JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	AMMON -v- COLONIAL LEISURE GROUP PTY LTD [2019] WASCA 158
CORAM	**:**	MURPHY JA MITCHELL JA BEECH JA
HEARD	**:**	19 AUGUST 2019
DELIVERED	**:**	17 OCTOBER 2019
FILE NO/S	**:**	CACV 95 of 2018
BETWEEN	**:**	DEREK NOEL AMMON Appellant AND COLONIAL LEISURE GROUP PTY LTD Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	MASTER SANDERSON
Citation	**:**	AMMON -v- COLONIAL LEISURE GROUP PTY LTD [2018] WASC 280
File Number	**:**	CIV 2449 of 2017

Catchwords:

Nuisance - Private - Apartment adjacent to Raffles Hotel - Whether noise from Raffles Hotel unreasonable and substantial interference with use and enjoyment of apartment - Noise levels from hotel in breach of Regulations - Whether and to what extent breach of Regulations relevant to an assessment of nuisance under the common law

Appellate intervention - Finding of nuisance an evaluative judgment - Application of a legal standard in respect of which there is only one correct outcome - Principles of appellate intervention concerning discretionary decisions not applicable

Legislation:

Environmental Protection Act 1986 (WA), s 3
Environmental Protection (Noise) Regulations 1997 (WA), reg 5, reg 7, reg 8, reg 9, reg 17, reg 18A, reg 18B, reg 19

Result:

Appellant's oral application to adduce additional evidence granted
Appellant's written application to adduce additional evidence refused
Appeal dismissed

Category: A

Representation:

Counsel:

Appellant	:	Mr C P Shanahan SC & Mr A P Hershowitz
Respondent	:	Mr M D Howard SC & Ms P A Honey

Solicitors:

Appellant	:	JDK Legal Services
Respondent	:	Lavan

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

Ammon v Colonial Group Pty Ltd [2018] WASC 280
Brown v Tasmania [2017] HCA 43; (2017) 261 CLR 328
Cambridge Water Co v Eastern Counties Leather Plc [1993] UKHL 12; [1994] 2 AC 264
Cohen v City of Perth [2000] WASC 306
Don Brass Foundry Pty Ltd v Stead (1948) 48 SR (NSW) 482
Elston v Dore [1982] HCA 71; (1982) 149 CLR 480
Flessas v The State of Western Australia [2018] WASCA 210
G v O [2018] WASCA 211; (2018) 369 ALR 346
Gartner v Kidman [1962] HCA 27; (1962) 108 CLR 12
House v The King [1936] HCA 40; (1936) 55 CLR 499
Jessical Estates Pty Ltd v Lennard [2007] NSWSC 1434
Marsh v Baxter [2015] WASCA 169; (2015) 49 WAR 1
Miller v Jackson [1977] QB 966
Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; (2018) 92 ALJR 713
Munro v Southern Dairies Ltd [1955] VLR 332
Norbis v Norbis [1986] HCA 17; (1986) 161 CLR 513
R v Bauer [2018] HCA 40; (2018) 92 ALJR 846
Secure Parking (WA) Pty Ltd v Wilson [2012] WASCA 230
Sedleigh-Denfield v O'Callaghan [1940] AC 880
Seidler v Luna Park Reserve Trust (Unreported, NSWSC, 21 September 1995)
Singer v Berghouse [1994] HCA 40; (1994) 181 CLR 201
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79; (2012) 42 WAR 287
State of Queensland v Baker Superannuation Fund Pty Ltd [2018] QCA 168; [2019] 2 Qd R 146
Sturges v Bridgman (1879) 11 Ch D 852
Victoria Park Racing and Recreation Grounds Co Ltd v Taylor [1937] HCA 45; (1937) 58 CLR 479
Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531

JUDGMENT OF THE COURT:

Introduction

1 This appeal is against the decision of Master Sanderson in ***Ammon v Colonial Leisure Group Pty Ltd*** (primary decision).[1] The primary decision concerned a claim for private nuisance brought by the appellant (Mr Ammon) against the respondent, Colonial Leisure Group Pty Ltd (Colonial) for the noise generated at the Raffles Hotel in Applecross. Colonial has owned the Raffles Hotel since 2009. Also since 2009, Mr Ammon has owned and occupied an apartment in a strata complex which included the Raffles Hotel.

2 The learned master dismissed Mr Ammon's claim. Mr Ammon appeals against that decision. For the reasons which follow, the appeal should be dismissed.

Background

History

3 A hotel has been located on the site of the Raffles Hotel, on the banks of the Swan River adjacent to Canning Bridge, since 1896. In 2002, the Raffles Hotel was heritage listed. The Raffles Hotel trading hours are from 11.00 am to midnight on Monday to Saturday and 11.00 am to 10.00 pm on Sundays. The Raffles Hotel has a beer garden which operates rarely in winter and on Wednesday, Friday, Saturday and Sunday during the summer months. The Raffles Hotel has two upstairs bars or function areas, being the Riverside Room and the Kitson Room. The Kitson Room is on the Canning Highway side of the premises, is not open to the general public, and is used only for small private functions. The Riverside Room is on the river side of the premises, overlooks the beer garden, has a balcony, and is used only on Wednesday evenings from 7.00 pm to midnight, the first Friday of each month, and when private functions are booked (including on Tuesdays for salsa dancing).[2]

2005 - apartment complex

4 In or about 2005, an apartment complex comprising approximately 116 residential strata lots was constructed on the northern boundary of the Raffles Hotel (Apartments). The Raffles Hotel and the Apartments

[1] ***Ammon v Colonial Leisure Group Pty Ltd*** [2018] WASC 280.
[2] Primary decision [1], [53] - [55].

are part of the same strata complex.[3] At all material times, Ms Johns was the facilities manager of the strata complex.[4]

5 The freeway is located to the east of the development and the Canning Highway is located to the south.[5]

2009 - Mr Ammon's apartment

6 Mr Ammon owns apartment E501, which is the southern-most apartment on the fifth floor of the east side of the Apartments. Mr Ammon's apartment overlooks the Raffles Hotel beer garden, and is nearby the upstairs bar known as the Riverside Room.[6] Mr Ammon moved into his apartment in May 2009.[7]

Mr Ammon's noise concerns 2009 - 2014

7 Between 2009 and 2014, Mr Ammon said that he experienced some noise problems, but they were confined to Melbourne Cup Day, New Year's Day and occasional Wednesday and Friday nights.[8]

2013 - 2014 - redesign and redevelopment

8 In March 2013, Colonial commenced a redesign and redevelopment of the Raffles Hotel.[9]

9 On or about 12 August 2014, the owners of the Apartments passed consent to the redevelopment of the Raffles Hotel at an extraordinary general meeting of owners. The motion was passed without dissent and Mr Ammon was present at the meeting.[10]

10 A letter from the City of Melville (City) dated 17 December 2014, approving the development, stated that it would be conditional on:[11]

> All noise generated as a result of the operation of the premises when received at neighbouring 'Noise Sensitive Premises' is not to exceed the 'Assigned Noise Levels' contained in the … Regulations … at any time.

