach for nuisance pursuant to Strata Schemes, Management Act (sic) Section 153.
>
> [34] On the material provided the Tribunal is not satisfied that the [appellant] has established the grounds upon which the orders sought should be made.
>
> [35] At the time of lodging the application and up to 5 March, 2019 the issue the noise was still an issue (sic) and following the appearance on 5 March, 2019 remedial work was carried out and in the findings of the Tribunal (sic) the matter was resolved prior to further hearings.

Scope and nature of internal appeals

33 Internal appeals may be made as of right on a question of law, and otherwise with permission (that is, the “leave”) of the Appeal Panel: NCAT Act, s 80(2).

34 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(a) the decision of the Tribunal under appeal was not fair and equitable; or

(b) the decision of the Tribunal under appeal was against the weight of evidence; or

(c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

Should we allow the appellants to rely on an amended Notice of Appeal?

35 In their Notice of Appeal, the appellants sought leave to appeal on the basis that the Decision was not fair and equitable and against the weight of the evidence.

36 They sought to amend those grounds, though, and gave notice to the Appeal Panel and the respondents with a proposed amended Notice of Appeal on 16 January 2020.

37 In the amended Notice of Appeal, the appellants sought to rely only on the following four grounds, each of which raise an error on a question of law, for which no leave to appeal is required:

<u>Ground One</u>

38 Whether the Tribunal (at first instance) constructively failed to exercise jurisdiction, by failing to consider the appellants' claims by reference to the statutory criteria set out in s 153 of the SSMA, or alternatively in identifying the wrong issue or asking itself the wrong question by treating the NSW Environment Protection Authority Noise Policy for Industry Guidelines as being determinative of the issue of whether certain noise constituted a nuisance for the purposes of the SSMA;

<u>Ground Two</u>

39 Whether the Tribunal fail to take into account relevant evidence that was important or critical to the proper determination of the issues before it, being

the appellants' uncontested evidence that the noise emanating from the commercial lot caused sleep disturbances; and that the noise occurred continuously through the night, outside commercial trading hours and at a time when the appellants had a reasonable expectation of peace and quiet;

Ground Three

40 Whether the Tribunal failed to take into account mandatory relevant considerations, in the form of express claims made by the appellants that the respondents committed an ongoing nuisance by reason of certain practices in the course of operating a cafe immediately below the appellants' residence; and

Ground Four

41 Whether the Tribunal failed to provide adequate reasons for its decision.

42 In the ordinary course, an appellant should be bound to the grounds raised in a Notice of Appeal, unless given the permission of the adjudicative body to amend.

43 Section 53 of the NCAT Act provides that the Tribunal may amend a document, including an appeal, if it considers it necessary in the interests of justice.

44 By virtue of s 36 of the NCAT Act, we are guided to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

45 Whilst an amendment to a pleading will usually be refused if a party has deliberately framed their case a particular way and the other party may have conducted their case differently had the new issues been previously raised (*Burnham v City of Mordialloc* [1956] VLR 239; *Harvey v John Fairfax Publications Pty Ltd* [2005] NSWCA 255), that is not the case here.

46 Ms Crittenden for the respondents, quite properly in our view, conceded that the appellants had sufficient notice of the proposed amendment to prepare adequately to meet the grounds in the amended Notice of Appeal, and had done so in the respondents' written submissions. The application for leave to amend the Notice of Appeal was not consented to, but not strongly opposed.

47 We were satisfied that in the absence of any material prejudice to the respondents and where allowing them to do so would cause no delay, the

appellants should have leave to rely on the amended Notice of Appeal. It was apparent that this would lead to a focus on the real issues in dispute and was therefore, in our view, in the interests of justice, and consistent with the Tribunal's guiding principle in s 36 of the NCAT Act.

48 The appellants confirmed, on being given leave to amend their Notice of Appeal, that the earlier grounds which required leave were abandoned.

Relevant legislation and legal concepts

49 Relevantly to the issues in dispute between these parties, s 153 of the SSMA is in the following terms:

> 153 Owners, occupiers and other persons not to create nuisance
>
> (1) An owner, mortgagee or covenant chargee in possession, tenant or occupier of a lot in a strata scheme must not—
>
> (a) use or enjoy the lot, or permit the lot to be used or enjoyed, in a manner or for a purpose that causes a nuisance or hazard to the occupier of any other lot (whether that person is an owner or not), or
>
> (b) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of the common property by the occupier of any other lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the common property, or
>
> (c) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of any other lot by the occupier of the lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the lot.

