

CASE NOTES

Cohen v City of Perth [2000] WASC 306, 15 December 2000

The Supreme Court of WA (Roberts-Smith J) upheld an action for breach of statutory duty and nuisance against the City of Perth for the noise caused by its rubbish collection services.

The judgement sets out a long story of acrimonious communications between the plaintiff and the Council, the Council's efforts to modify its rubbish collection system and its endeavour to seek an exemption from the Noise Regulations when it could not comply with the standards prescribed by the regulations. When the exemption application process proved too difficult, the Council sought an amendment of the regulations through a review process.

The Council accepted that its operations were breaching the Noise Regulations, but denied liability to Mr Cohen. The Council argued that the plaintiff had no private right of action under the Act, no action in private nuisance or public nuisance and, even if he did have a right of action, no injunction should issue as a matter of the Court's discretion.

Roberts-Smith J held that the plaintiff did have a private right of civil action for breach of the statutory duty in s79 of the Act not to cause unreasonable emissions of noise. The plaintiff could succeed because the noise was, by statutory definition, unreasonable as it exceeded the levels prescribed by regulation. His Honour held that the provisions of s79 for private prosecution and the express remedy in the Act for damages for harm to property did not preclude the creation of a private right of action for personal injury.

The plaintiff also succeeded in the claim of private nuisance. Roberts-Smith J noted that breach of the Noise Regulations did not necessarily establish a private nuisance at common law. His Honour took into account the usual factors of normal land use in the locality in holding that the Council had not done everything that it reasonably could to mitigate the interference with the plaintiff's amenity. As his Honour explained, the course of action of the Council suggested this, at para 160.

“Certainly the Council has made some effort to accommodate Mr Cohen's complaints but the fact remains that the garbage trucks still generate excessive noise and I am not satisfied on the evidence before me that all reasonable steps have been taken to ensure that collections in fact occur at times when such excessive noise would create the least practicable interference with Mr Cohen's amenity. The DEP repeatedly sought information from the Council for the purpose of progressing its application for variation under reg 17 but that was never sufficiently provided. Much of what was sought would have enabled a proper consideration of the reasonableness of the measures taken by the Council to overcome the problem. Although there was obviously some breakdown of communication between the Council and the Department of Environmental

Protection [in seeking the exemption from the Noise Regulations] I am satisfied ... that the Council officers took the view, subconsciously or otherwise, that the application for variation [sic, exemption] was all too difficult and the real solution to their problem was to be found in amendment of the Noise Regulations to provide a statutory exception for noise emitted by Council garbage trucks. That, of course, was a longer-term and potentially more uncertain proposition than the application for variation - which was essentially progressed without much enthusiasm in the meantime. The effect was that Mr Cohen was expected to put up with the discomfort and irritation of the Council's admitted breaches of the prescribed noise levels until the Council could (hopefully) have the regulations changed."

His Honour also held that the plaintiff could succeed in an action for public nuisance.

His Honour agreed to grant the injunction sought by the plaintiff, although not in the terms sought. Further submissions were sought from the parties as to the terms of the injunction restricting the rubbish collection services to particular times to satisfy the plaintiff. His Honour also awarded \$1,000 in damages to the plaintiff for the stress, disruption and emotional upset suffered by the plaintiff.

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