[3] Primary decision [1].
[4] Primary decision [46].
[5] Primary decision [84]
[6] Photograph GB 348.
[7] Primary decision [2], [22].
[8] Primary decision [22].
[9] Primary decision [2].
[10] Primary decision [40], [47].
[11] GB 278.

11 The Raffles Hotel was closed throughout the refurbishment period. During the course of refurbishment, steps were taken to limit the noise emanating from the Raffles Hotel.[12]

12 The Raffles Hotel was re-opened on 19 December 2014.[13] Mr Ammon said that his 'problems began' after the Raffles Hotel reopened in December 2014, even though he had experienced some noise problems earlier (see [7] above).[14]

Complaints 2014 - 2015

13 After the Raffles Hotel re-opened in December 2014, the venue manager was uncooperative, and did not engage with the council of owners of the Apartments and would not return Ms Johns' calls. During this period the relationship between the Raffles Hotel and the apartment owners generally was fractious.[15]

14 Approximately six months after the Raffles Hotel reopened, Colonial engaged an event promoter, DSB Promotions, to run Wednesday evenings upstairs at the Raffles Hotel, targeted at patrons between the ages of 18 and 25 years. The venue reached capacity on most Wednesday evenings and there was usually a queue of patrons waiting to get into the venue.[16]

15 Around this time, Colonial received complaints about the noise from owners of the apartments. Ms Johns said that throughout 2015 there were a series of complaints from residents generally, and nothing was done to address those complaints.[17]

16 During the time DSB Promotions was engaged to run Wednesday nights, hotel management allowed DJs to bring and use their own AV equipment, which was not controlled and limited through the Raffles Hotel sound system. As soon as he became aware of this, Mr Patching, the national operations manager for Colonial,[18] stopped the practice of DJs using their own sound equipment. From about the end of October 2015, all sound was played through the Raffles Hotel's sound system. Further, a sub-woofer which had been installed in the first floor ceiling over the balcony, was removed. Colonial terminated its arrangement

[12] Primary decision [2], [39], [45].
[13] Agreed chronology WB 86.
[14] Primary decision [22].
[15] Primary decision [48].
[16] Primary decision [41], [45].
[17] Primary decision [41], [45], [48].
[18] Primary decision [36].

with DSB Promotions and engaged a different promotions company, targeting patrons in their 30s and 40s.[19]

17 From January 2015 to October 2015, Mr Ammon made two or three verbal complaints about the noise.[20] On 19 October 2015, Mr Ammon directed an 'expletive laden rant' at Ms Johns.[21]

18 In October 2015, Mr Ammon commissioned Herring Storer Acoustics (Herring Storer) and Mr Watts, a senior acoustic consultant with that firm, to 'carry out acoustic assessments of noise emissions associated with the Raffles Hotel' relating to noise complaints made by Mr Ammon.[22] Herring Storer produced their first report in November 2015 and their last report in January 2018.[23] (The reports are referred to in detail in [51] - [80] below.)

City's letter of 6 January 2016

19 On or about 6 January 2016, the Raffles Hotel received a letter from the City, notifying it that a complaint had been received about the noise of the Raffles Hotel.[24] The letter advised the Raffles Hotel of the City's obligations and powers under the *Environmental Protection Act 1986* (WA) (EP Act) and the *Environmental Protection (Noise) Regulations 1997* (WA) (Regulations).[25]

Mr Ammon's complaints early 2016

20 On 8 January 2016, Mr Ammon wrote to the City, asking it to take noise measurements in relation to his complaint.[26]

21 On 11 May 2016, at around 7.30 pm, Mr Ammon went to the Raffles Hotel entrance, spoke to the then deputy manager and the current venue manager, Mr Chowdhury, and complained about the noise. Mr Ammon returned to his apartment and threw a number of tomatoes and four or five 375 ml water bottles towards the noise-making equipment in the beer garden.[27]

[19] Primary decision [41], [45].
[20] Primary decision [49].
[21] Primary decision [30] - [31].
[22] Mr Watts' statement, 19 January 2018, par 9, GB 25.
[23] Primary decision [63] - [64].
[24] Primary decision [42].
[25] GB 302 - 305.
[26] GB 306.
[27] Primary decision [33] - [34].

Colonial's acoustic reports

22 Following the City's letter of 6 January 2016, Colonial engaged an acoustic consultant, SLR Consulting Australia Pty Ltd (SLR), to assess the noise the subject of the complaint and to give advice to Colonial as to the steps it could take to reduce the noise.[28] SLR prepared a preliminary report dated 28 April 2016, and a further reported dated 30 August 2016.[29]

City's notice of 18 August 2016

23 On or about 18 August 2016, the City issued Colonial with, relevantly, an environmental protection notice under s 65(1) of the EP Act relating to noise from amplified music at the Raffles Hotel.[30]

24 The notice directed Colonial to take the specified measures to bring levels of noise emanating from music into 'compliance with the assigned levels under the [Noise] Regulations'. The notice also directed Colonial to provide a report by an acoustic consultant describing the nature of the measures taken to control and abate the noise emissions, and confirming that the premises would comply with the assigned levels prescribed by the Regulations.[31]

Steps taken by Colonial 2016 - mid-2017

25 As a result of SLR's report and a meeting with the chair of the council of owners of the strata complex, steps were taken over the period April 2016 to mid-2017, to limit the noise caused by music and crowds. In this regard, (1) the DJ booth was moved from the boundary of the beer garden closest to the Apartments to the north-side of the courtyard, (2) the DJs on Fridays and Saturday nights were moved to inside the bar from the courtyard, (3) the time DJs played in the courtyard was limited to 10.00 pm, (4) two speakers overlooking the beer garden, including the one closest to Mr Ammon's apartment, were turned off, (5) automatic door closers were installed to the beer garden doors, (6) a bouncer in the Riverside Room was hired to keep the Riverside Room balcony door closed, (7) the Riverside Room balcony door closest to the Apartments was kept locked, (8) the DJ booth in the Riverside Room was moved away from the wall closest to the Apartments and its speakers face southwards, (9) complaints