50 The clear focus of the parties in the conduct of the proceeding in the Tribunal at first instance was on an allegation that the operation of the café from the commercial lot caused a nuisance to the appellants in their use of the residential lot. Whilst some reference was made that it may also constitute a hazard, that was not strenuously pressed and not raised as an issue in the appeal.

51 During the appeal, the parties made submissions as to the proper meaning to be given to the word nuisance in s 153, as it is not defined in the SSMA.

52 Subsequent to our hearing the appeal, the Supreme Court of New South Wales handed down its decision in *The Owners Strata Plan No 2245 v Veney* [2020] NSWSC 134 ('Veney').

53 In Veney, Darke J found, at [46], that "nuisance" for the purpose of s 153(1)(a) of the SSMA should be interpreted in accordance with the common law meaning of an actionable nuisance, consistent with the approach previously taken by the Tribunal in applications under the former *Strata Schemes Management Act 1996*, for example in *Cannell v Barton* [2014] NSWCATCD 103 at [95] and *Gisks v The Owners – Strata Plan No 6743* [2019] NSWCATCD 44 at [26] ([46]-[47]).

54 In broad terms, the Court in Veney found that an actionable nuisance may be described as an unlawful interference with a person's use or enjoyment of land, or of some right over or in connection with the land. Liability is founded upon a state of affairs created, adopted or continued by a person, otherwise than in the **"**reasonable and convenient use" of their own land, which, to a substantial degree, harms another owner or occupier of land in the enjoyment of that person's land, citing *Hargrave v Goldman* (1963) 110 CLR 40 at [59]-[62].

55 The Court also referred with approval, at [45] to the comments of Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903, where his Lordship said:

> A balance has to be maintained between the right of the occupier to do what he likes with his own [land], and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.

56 That statement is consistent with the submissions of the parties here and so we will, with respect, adopt that meaning. We are satisfied that there is no need to hear further from the parties prior to doing so.

57 The parties also referred us to *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248, where Ward J framed the question for determination in relation to a claim for nuisance as:

> ...whether there has been a substantial and unreasonable interference by the defendants with the rights of Mr and Mrs Quick in relation to or in connection with the use of their land.

58 Ward J considered the principles relating to establishing whether a defendant has created or maintained a nuisance. Her Honour quoted from the judgment

of Preston CJ in *Robson v Leischke* [2008] NSWLEC 152, from [47], relevantly as follows:

> Where the defendant created the nuisance, the fault element varies depending on the nature of the defendant's conduct and his or her state of knowledge. Clerk & Lindsell on Torts identify three situations where the defendant has created the nuisance:
>
> > (a) "if the defendant deliberately or recklessly uses his land in a way which he knows will cause harm to his neighbour, and that harm is considered by a judge to be an unreasonable infringement of his neighbour's interest in his property, and therefore an unreasonable use by the defendant of his property, the defendant is liable for the foreseeable consequences. This proposition covers all those cases of obvious or "patent" nuisances, and they are peculiarly the cases which call for prevention or prohibition by injunction. It is no defence that the defendant believed he was entitled to do as he did or that he took all possible steps to prevent his action amounting to a nuisance": Clerk &Lindsell on Torts, 19th ed, Sweet & Maxwell, London, 2006, [20-39], p 1184;
> >
> > (b) "if the defendant knew or ought to have known that in consequence of his conduct harm to his neighbour was reasonably foreseeable, he is under a duty of care to prevent such consequences as are reasonably foreseeable. In such case the defendant is liable because he is considered negligent in relation to his neighbour, and here nuisance and negligence coincide": Clerk & Lindsell on Torts, 19th ed, Sweet & Maxwell, London, 2006, [20-40], p 1185; and
> >
> > …
>
> Where the defendant continues or adopts a nuisance, different conduct is required before liability will be imposed on the defendant. An occupier of land "continues" a nuisance or a potential nuisance if, with actual or constructive knowledge of its existence, he or she fails, within a reasonable period of time, to take reasonable measures to bring it to an end: *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 894, 904-905, 913; *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637 at 657-658; *Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986) 62 ALJ 282 at 284, (1986) 62 LGRA 46 at 50; *City of Richmond v Scantelbury* [1991] 2 VR 38 at 41, 42; *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478 at 484; *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321 at 332 [29].

