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IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

M.1860

BETWEEN RICHARD GEORGE SANDERS of Richmond, Salesman; ROBERT DAVID REED of Nelson, Foreman; ALAN EDWARD AITKEN of Nelson, Orchard Worker and GRAEME LAURIE WESTRUPP of Nelson, Workman

Appellants

A N D NELSON CITY COUNCIL

Respondent

Hearing: 17 June 1981

Counsel: J.M. Fitchett for Appellants
K.O. Beckett for Respondent

Judgment: - 3 JUL 1981

JUDGMENT OF HARDIE BOYS J.

The applicant Council applied to the District Court for the following orders:

"That (i) The Respondents effectively abate the nuisance of noise existing on the premises at 102 Russell Street, Nelson

(ii) The Respondents prohibit the recurrence thereof and

(iii) The Respondents take such steps as are necessary to ensure that the noise emitted from the said premises does not exceed the following levels at any residential boundary in the vicinity of the said premises:

(a) 40 dba between the hours of 10.00p.m. to 7.00a.m.

(b) 50 dba between the hours of 7.00a.m. to 10.00p.m. "

These orders were sought under s 33 of the Health Act 1956 which by subs (2) entitles the Court to act "if satisfied that a nuisance exists on the premises, or that, though abated, it is likely to recur". For the purposes of the Act, nuisances are defined in s 29. The particular nuisance relied on by the Council is that set out in para (ka), namely:

> "Where any noise or vibration occurs in or is emitted from any building, premises, or land to a degree that is offensive or is likely to be injurious to health:"

Instead of using this wording or referring to this paragraph, the Council's notice of application gave as its grounds (after an amendment made by the District Court Judge at the hearing) "that a nuisance from noise exists on the said premises or is likely to recur" : the wording of s 33(2).

Mr Fitchett submitted that para (ka) contemplates two quite separate categories of noise nuisances, one to persons on the premises, such as workers in a factory, the other to persons outside, such as occupiers of adjoining premises. He argued that the wording of the Council's application limited it to the first of these categories, and that as there was no evidence that any of the occupiers of the appellants' premises were affected, there was no basis upon which the District Judge was entitled to make an order at all.

This submission places a much stronger emphasis on pleading than has for many years been considered appropriate. The application was brought as an originating application under Rule 75 of the District Courts' Rules 1948, subclause (1) of which requires that "the application shall state the order applied for and sufficient particulars to show the grounds on which the applicant claims to be entitled to the order." This application states the order applied for with particularity, whilst in stating the grounds it uses the wording of s 33(2) of the Act. It does not use words appropriate to indicate

reliance on one or other of the categories of nuisance referred to in s 29(ka), but by naming noise as the nuisance complained of, it obviously refers in a general way to that paragraph, because that is the only paragraph dealing with nuisance from noise. Although the grounds thus nominate noise, but neither of the categories of noise mentioned in para (ka), it is nonetheless quite clear from the wording of the orders which are sought that what the Council is complaining of and wishes to have abated is noise emitted from the appellants' premises. There is nothing in the application justifying the belief that the Council is concerned with a nuisance allegedly caused to persons on those premises. In my view therefore the requirements of Rule 75(4) have been met. The appellant was given adequate notice of what was sought and of the grounds thereof. Even if that had not been the case the appropriate remedy would have been an amendment and an adjournment rather than a refusal to deal with the matter on its merits. I therefore do not accept Mr Fitchett's first submission.

The learned District Court Judge having also overruled this objection went on to deal with the matter on its merits and made the orders that the Council had sought. The appellants challenge these orders only in two respects. The first was accepted by Mr Beckett as valid and it was agreed that the order should be amended by adding after the words "the said premises" in para (iii) the words "for 10% of any period of observed time". (I make a comment about that wording below). In other words the Council concedes that the prohibition against exceeding the levels fixed in the order cannot reasonably be absolute but must allow for some measure of excess to the extent of the 10% that has been agreed upon.

The second ground of appeal was that the Distrct Judge ought not to have fixed the level of 40 decibels between the hours of 10pm and 7am but should have divided those hours into two parts, fixing a level of 45 decibels between the hours of 10pm and midnight and restricting the limit of 40 decibels to the hours between midnight and 7am.

The learned District Court Judge fixed the permitted level on the basis of a Health Department publication produced in evidence and relied on by the Council's Health Inspector. This publication states, and it appears to be a matter of general acceptance, that "a noise is liable to provoke complaints whenever its level exceeds by 10 dB that of the measured pre-existing background noise, or when it exceeds the levels set out in Table 2 by 10 dB." Background noise is accepted to be that level of noise which on the statistical analysis method is equalled or exceeded for 95% of the observation time. Table 2 lists background noise levels so ascertained that are generally considered acceptable in New Zealand, giving different levels for the hours 7am to 10pm and 10pm to 7am according to the type of area concerned. In Zone 2 "generally suburban areas with infrequent transportation" the levels are respectively 40 and 30 decibels, whilst in Zone 3, "generally suburban areas with medium density transport" the levels are respectively 45 decibels and 35 decibels. The publication points out that this table is an appropriate reference where it is impossible to obtain actual background noise level readings. In this case no such readings were available to the District Court Judge. He therefore applied the standards in the Health Department publication. He accepted that for the purposes of Table 2 the area in question in this case was to be regarded as Zone 2. There was evidence to support this finding and it cannot be challenged. It was on the basis of Table 2 applied to a Zone 2 area, that the District Court Judge fixed the maximum permitted levels as 10 decibels above the background noise levels therein. The Health Department publication contains a further statement that "when the Corrected Noise Level /this being a reference to the need for correction in certain circumstances which it appears do not apply here/ exceeds the figures given by 10 dB, then annoyance is likely to be caused and the noise could be considered as a nuisance." The order the District Court

Judge made thus permitted continous noise right up to the level at which it is likely a nuisance will be created, whilst the amendment the Council has agreed to will permit that level to be exceeded 10% of the time.