[28] Primary decision [42], [45].
[29] Mr Patching's statement, par 149, GB 116; GB 316.
[30] Primary decision [43]; GB 311 - 312.
[31] GB 311 - 312.

procedures were revised and a new complaints procedure was implemented, (10) a written noise management plan was implemented, (11) security procedures were increased, (12) further caps on sound system limits were placed and (13) a number of major events planned at the Raffles Hotel were cancelled. These steps were not sufficient to placate the City.[32]

26 Since the 18 August 2016 notice, in addition to the steps referred to above, Colonial was in discussions with the City about the steps to be taken to limit the noise from the music and crowd. Mr Patching acknowledged that the requirements of the notice in relation to crowd noise and music had not been resolved. However, no prosecutions had been launched by the City against Colonial at the time of trial for the crowd noise and music breaches. That appears to have been because Colonial suggested to the City that any further steps by the City could await the outcome of the nuisance action.[33]

November 2016 and subsequently

27 In November 2016, Mr Ammon approached Mr Chowdhury at around 8.30 am before the Raffles Hotel opened, telling him he intended to call the City. Mr Ammon was aggressive, yelling and swearing. Mr Blakey from the City went to the Raffles Hotel and indicated to Mr Chowdhury that the level of music was satisfactory. Mr Blakey later called Mr Chowdhury from Mr Ammon's apartment, and as a result of that discussion the music at the Raffles Hotel was turned down further.[34]

28 As a consequence of the steps taken to limit the noise from the Raffles Hotel, Mr Chowdhury has received complaints from DJs and customers that the music is not loud enough. Mr Chowdhury's view was that this adversely affected the patronage of the hotel, but was not in a position to provide figures as to what that reduced patronage might be.[35]

Mr Ammon's claim in the primary proceedings

29 Mr Ammon contended that the noise emanating from the Raffles Hotel was a private nuisance which interfered with his enjoyment of his apartment. He sought an injunction to restrain the playing of music in

[32] Primary decision [42] - [43], [45]; Mr Patching's statement, pars 149 - 154, GB 116 - 117.
[33] Primary decision [43] - [45].
[34] Primary decision [59] - [60].
[35] Primary decision [61].

the beer garden and the upstairs Riverside Room bar of the Raffles Hotel between certain hours during the week.[36]

30 In Mr Ammon's amended statement of claim, he also pleaded that the noise generated by the Raffles Hotel was in excess of the 'assigned level' of noise allowed by the Regulations, however Mr Ammon did not claim for breach of statutory duty.[37]

31 The master granted Mr Ammon leave to re-amend the terms of the relief sought in the amended statement of claim. In effect, Mr Ammon sought an injunction restraining Colonial from:[38]

1. Playing music in the beer garden of the Raffles Hotel:

    (a) after 9.00 pm and before 11.00 am on Wednesday, Friday and Saturday; and

    (b) after 8.00 pm and before 11.00 am on Monday, Tuesday, Thursday, Sunday and public holidays.

2. Playing music in the Riverside Room and outside balcony of the Riverside Room of the Raffles Hotel:

    (a) after 9.00 pm and before 11.00 am on Tuesday, Wednesday, Friday and Saturday; and

    (b) after 8.00 pm and before 11.00 am on Monday, Thursday, Sunday and public holidays.

3. Keeping the doors from the Riverside Room to the upstairs balcony of the Raffles Hotel open at all after 8.00 pm and before 9.00 am on Sunday and public holidays.

4. Keeping the doors from the Riverside Room to the upstairs balcony of the Raffles Hotel open at all after 9.00 pm and before 8.00 am on Monday to Saturday.

Mr Ammon's evidence

32 Mr Ammon gave the following evidence of the impact that the noise had on him:[39]

[36] Primary decision [2].
[37] Primary decision [3] - [4].
[38] Primary decision [6] - [7].
[39] Primary decision [24]; Mr Ammon's witness statement, pars 122 - 140, GB 20 - 21.

122. My TV/lounge is my primary place of relaxation and is located along the southern boundary of the Apartment and is the nearest room to the Hotel.

123. From years of living in the Apartment and experiencing the noise coming from the Hotel I am able to say that crowd and music noise from the beer garden and upstairs bar penetrates the full length of my Apartment. It travels through the main lounge area at the southern end, the kitchen area in the middle and the master bedroom at the northern end of the Apartment.

124. When the crowd and music noise starts up I have to turn the lounge TV off and move to one of the small bedrooms at the northern western corner of the Apartment.

125. On the days and at the times when the beer garden or upstairs bar are operating, I lose the use of most of my Apartment because the crowd and music noise inside my Apartment is so loud.

126. When the crowd and music noise becomes very loud I usually move to the north-western most bedroom but even then I sometimes have to use industrial strength headphones so that I can read sleep before Hotel closing time. The headphones are quite effective in reducing the noise, but I find that they are very uncomfortable to wear. My sleep is disturbed and disjointed whenever I wear the headphones to get to sleep. If I fall asleep with the headphones I usually find that I wake up a few hours later. If the Hotel is closed I take them off.

127. The crowd and music noise I experience in the Apartment can be so loud at times that even after moving to the north western corner of the Apartment I am unable to read without disruption to my enjoyment. Reading is one of my great passions and pastimes but is out of the question without me using the headphones.

128. From time to time I carry out work on my personal affairs and business affairs at a desk in the Apartment. I am regularly disturbed by the noise from the Hotel and find myself having to defer the work until a time when the beer garden and upstairs bar are not open. This causes me inconvenience.

129. The ongoing noise has made me feel increasingly frustrated, upset and angry. I have tried to remain calm about the situation but on occasions I have not been able to remain calm and have done some silly things which I later regretted. One such incident was the tomato and water bottle incident. I have also yelled at people and spoken badly to people.

130. The emotional upset I feel happens after relentless hammering of my eardrums from the Hotel's activities. I find this impacts on my personality and nature in a very big way. I used to be an easy going person but now I find myself becoming ratty when the noise is loud. I become easily angry and frustrated when I experience the noise coming from the Hotel beer garden and upstairs bar.

131. After nearly two years of trying to do everything I can to obtain some relief from what is for me a nightmare situation, very little has been achieved and I am fearful that I will snap if the situation is not resolved.

132. I have on occasion been accused of being a bully by the Strata Management company because of my numerous complaints to Ms Johns. I make complaints because I am at my wits end and my nerves are frayed from the noise and my disturbed sleep.