59 Ward J, at [158], said that unreasonable interference required a determination of whether the events in question interfered with the comfortable and convenient enjoyment by the plaintiffs of their land, and that "this turns on whether there has been an excessive use by the defendants of their land resulting in what is considered to be an unreasonable interference with the enjoyment by the plaintiff of his land, having regard to the ordinary usages of humankind living in a particular society; (Robson, at [84])."

60 In considering this question, her Honour went on to refer to the decision of the Full Court of the Supreme Court of New South Wales in *Bayliss v Lea* [1961] NSWLR1002 ('*Bayliss*') in which the Court approved the following statement from Fleming on Torts 2nd ed, Clarendon Press, 1961at 400-1:

> The paramount problem in the law of nuisance is, therefore, to strike a tolerable balance between conflicting claims of landowners each of whom is claiming the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other. Reconciliation has to be achieved by compromise, and the basis for that adjustment is reasonable use. Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, considering the prevailing standard of comfort of the time and place. Reasonableness in this context is a two-sided affair. It is viewed not only from the standpoint of the Defendant's convenience, but must equally take into account the interest of the surrounding occupiers. It is not enough to ask: Is the Defendant using his property in what would be a reasonable manner if he had no neighbour? The question is: Is he using it reasonably, having regard to the fact that he has a neighbour?

Consideration

Ground One

61 The appellants submit that, having accepted that the evidence failed to establish that the noise emanating from the commercial lot by the conclusion of the proceedings was 'offensive' or breached the NPFI or the PEO Act, the Tribunal erred in treating that issue as determinative of the whole of the appellants' claim.

62 They submit that, in treating the issue as determinative, the Tribunal in effect treated the NPFI as a threshold to be satisfied by the appellants, in so far as their application under the SSMA complained about the compressor noise. They refer to the Tribunal's reasoning at [33] of the Reasons in support of this submission, where the Tribunal said:

> The Tribunal is not satisfied that it is appropriate to break down the data to such a degree to apply modifying factors to establish an exemption to the NFPI (sic) Guidelines to prove a breach of nuisance pursuant Strata Schemes, Management Act Section 153.

63 The appellants submit that, in so doing, the Tribunal identified the wrong issue or asked itself the wrong question in determining the matter. The Tribunal was required to consider whether the use of the commercial lot by the respondents created a nuisance (or hazard) to the appellants or interfered unreasonably with the appellants' use or enjoyment of the residential lot.

64 The appellants say that, while a relevant issue was whether the noise emanating from the commercial lot was, by reference to guideline documents produced by the EPA, an "intrusive noise" (as intrusive noise could constitute offensive noise, which in turn could constitute a nuisance), the answer to that question was not coterminous with the statutory question asked of the Tribunal. In other words, a finding that the noise was not intrusive or offensive did not automatically result in a finding that it was not a nuisance or did not interfere unreasonably with the appellants' enjoyment of the residential lot.

65 The appellants point to their own unchallenged evidence, contained in affidavits filed in the proceedings, that the noise emanating from the commercial lot affected their ability to sleep; that it had affected their ability to sleep for over five years; and that it continued to affect their ability to sleep notwithstanding the acoustic treatment works undertaken by the respondents.

66 The appellants say that what was directly put in issue by them in both their lay and expert evidence was not just that the overall volume of the noise constituted a nuisance, but also the particular nature and characteristics of the noise including the fact that it was present 24 hours a day, and in particular during the quiet hours of the night, and the fact that it had an intermittent characteristic to it.

67 The appellants acknowledge that the Tribunal dealt with their own evidence at [13] of the Reasons, where the Tribunal said:

> …[The appellants] state the compressor and other offending equipment impacts on the occupation of the premises. They state the compressor and other offending equipment create an annoying noise that has deep humming, buzzing and pulsating characteristic which mean they cannot sleep in their main bedroom and noise is audible throughout the premises.