Mr Fitchett did not dispute that a nuisance is likely to be created when the background noise level is exceeded by 10 decibels. Instead, he argued that the background noise level for the area in question was in fact higher than 30 decibels, certainly during the hours of 10pm and midnight, so that it was unreasonable for a limit of 40 decibels to be fixed during those hours. In support of this argument, he first referred to NZSS 6802.1977 (published a year later than the Health Department paper) Appendix A of which gives 38 decibels as the appropriate background noise level for a residential area at night time. This figure of course is close to that given for a Zone 3 area in the Health Department publication. However, clause 3.3 of NZSS 6802 makes it clear that Appendix A is to be used, as is Table 2 in the Health Department paper, only where reliable background measurements cannot be obtained.

Although no actual background noise readings were before the lower Court, they were given to me. By consent, the Chief City Health Inspector gave evidence of readings taken in the vicinity of the appellants' property the previous night. This was a typical weekday evening. The background noise level, calculated by the statistical analysis method, was 30.2 decibels; thus confirming the appropriateness of the basis adopted by the learned District Court Judge in making his order and rendering inappropriate reference to the generalised levels contained in the publications referred to.

Mr Fitchett next referred to the Third Review of the Council's District Scheme. Part 7 sets certain standards as to the emission of noise from industrial and commercial sites. In commercial zones, the maximum permitted is 45 decibels between 10pm and 7am on weekdays and after 6pm on Saturdays, Sundays and public holidays. Virtually over the road from the appellants' property

there is an area zoned Commercial 1. Mr Fitchett argued that because the Council's own Scheme allowed 45 decibels in this vicinity, it was unreasonable to restrict the appellants to a level lower than that. This argument was rejected by the District Court Judge on the basis that the District Scheme is in this respect no more than a generalisation. Its adoption cannot inhibit the Council from exercising in an appropriate particular case the powers conferred and duties imposed by the Health Act. In considering what was reasonable, the District Court Judge was entitled to consider all the material before him and was in my view quite justified in concluding on the basis of it all that the permitted maximum between 10pm and midnight should be derived from the Health Department's publication, supported as it was by the evidence of the Chief Health Inspector. That gentleman's evidence before me clinches the argument completely.

Mr Fitchett also drew attention to the evidence given by the various long-suffering local residents whose very genuine complaints had prompted the Council to bring the proceedings. Two of them said that traffic noise in the area increased considerably in the late evening after the pictures came out, although one limited that to a period of approximately 45 minutes. Two others spoke of other parties in the neighbourhood which from time to time carried on until about midnight, and caused no real interference with their comfort. The Chief Health Inspector's evidence as to background noise levels showed that in the 24 minutes between 10.30pm and 10.54pm, 17 vehicles passed, and largely if not entirely because of them for 10% of the time the sound level was 60 decibels or more. On that basis, Mr Fitchett said, it was unreasonable to restrict the appellant to 40 decibels, because in the hours up to midnight other sounds, passing traffic in particular, would in any event wake those who would be troubled if the appellants were permitted 45 decibels.

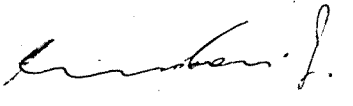
This argument must be assessed against several facts. First, the Inspector's evidence showed that the level of actual noise exceeded 40 decibels only 42% of the time and it exceeded 45 decibels only 32% of the time.

To allow the appellants 45 decibels would mean that that level could be maintained for up to 100% of the time. Secondly, an increase of 5 decibels in the permitted limit would increase the discernible noise level by as much as 40%. Thirdly, the evidence showed that there is a very different level of tolerance between traffic noise and noise of the kind emitted from the appellants' premises, which was principally from recorded music but also from a variety of uncontrolled human and animal sources.

Having regard to these various matters I am satisfied that the learned District Court Judge was fully justified and quite correct in making the order he made.

The appeal therefore fails, except in the one respect in which Counsel are agreed the order should be varied. It seems to me that further thought should be given to the words which are to be added. Should they not, for example, be "for more than 10% of any period of observed time"? And might it be better if the addition were made after the words "to ensure that" and for them then to be "for no more than 10% of any period of observed time"? I invite Counsel to consider the point and I will defer making a formal order until they have informed me of their wishes in this regard.

The formal order will include a direction that the appellants, who have been largely unsuccessful, pay the Council $100 on account of costs.



Solicitors:

Rout, Milner & Fitchett, NELSON, for Appellants.
Fletcher & Moore, NELSON, for Respondent.

M. 1860

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