133. At my age I find need a lot more sleep than I used to. I do not know whether this is because I am sleep deprived or it is for some other reason. All I know is that the noise being generated by the Hotel not only has a major impact on my capacity to get to sleep and remain sleeping but it is also has a major impact on my ability to live, use and enjoy my home.

134. I find myself becoming ratty and anxious when the noise level is up and I have no way of escaping the noise. I cannot watch TV without the noise impacting my enjoyment, I cannot read a book without some interruption and I cannot listen to music quietly if I choose to do so without the noise affecting my enjoyment.

135. The Apartment has wonderful views from its southern and eastern sides. These areas cop the full brunt of the noise and often I find that my enjoyment of those views is ruined due to the ongoing noise.

136. The situation has been intolerable for me for many years and continues to be so. I have done everything I can to obtain the City of Melville and RGL to intervene on my behalf and have the noise constrained to permitted use under the Regulations. All my efforts in this regard have not helped and the Hotel continues to operate the beer garden and upstairs bar as it did before.

137. From my years of living in the Apartment since late 2014 I am able to say that the noise level inside my Apartment is exceptionally loud even when the sliding doors to the upstairs bar is closed. When the beer garden and upstairs bars are

> operating the music and crowd noise is noticeably louder in my Apartment.
>
> 138. When the weather is warmer and the beer garden is full the noise levels of the crowd and music is at its worst and becomes insufferable to me.
>
> 139. I appreciate that as a resident in the apartments there has to be some give and take by me when living next to a Hotel. I have never asked that the Hotel's operation be shut down. All I want is to be able to live in the Apartment without my daily existence and enjoyment being interfered with by what I am advised by [Herring Storer] is a level of noise that significantly exceeds the permitted noise emissions under the prescribed Regulations.
>
> 140. I cannot continue residing in the Apartment with the Hotel emitting the level of noise that it does and the interference this causes to my quality of life in my own home.

33 Mr Ammon's evidence as to the effects of the noise upon him was not challenged in cross-examination.

The Regulatory regime and the expert evidence

34 At trial (and in this appeal), Mr Ammon's case was heavily reliant on the expert evidence of Mr Watts and the reports of Herring Storer concerning the exceedance of assigned emission levels under the Regulations.

Noise levels under the EP Act and the Regulations - overview

35 In broad overview, the EP Act creates various offences which may be committed by the emission of noise from premises in excess of a standard prescribed by regulations. The Regulations do not themselves create an offence, but rather operate to define the circumstances when an offence may be committed under the Act. The Regulations exclude certain kinds of noise emission from the standards they prescribe, and provide for the Minister to approve the emission of noise above the prescribed levels where the premises cannot reasonably or practicably comply with the prescribed standard.

Prohibitions in the EP Act

36 Section 79 of the EP Act deals specifically with noise emissions. Under s 79(1) of the EP Act:

> A person who on any premises ... emits or causes or allows to be emitted unreasonable noise from those premises commits an offence.

37 Section 3(3)(c) of the EP Act provides, relevantly, that for the purposes of the EP Act, noise is taken to be unreasonable if it is prescribed to be unreasonable for the purposes of the Act.

38 In addition, s 51(a) of the EP Act provides that the occupier of premises who does not comply with any prescribed standard for an emission from those premises commits an offence. Under s 3(1), an 'emission' includes an emission of noise.

39 Further, s 49 of the Act creates offences where a person causes pollution or allows pollution to be caused. Pollution is relevantly defined in s 3A(1) of the Act to mean direct or indirect alteration of the environment of a prescribed kind that involves an emission (which, as noted above, includes an emission of noise). Section 49 also creates offences where a person emits an unreasonable emission from any premises, relevantly defined in s 49(1) to mean:

> An emission … of noise … which unreasonably interferes with the health, welfare, convenience, comfort or amenity of any person.

40 In addition to defining when an offence is committed, regulations prescribing standards for noise emissions may also operate together with provisions of the EP Act to provide a defence to the above offences. Under s 74A(b)(i), it is relevantly a defence to proceedings under pt V for causing pollution or in respect of an emission if the person charged with the offence proves that the pollution or emission occurred in accordance with a prescribed standard.

41 Prescribed standards for noise emissions also affect when an environmental protection notice may be issued under s 65 of the EP Act.

Operation of the Regulations

42 Regulation 4(1) relevantly provides that the requirements prescribed by reg 7 of the Regulations for the emission of noise from premises are, subject to the Regulations, prescribed standards for the purposes of s 51, 65 and 74A of the EP Act. Regulation 4(2) relevantly provides that the emission of noise otherwise than in accordance with reg 7 of the Regulations is, if reg 7 applies to the emission, a prescribed alteration of the environment for the purposes of the definition of pollution in s 3A(1)(c) of the EP Act.

43 Regulation 5(1) relevantly provides that noise emitted in contravention of a standard prescribed under reg 7 of the Regulations is taken to be unreasonable. Regulation 5(1) operates subject to reg 5(2) of the Regulations.

44 Regulation 5(2)(a) provides that noise is not to be taken to be unreasonable under subreg (1) if the person causing the noise emission shows that, by virtue of other regulations, reg 7 does not apply to the noise emitted. The other regulations provide that reg 7 does not apply in certain circumstances to noise resulting from certain activities (such as waste collection, dealt with in reg 14A and reg 14B) or certain premises (such as construction sites, dealt with in reg 13).

45 Regulation 5(2)(b) provides that noise is not to be taken to be unreasonable under subreg (1) if the noise is emitted in accordance with an approval granted under, relevantly, reg 18B.

46 The above provisions also operate subject to reg 3, which provides that the Regulations do not apply to certain noise emissions, including noise emissions from the propulsion and braking systems of motor vehicles operating on a road (reg 3(1)(a)).

Standard prescribed by reg 7 of the Regulations

47 Regulation 7(1) prescribes the standard for noise emitted from premises (in this case, the Raffles Hotel) when received at other premises (in this case, Mr Ammon's apartment). Regulation 7 provides, relevantly in effect, that noise emitted from the hotel must not cause or significantly contribute to a level of noise which exceeds the 'assigned level' at the apartment. When assessing the noise level from the Raffles Hotel, the Regulations require, relevantly, an additional 15 decibels to be added to the measurement of noise levels inside Mr Ammon's premises with windows and doors closed.[40] Also, the Regulations require that noise levels, when assessed, should be 'free' of tonality, impulsiveness and modification.[41] If, as in the case of music, the type of noise is such that these characteristics cannot reasonably or practicably be removed, a further 5 - 15 decibels is to be added to the measured levels. In the case of music, 10 decibels is to be added where impulsiveness is not present, and 15 decibels is to be added where impulsiveness is present.[42]

[40] Regulations 19(2) and (4)(a).
[41] Regulation 7(1)(b).
[42] Regulation 9(3), table 2.