68 However, the appellants contend that the Tribunal made no findings as to the truth of these allegations and say that a fair reading of the Reasons show that it did not take them into account. They rely on the fact that no express evidence was led by the respondents contradicting their lay and expert evidence that the compressor noise remained audible in the residential lot at night, irrespective of whether or not in terms of overall decibel level it was comparable to the general background noise. They rely on the failure of the respondents to assert that

they are unusually sensitive or vulnerable to noise, and point to their own evidence that they are not.

69 The appellants submit that there was clearly cogent evidence before the Tribunal of an "interference" in the use or enjoyment of the residential lot by the appellants and that in treating the question of whether the noise was ‘intrusive’ or ‘offensive’ as a precondition, the Tribunal failed to failed to address the correct question and constructively failed to exercise its jurisdiction.

70 The respondents submit that the Tribunal’s reasons are responsive to the way in which the proceedings were conducted by the parties.

71 They say that the appellants failed to establish to the satisfaction of the Tribunal that the use of the commercial lot as a café by the second-named respondent, being a use to which the premises have been put prior to the purchase of the residential lot by the first-named appellant in July 2013, amounted to an excessive use which caused inconvenience to the appellants beyond what occupiers of the residential lot should be expected to bear, considering the prevailing standard of comfort of the time and place.

72 The respondents submit that the fact that the appellants may be able to hear compressors associated with the operation of refrigerators did not establish nuisance and that, in the context of a mixed use strata scheme with occupants living and working in close proximity, hearing sounds from one lot in another does not constitute a nuisance unless such sounds arise from a use which is excessive or unreasonable.

73 As can be seen from the cases referred to above, for an actionable nuisance in respect of noise to be established, there are two primary elements which need to be satisfied.

74 The first is that there must be some noise that can be heard by the complainant (here the appellants) in the use of their lot which emanates from the respondents’ lot, allegedly causing damage or interference. This may readily be established by the subjective evidence of the appellants as to what they hear or experience.

75 The second element, though, is that there must be evidence to establish to the satisfaction of the Tribunal that the noise is caused by a use of the respondents' land which is excessive or unreasonable and "causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, considering the prevailing standard of comfort of the time and place" (*Bayliss*), or that what is experienced by the appellants is not "reasonable according to the ordinary usages of mankind living in … [our] society": *Sedleigh-Denfield v O'Callaghan* ibid. This is an objective test: *Marsh v Baxter* [2015] WASCA 169 at [247], referred to with approval in *Weber v Greater Hume Shire Council* [2018] NSWSC 667 at [427].

76 Here, the primary way in which the parties sought to adduce evidence of the second element was through the use of expert evidence and, thereby, by reference to established guidelines and legal requirements as to what is reasonable with respect to noise emissions in our society. That was appropriate, particularly when regard is had to the definition of offensive noise in the PEO Act, which requires an assessment of whether the noise is:

(1) harmful to (or is likely to be harmful to) a person who is outside the premises from which it is emitted; or

(2) interferes unreasonably with (or is likely to interfere unreasonably with) the comfort or repose of a person who is outside the premises from which it is emitted.

77 Whilst it does not constitute a mandatory consideration or a precondition to a finding of nuisance, that definition is relevant to the establishment of the second element for an actionable nuisance in respect of noise. The standards set by the PEO Act and other governmental guidelines are relevant evidence of the reasonably acceptable standard of noise emission in our society, particularly as it affects others.

78 On that basis, we are satisfied that the Tribunal, in its finding at [33] of the Reasons, was addressing whether there was any evidence that it accepted from which it could be satisfied that there was a nuisance or hazard established, having regard to the second element. In doing so, it was determining the contest between the experts' evidence as to whether the noise was unreasonable or excessive on those objective standards due to the factors

relied on by the appellants, which went to issues beyond simply that of its volume. That evidence, in respect of the tonal and intermittent factors Mr Parry-Jones sought to make adjustments for, was relevant to each of the other characteristics of the noise complained of by the appellants.