48 Regulation 8(3) provides for the assigned noise levels for premises. The most relevant assigned level for present purposes is the 'L_{A10} assigned level' which is, when measured in a specified manner, not to be exceeded for more than 10% of the representative assessment period.[43] Regulation 8 provides for an 'influencing factor', calculated in accordance with sch 3, to be added to the values specified in the table to reg 8 of the Regulations. Schedule 3 provides for the influencing factor to be determined by reference to the extent of industrial, commercial or transport land uses surrounding noise sensitive premises. In the case of Mr Ammon's premises, the evidence was that the influencing factor at the apartment was +8 decibels.[44] The assigned L_{A10} levels for Mr Ammon's premises under reg 8 therefore are:

(1) 53 decibels between 7.00 am and 7.00 pm Monday to Saturday;

(2) 48 decibels between 7.00 pm and 10.00 pm on all days, and between 9.00 am and 7.00 pm Sundays and public holidays;

(3) 43 decibels between 10.00 pm on any day to 7.00 am on Monday to Saturday and 9.00 am on Sunday and public holidays.

Where a person cannot reasonably or practicably comply

49 Regulation 17(1) provides, relevantly in effect, that if a person is of the opinion that the person cannot reasonably or practicably comply with a standard prescribed under the Regulations, that person may apply to the Minister for approval to allow the emission of noise in that case to exceed or vary from the standard. Regulation 18A deals with the referral of such an application to the CEO for assessment. Regulation 18B provides, in effect, that after receiving specified reports, the Minister may grant, or may refuse to grant, the approval for the purposes of reg 17.

Mr Ammon's expert evidence

50 As noted earlier, Mr Ammon called expert evidence from Mr Watts of Herring Storer.

[43] Regulation 8(1) (definition of 'L_{A10} assigned level') of the Regulations.

[44] See, for example, the Herring Storer report of December 2017, pages 2 - 3 (GB 454-455). As is acknowledged in that part of the report, a lower influenced factor of 7 decibels was referred to in another report which assumed a lesser extent of surrounding commercial land use.

51 Herring Storer produced acoustic reports dated:

1. November 2015 in relation to noise levels at the balcony of Mr Ammon's apartment on Friday, 23 October, Saturday, 24 October and Wednesday, 28 October 2015.[45]

2. August 2016 in relation to noise levels at the balcony of Mr Ammon's apartment over several Wednesdays, Fridays and Saturdays in late June to late July 2016.[46]

3. June 2017 in relation to noise levels 'at the residence' on several Wednesdays, Fridays, Saturdays and Sundays in June 2017.[47]

4. July 2017 in relation to noise levels 'at the residence' on a Friday in late June 2017, three Saturdays in early July 2017, a Sunday in early July 2017 and a Tuesday and Wednesday in mid-July 2017.[48]

5. August 2017 in relation to noise levels at the balcony and in the living room of Mr Ammon's apartment on Wednesday, 9 August 2017 between 10.00 pm and 11.00 pm.[49]

6. December 2017 in relation to noise levels at the balcony and living room of Mr Ammon's apartment on Wednesday, 6 December 2017 between 9.00 pm and 11.00 pm.[50]

7. January 2018 in relation to noise levels at the inside of the apartment (living room, small bedroom/study, master bedroom, second bedroom), and the balcony (eastern-facing and western-facing) at Mr Ammon's apartment on Friday 8 December 2017 between 9.30 pm and 11.00 pm.[51]

8. January 2018 in relation to noise levels at the balcony (including the balcony facing Raffles), and inside the apartment (living room and small bedroom/study) on Friday, 15 December 2017 between 10.00 pm and 11.00 pm.[52]

[45] GB 352 - 360.
[46] GB 361 - 389.
[47] GB 390 - 412.
[48] GB 413 - 435.
[49] GB 436 - 448.
[50] GB 449 - 463.
[51] GB 464 - 479.
[52] GB 480 - 494.

9. January 2018 in relation to noise levels at Mr Ammon's apartment on a number of Wednesdays, Fridays, Saturdays and Sundays between 6 November and 25 December 2017.[53]

52 Mr Watts, in his witness statement dated 28 March 2018,[54] annexed a 'Noise Guide for Local Government' issued by the Environment Protection Authority of NSW. Mr Watts provided an extract from this guide in his witness statement that indicated that the noise levels in the 30 - 40 decibel range in the 'A' frequency (dB(A)) were equivalent to 'quiet countryside', that noise levels in the 40 - 50 decibel range were equivalent to a 'quiet suburban area', and that a 60 decibel noise level was equivalent to a 'busy office'.[55]

53 References to 'decibels' in the following discussion are to dB(A).

The November 2015 report

54 The November 2015 report related to the balcony of Mr Ammon's apartment.[56] It indicated, amongst other things, that the *assigned* L_{A10} noise level, being the noise level not to be exceeded for more than 10% of the representative assessment period,[57] ranged between 42 and 52decibels, depending on the day of the week and the time.[58] The *measured* L_{A10} noise level, being the noise level exceeded for 10% of the time, was, according to Mr Watts, 'generally in the range of 64 to 66 dB(A)'. This was attributable to the noise of the traffic. In other words, the regulatory assigned L_{A10} noise level was consistently exceeded by traffic noise.[59]

55 The report also indicated that at the balcony of Mr Ammon's apartment:[60]

1. In the afternoons/evenings and nights on Wednesdays, Fridays and Saturdays:

    (a) noise from light ambient music at the hotel was audible infrequently, and not audible sufficient to attract adjustments applicable to music noise emissions;

[53] GB 495 - 517.
[54] GB 29 - 86.
[55] GB 41, 85.
[56] Section 3, GB 357.
[57] Regulation 8.
[58] Table 4; GB 357.
[59] Section 5; GB 357.
[60] Section 5; GB 357 - 358.

(b) crowd noise was the dominant noise source; and

(c) measured noise levels were in the range of 67 to 70 decibels, ie, only a few decibels higher than the traffic noise referred to by Mr Watts.

2. Crowd noise and 'dance' music, in the evening and into the night, primarily on Saturdays, were measured in the range of 75 - 80 decibels. Music was audible and the primary source of noise. The measured figure was then adjusted by adding 10 decibels on account of music being the primary source of noise (with impulsiveness not present),[61] giving an adjusted L_{A10} noise level of 85 decibels.[62]

The August 2016 report

56 The report indicated that at the balcony of Mr Ammon's apartment:[63]

1. Received L_{A10} noise levels were generally in the range of 64 - 66 decibels due to traffic, which, again, exceeded the regulatory assigned levels.

2. Noise levels from crowd and light ambient music in the early afternoon, evenings and nights on Wednesdays, Fridays and Saturdays were in the range of 67 to 70 decibels, ie, similar to those recorded in the November 2015 report.[64] Music was inaudible frequently, and crowd noise was the dominant source of noise.

3. Noise from crowd and 'dance' music in the evening and often into the night on Wednesdays, Fridays and Saturdays ranged between 67 and 72 decibels, ie, 8 decibels lower than the corresponding figures in the November 2015 report.[65] A further 10 dB was added on account of a source being music (with impulsiveness not present).[66]

[61] Regulation 9, table 2.
[62] Section 5, table 6; GB 358.
[63] Section 3, 5; GB 366, 368 - 369.
[64] GB 368.
[65] GB 368.
[66] GB 368.

57 The assigned L_{A10} noise levels again ranged from 42 - 52 decibels.[67]

The June 2017 report

58 This report was based on the 'noise logger' being 'placed at the residence', but without identifying where.[68] As there is no reference (unlike some later reports) to measurements taken indoors, the implication is, and senior counsel for Mr Ammon accepted,[69] that the measured noise levels were taken on the balcony.

59 The report covered certain Wednesdays, Fridays, Saturdays and Sundays in June 2017. The report indicated that:[70]

1. On most days, the measured L_{A10} noise level was between 61 and 66 decibels,[71] ie, ranging lower than the noise levels generally associated with traffic noise on the balcony.[72]

2. The highest measured noise levels were on Sunday, 4 June 2017 at 78 decibels between 7.00 am and 7.00 pm, and 72 decibels between 7.00 pm and 10.00 pm on Sunday, 4 June 2017.[73]

3. Crowd or music noises were the dominant sources of received levels of noise from the hotel, depending on time and day.[74]

4. Based on music being a source of emission (without impulsiveness), a further 10 decibels was again added to each of the measured levels, taking the overall adjusted range to 71 - 88 decibels.[75]

5. The assigned L_{A10} levels, again, ranged between 42 and 52 decibels, so that the measured levels exceed the assigned levels by 19 - 46 decibels.[76]

[67] Table 4; GB 366.
[68] Section 4; GB 396.
[69] Appeal ts 26.
[70] Sections 4 and 5; GB 396 - 397.
[71] Table 5; GB 396.
[72] See [54] and [56.1] above.
[73] Table 5; GB 396.
[74] Section 5; GB 396.
[75] Table 6; GB 397.
[76] Table 7; GB 397.

The July 2017 report

60 The report was based on a 'noise logger' being 'placed at the residence', but without identifying where. Again, the implication is, and senior counsel for Mr Ammon accepted,[77] that the measured levels were taken on the balcony. This report, related to a Friday in late June 2017 and a Tuesday, a Wednesday, three Saturdays and a Sunday in July 2017.

61 The report indicated, again, that assigned L_{A10} noise levels ranged between 42 and 52 decibels, and that the measured L_{A10} noise levels attributable to the hotel, with crowd or music being the dominant source, ranged between 57 and 63 decibels.[78] The measured levels in this report were significantly lower than the levels found in the November 2015, August 2016 and June 2017 reports.

62 The measured level was again adjusted by adding 10 decibels in relation to music emissions to give the adjusted L_{A10} noise level range as 67 to 73 decibels.[79]

The August 2017 report

63 This report is the first to include a reference to received noise levels inside the apartment. It indicated that on Wednesday, 9 August 2017, the measured L_{A10} noise level was:[80]

1. 41 decibels in the living room, with the external windows and doors closed.

2. 65 decibels on the balcony.

64 The living room figure was then adjusted by adding 15 decibels, to take into account the closure of the doors and windows to the living room.[81]

65 Then a further 10 decibels was added to each of the adjusted living room figure and the balcony figure, on account of music being a noise emission source (where impulsiveness was not present). The result was that the adjusted L_{A10} noise level on the balcony was assessed at 75 decibels and the adjusted L_{A10} noise level in the living

[77] Appeal ts 28.
[78] Section 5; GB 419.
[79] Section 5, table 6; GB 419.
[80] Section 3, table 5; GB 443.
[81] Table 6; GB 443.

room was assessed at 66 decibels.[82] Again, the assigned L_{A10} noise levels ranged between 42 and 52 decibels.[83]

66 The report stated that 'the level of exceedance' of the assigned levels under the Regulations 'is considered significant'.[84]

67 The report indicated that, when the measurements were taken, the beer garden was closed or empty, and no music was being played there.[85]

The December 2017 report

68 This report indicated that on Wednesday, 6 December 2017, the measured L_{A10} noise level for the living room (external windows and doors shut) was 43 and 44 decibels, and for the balcony was 67 decibels.[86]

69 The living room figure was then adjusted by adding 15 decibels on account of the closed internal doors and windows, to take the figure to 58 and 59 decibels.[87]

70 A further 10 decibels was then added to both the adjusted living room figure, and the balcony figure, to account for music as a noise source (without impulsiveness).[88] The adjusted noise levels were 68 and 69 decibels for the living room, and 77 decibels for the balcony.[89] The assigned L_{A10} noise levels were between 43 and 53 decibels, so that the measured levels exceed the assigned levels by 20 - 34 decibels.[90]

71 The report stated that 'the level of exceedance' of the assigned levels under the Regulations 'is considered significant'.[91]

The January 2018 reports

72 The first January 2018 report indicated that on Friday, 8 December 2017, between 9.30 pm and 11.00 pm, the measured L_{A10} noise levels for:[92]

[82] Table 7; GB 444.
[83] Table 8; GB 444.
[84] Executive summary; GB 439.
[85] Section 5, GB 445.
[86] Section 3, table 3.1; GB 456 - 457.
[87] Table 4.1; GB 458.
[88] Table 4.2; GB 458.
[89] Table 4.2; GB 458.
[90] Table 2.4; GB 456.
[91] Executive summary; GB 452.