79 Having determined that it did not accept the evidence of Mr Parry-Jones, for reasons not controversial in the appeal, and in the absence of any other evidence by which the Tribunal could determine that the volume or nature of the noise was unreasonable to any objective standard, the Tribunal was satisfied, correctly in our view, that there was no substantiated breach of s 153 of the SSMA to warrant making the orders sought by the appellants. The Tribunal did not, therefore, ask itself the wrong question or apply the wrong test. Nor did it treat the NPFI Guidelines as being determinative of the issue of whether certain noise constituted a nuisance. The Tribunal simply made a finding in respect of the evidence available to it, the consequence of which was that nuisance in the sense used in s 153(1)(a) of the SSMA was not established.

80 In doing so, the Tribunal, of course, needed to properly consider the appellants' own evidence, which we will deal with in respect of Ground Two.

81 Ground One is not made out.

Ground Two

82 This ground is an allegation that by failing to take into account relevant evidence that was important or critical to the proper determination of the issues before it, the Tribunal erred on a question of law.

83 That was said to be the appellants' uncontested evidence that the noise emanating from the commercial lot caused sleep disturbances; and that the noise occurred continuously through the night, outside commercial trading hours and at a time when the appellants had a reasonable expectation of peace and quiet.

84 The Respondents contend that the evidence presented by the appellant was wholly insufficient to establish that the respondents' conduct amounted to a nuisance.

85 The Tribunal was required to engage with the relevant evidence in its totality, including the evidence of the appellants' experience of sleep disturbance. In considering the evidence to make a decision, the Tribunal must engage in an 'active intellectual process', in which each relevant matter receives genuine consideration: *Bat Advocacy NSW Inc v Minster for Environment Protection, Heritage and the Arts* (2011) LGERA 99, [2011] FCAFC 59 at [44] (Emmett, McKerracher and Foster JJ), citing *Tickner v Chapman* [1995] FCAFC 1726; (1995) 57 FCR 451 at 462 and *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at [105].

86 In *Torbey Investments Corporated Pty Ltd v Ferrara* [2017] NSWCA 9 at [65], the Court of Appeal (per Basten JA with whom McColl and Simpson JJA agreed) accepted that to ignore or overlook apparently credible and relevant information, which might support an essential step in the reasoning process if the claim were to be upheld, may amount to an error of law.

87 However, the Court of Appeal pointed out, at [68] that the fundamental question is the importance of the ignored or overlooked material to the exercise of the Tribunal's function and thus the seriousness of any error, saying:

> In short, although one can describe the overlooking of critical evidence as an error of law, it is important to understand the purpose and context of such a description. In this case, it is patent that the Tribunal did not ignore the material identified in the particulars: indeed, the particulars identified the material by reference to the reasons of the Tribunal and the appeal judgment. The complaint is merely that, for reasons she gave, the Tribunal member preferred other evidence. This ground did not establish an error of law on the part of the Tribunal, nor on the part of the District Court which correctly rejected it.

88 We are satisfied that the Reasons disclose that the Tribunal did take into account the appellants' evidence that the noise emitted from the commercial lot disturbed them and interrupted their sleep. That is apparent, in our view, from the extensive description of the noise of which the appellants complain, and how it affects them, referred to by the Tribunal, at [13] of the Reasons.

89 We acknowledge that the Tribunal did not record that the evidence was unchallenged or whether it was accepted and that we should be hesitant to conclude that the Tribunal accepted the direct evidence of the appellants just because that would be consistent with the reasons as they are expressed and

because it can be reconciled with the Decision: *Denham v Consolidated Herd Improvement Services Co-Op Ltd* [2014] VSC 520, at [37].

90 Here, though, in the context of the way in which the hearing was conducted, and given the thorough way in which the experience of the appellants is described at [13] of the Reasons, without reference to competing evidence, we are satisfied that we may infer that the Tribunal intended to convey that the evidence was accepted.

91 If we are wrong in this, we would still not allow the appeal on this ground, as we would need to consider that issue, and the seriousness of it, in the context of whether the noise was the result of an unreasonable or excessive use of the commercial lot, or, to use the words of the Court in *Bayliss,* whether there was "an excessive use of property [causing] inconvenience beyond what other occupiers in the vicinity can be expected to bear, considering the prevailing standard of comfort of the time and place".

92 Both parties relied on the expert evidence of the acoustic engineers to establish this issue by reference to several objective standards. In our view, the evidence of the appellants' subjective experience of the noise, accepted as unchallenged, would be insufficient to discharge the practical onus they bore to lead evidence that the noise constituted an actionable nuisance, given the Tribunal's conclusion as to the expert evidence.