1. Indoors, with external windows and doors shut, were:

    (a) 35 decibels for the second bedroom;

    (b) 36 decibels for the master bedroom;

    (c) 40 decibels for the small bedroom/study; and

    (d) 42 and 43 decibels for the living room.

2. The balcony ranged from 58 to 70 decibels.

73 Again, 15 decibels was added to each of the indoors measured figures, as the internal doors and windows had been closed.[93]

74 All the figures then had a further 10 decibels added on account of music as a source of the emission (without impulsiveness).[94] 5 decibels was also added to the figures measured in the second bedroom and the rear balcony, due to the presence of tonality.[95] The adjusted L_{A10} noise levels ranged from 55 to 68 decibels for internal measures, and 63 to 80 decibels for the balcony.[96] The assigned L_{A10} noise levels ranged between 43 and 53 decibels, so that internal measurements exceeded the assigned levels by 12 - 24 decibels and balcony measurements exceeded the assigned levels by 20 - 37 decibels.[97]

75 The report stated that 'the level of exceedance' of the assigned levels under the Regulations 'is considered significant'.[98]

76 The second January 2018 report related to Friday, 15 December 2017, between 10.00 pm and 11.00 pm. It indicated that the measured L_{A10} noise level figures:[99]

1. For indoors, with external windows and doors shut, were 37 decibels for the small bedroom/study and 42 decibels for the living room.

2. For the balcony were 66 and 67 decibels.

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[92] Table 3.1; GB 472.
[93] Table 4.1; GB 473.
[94] Table 4.2; GB 474.
[95] Table 4.3; GB 474.
[96] Table 4.4; GB 474.
[97] Table 2.4; GB 471.
[98] Executive summary; GB 467.
[99] Section 3, table 3.1; GB 488.

77 As with the earlier reports, an additional 15 decibels was added to the indoor figures to take into account the closed internal windows and doors, and a further 10 decibels was added to each of the adjusted internal and balcony figures, on account of music being a source of the noise emission (without impulsiveness).[100] Again, the assigned L_{A10} noise levels ranged between 43 and 53 decibels.[101] The adjusted L_{A10} noise levels were 62 and 67 decibels for internal measures, and 76 and 77 decibels for the balcony.[102] The report stated that 'the level of exceedance' of the assigned levels under the Regulations 'is considered significant'.[103]

78 The third report of January 2018 recorded noise levels on the balcony.[104] The periods for measurements were Wednesday evening/night, Friday evening/night, Saturday evening/night and Sunday afternoon. 9.00 pm was used as a typical 'evening' period, and 11.00 pm was used as a typical 'night' period. The measured L_{A10} noise levels were:[105]

1. Wednesday evening: 66 - 69 decibels.

2. Friday evening: 67 - 71 decibels.

3. Saturday evening: 66 - 69 decibels.

4. Wednesday night: 62 - 68 decibels.

5. Friday night: 64 - 68 decibels.

6. Saturday night: 64 - 68 decibels.

7. Sunday afternoon: 65 - 67 decibels.

79 For each measured level there was an additional 10 decibels added on account of the noise emission being music (without impulsiveness).[106] The adjusted noise levels were 76 and 77 decibels for evenings, 72 and 74 decibels for nights, and 75 decibels for Sunday afternoons.[107]

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[100] Section 4; GB 473.
[101] Table 2.4; GB 471.
[102] Table 4.3; GB 489.
[103] Executive summary; GB 483.
[104] Section 3; GB 502.
[105] Section 4, table 4.1; GB 503.
[106] Table 4.2; GB 504.
[107] Table 4.3; GB 504.

80 The assigned L_{A10} levels were (1) 48 decibels for the evenings, (2) 48 decibels for Sunday afternoon, and (3) 43 decibels for the nights.[108] The measured levels exceed the assigned levels by 28 - 31 decibels.[109] The report stated that 'the level of exceedance' of the assigned levels under the Regulations 'is considered significant'.[110]

Mr Watts' conclusions

81 In his witness statement dated 19 January 2018,[111] Mr Watts summarised his opinions, relevantly, as follows:[112]

1. The beer garden in the Raffles Hotel cannot comply with the noise levels prescribed by the Regulations if it is permitted to operate and to play any music. Moreover, the crowd noise alone would, in all probability, exceed the noise levels prescribed by the Regulations. The beer garden would likely need to be closed down, as crowd noise alone would probably continue to breach the Regulations.

2. The crowd noise alone from the upstairs bar (the Riverside Room) would, in all probability, exceed the noise levels prescribed by the Regulations, although closing the doors and windows of the upstairs bar would reduce noise levels.

Primary decision

The issues in summary

82 The master said the issues between the parties at trial were:[113]

1. Is the noise emanating from the Raffles Hotel such that it amounted to a private nuisance?

2. If the noise emanating from the Raffles Hotel amounts to a private nuisance, should Colonial be restrained by an injunction from continuing with the nuisance?

83 As to the first issue, the master found that Mr Ammon had failed to establish that the noise emanating from the Raffles Hotel had interfered with his enjoyment of his apartment in a way that was

[108] Table 4.3; GB 504.
[109] Table 4.3; GB 504.
[110] Executive summary; GB 498.
[111] GB 23 - 28.
[112] GB 27.
[113] Primary decision [5].

substantial and unreasonable.[114] As to the second issue, the master said that even if the interference was substantial and unreasonable, he would not issue an injunction restraining Colonial from continuing with the nuisance in the management of the Raffles Hotel. That was because Colonial could not be expected to restrict the operation of it in a way inconsistent with the orderly and proper use of that venue.[115]

Private nuisance

84 The master said that a cause of action in nuisance protects a claimant's interest in the beneficial use of land and is directed at the harm caused rather than the conduct causing it. The master said that a claimant in nuisance must establish that a reasonable individual would find the nuisance substantial and real, and that the nuisance actually interferes with their enjoyment of their property. His Honour said the test to be applied is not entirely subjective, but the effect of the interference upon particular individuals might vary. The master said nuisance is a question of degree, and that all the relevant factors must be taken into account, including in this case that the Apartments are in a busy precinct, not a quiet suburban back water.[116]

85 The master found that the noise from the Raffles Hotel caused an interference with Mr Ammon's enjoyment of his apartment. The master accepted that Mr Ammon maintained a consistent position over time that the noise emanating from the Raffles Hotel was intrusive, based on evidence of Mr Ammon's complaints to the Raffles Hotel as well as to the strata management, the City, and the relevant liquor licensing authorities. The master said that from Mr Ammon's witness statement, it was clear that Mr Ammon found the noise affected his ability to watch television and read, and his sleep patterns.[117]