93 Further, given that both experts' evidence was that noise from the commercial lot could be heard in the residential lot, thereby establishing a level of interference, the acceptance of the appellants' direct evidence was not an essential step in the reasoning process.

94 We are not satisfied that this ground is made out.

Ground Three

95 The appellants note that the Tribunal did not in any manner consider the issue of whether the 'operational noise' constituted a nuisance to the appellants, or an unreasonable interference in their use or enjoyment of the residential lot.

96 They point to the fact that the Tribunal also did not in any manner consider in the Reasons the appellants' contentions and evidence as to a nuisance committed by reason of the 'odour and smells' complained of.

97 The appellants submit, correctly, that a substantial or significant and clearly articulated claim raised by an party to the proceedings is a mandatory relevant consideration, and a failure to consider such a claim constitutes an error of law: *Kassem v Minister for Home Affairs* [2019] FCA 1196 at [59] - [70] and [87] (and the authorities cited therein), and see also *Minister for Home Affairs v Omar* [2019] FCAFC 188 at [41].

98 This argument, though, overlooks what the Tribunal was ultimately asked to do.

99 If we return to the course of the changes to the orders sought by the appellants, it is clear that by the time the orders sought were amended in March 2019, as set out at [19(2)(d)] above, the issue of odour and smells had become a small part of the basis for the orders sought, and only to the extent that it related to heat or smell occasioned by equipment utilised for refrigeration or ventilation in the commercial lot. Counsel for the appellant correctly conceded it was a 'thin' reference to the issue of odour and smells at that point.

100 By the time the appellants had an opportunity to consider and revise the orders they sought in final written submissions, what was sought was further narrowed, as set out at [21(2)] and [21(3)], above. Importantly, none of the orders finally pressed for by the appellants could be said to have any bearing on the 'operational noise' issue, or the 'odour and smells' issue.

101 No question of law arises in circumstances where the Tribunal did not resolve an issue and did not make findings of fact in relation to an issue which was not relevant to the contentions ultimately advanced before it for resolution. There was no error, on that basis, in the Tribunal not dealing with those issues at all in the Reasons, as those matters were no longer material to the Decision on the orders sought.

102 This ground is not made out.

Ground Four

103 The appellants contend that the Tribunal failed to provide adequate reasons for its implicit dismissal of the claims discussed in respect of Ground Three, and for its reasons in rejecting the evidence of the appellants identified at [65] above.

104 In respect of the issues which constituted Ground Three, this must be rejected for the reasons we gave in respect of that ground.

105 In relation to the appellants' own evidence as to their experience of the noise emanating from the commercial lot, we are not satisfied that the evidence was rejected, for the reasons we gave in the resolution of Ground Two.

106 This final ground is not made out.

107 The appeal should be dismissed.

Costs of the appeal

108 The respondents indicated, in the event that they were successful in the appeal, that they sought costs.

109 We express the tentative view that there should be no order for costs of the appeal, because:

(1) Section 60 of the NCAT Act provides that each party should pay its own costs unless special circumstances exist. Our tentative view, subject to any submissions which the respondents wish to put forward, is that special circumstances would not seem to arise; and

(2) Rule 38A of the *Civil and Administrative Tribunal Rules 2014* does not apply in this case.

110 However, we will make directions for the filing of submissions on that issue if the respondents wish to prosecute anyapplication for costs.

Orders

111 We make the following orders:

(1) The appellants' application for leave to rely on the proposed amended Notice of Appeal is allowed.

(2) The appeal is dismissed.

(3) The respondents are to lodge submissions and evidence in support of any costs application with the Appeal Registry and give them to the appellants within 14 days of the publication of these orders.

(4) Any submissions and evidence in response to the costs application are to be lodged with the Appeal Registry and given to the respondents within 14 days thereafter.

(5) Submissions on the application for costs are not to exceed five pages in length.

(6) The Appeal Panel may dispense with a hearing and determine any application for costs on the basis of the written submissions and evidence provided. If the parties oppose this course they should make submissions on this issue when complying with the directions as to their submissions on any substantive costs application should the respondents elect to pursue such application.

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