86 The master said the relevant question was whether Mr Ammon had established a substantial and unreasonable interference with his beneficial use of his apartment by noise emanating from the Raffles Hotel.[118]

87 The master said the main evidence of the noise from the Raffles Hotel being a substantial and unreasonable interference with Mr Ammon's enjoyment of his apartment was the fact that the noise

[114] Primary decision [83].
[115] Primary decision [89].
[116] Primary decision [13] - [14].
[117] Primary decision [23] - [25], [79].
[118] Primary decision [79].

levels measured by Mr Watts exceeded the levels permitted by the Regulations. The master said:[119]

> There can be no doubt based upon Mr Watts' evidence that the noise levels he recorded in the plaintiff's apartment exceeded the allowable levels under the relevant regulations. What is more difficult to assess is the extent to which the noise exceeding the regulations affected the plaintiff's lifestyle. Put another way, the evidence of Mr Watts is largely quantitative rather than qualitative. The issue is the extent to which the noise emanating from the Raffles affects [Mr Ammon]. The fact that the noise is above levels permitted by the [Noise] Regulations is not necessarily determinative of the central issue in this case.
>
> …
>
> The main evidence in support of the plaintiff's contention is the fact that the noise levels as measured by Mr Watts exceed the noise levels permitted by the [Noise] Regulations. That is not in and of itself determinative. It is but one factor to be taken into account and when it is taken into account, it favours the plaintiff's position.

88 Despite Colonial's suggestion, the master said Mr Ammon did not strike him as a fastidious and delicate individual, and that he appeared to be stoic and tough. The master was unable to conclude from Mr Ammon's behaviour that he was adopting an unreasonable position in relation to the noise emanating from the Raffles Hotel.[120]

89 The master was not satisfied that the interference with Mr Ammon's enjoyment of his apartment, caused by the noise from the Raffles Hotel, was substantial and unreasonable. The factors contributing to this finding were:[121]

1. The lack of detailed evidence from Mr Ammon on the topic.

2. Mr Ammon chose to buy an apartment in a development with high levels of ambient noise, with the freeway to the east and Canning Highway to the south, such that there was always going to be a background hum of ambient noise.

3. Mr Ammon was aware when he bought the apartment that the Raffles Hotel operated as an entertainment venue and had done so for many years. Whilst he could not have known precisely the level of noise that would emanate from the hotel, 'he must

[119] Primary decision [69], [80].
[120] Primary decision [35], [81].
[121] Primary decision [83] - [84].

[have] been aware that there would be some noise. Any hotel plays music. [He] could not have expected anything else'.

4. There was a stage when music emanating from the Raffles Hotel was so loud that not only Mr Ammon, but also other residents were affected. But that was not the position now. Changes were made in the Raffles Hotel such that the noise from it was consistent with what is reasonable and with what Mr Ammon could have anticipated when purchasing his apartment.

Injunction

90 In effect, the master said that in deciding whether to grant an injunction in the current case, it was a balancing exercise, to balance the right of Colonial to continue to operate the Raffles Hotel as an entertainment venue, against the right of Mr Ammon to not be interfered with.[122]

91 The master said that even if he were satisfied that Mr Ammon established the nuisance claim, he would not have granted the injunction sought.[123]

92 The master said Mr Ammon may not have anticipated the level of noise that was emanated from the Raffles Hotel, but he bought next to it and to now seek to shut down its operations, even to a limited extent, was not appropriate. The master said Mr Patching and Mr Chowdhury made plain that Colonial had adjusted its business to take into account complaints about noise, such that the Raffles Hotel was being operated at the time of trial in a way consistent with sound management of such a venue. The master said the management of the Raffles Hotel could not be expected to restrict the operation of the venue in a way which was inconsistent with the orderly and proper use of the venue. The master said that this was a compelling reason against issuing an injunction.[124]

Grounds of appeal

93 Ground 1 of the grounds of appeal alleges that the master erred in finding the noise levels emanating from the Raffles Hotel were not a

[122] Primary decision [87] - [88]; citing ***Sturges v Bridgman*** (1879) 11 Ch D 852 and ***Miller v Jackson*** [1977] QB 966.
[123] Primary decision [85].
[124] Primary decision [88] - [89].

substantial and unreasonable interference with Mr Ammon's comfort and quiet enjoyment of his apartment, when:

1. The master, having accepted Mr Watts' evidence and found (at primary decision [83]) that the noise level appeared to be in excess of the level allowed under the Regulations, failed to appreciate the 'intrinsic nature of that breach [which] was demonstrably substantial and unreasonable'.

2. The master found (at primary decision [84]) that the noise levels were consistent with what is reasonable, as such a finding was erroneous in that it:

    (a) was inconsistent with Mr Watts' evidence and the finding at primary decision [83] referred to above;

    (b) erroneously relied on 'iterative evidence of a reduction in the level of complaints by other residents', when that evidence was also inconsistent with Mr Watts' evidence and the finding at primary decision [83]; and

    (c) was inconsistent with the evidence that the attempts at mitigation had not 'solved the problem', particularly where the evidence was that at the time of the trial, Colonial had failed to comply with the Environmental Protection Notice dated 15 August 2016, directing it to bring the levels of noise emissions into compliance with the assigned levels under the Regulations.

94 Ground 2 alleges, in effect, that the master erred in finding (at primary decision [84]) that the noise was now consistent with a level which Mr Ammon could have anticipated when he purchased his apartment, given:

1. That noise levels complained of only arose after the refurbishment of the Raffles Hotel.

2. The master's finding as to the ongoing breach of the Regulations at the time of the trial.

3. That as a matter of law, any development or operation of the hotel and apartments was always subject to the legal requirements of the EP Act and Regulations.

4. Mr Ammon's expectations in 2009 are not relevant, as a matter of law, to the question of whether there was an ongoing substantial and unreasonable interference with his quiet enjoyment of the apartment.

95 Ground 3 alleges, in effect, that the master erred in failing to grant an injunction in that:

1. The master erroneously found Mr Ammon should have anticipated the interference with his quiet enjoyment because he was aware in 2009 that he was buying next to a hotel, in circumstances where the nuisance only commenced in 2013 - 2014 after the Raffles Hotel was refurbished.

2. The master proceeded, erroneously, on the basis that Mr Ammon sought to shut down the Raffles Hotel operation, when he, in fact, sought only to balance the interests of the Raffles Hotel and his quiet enjoyment of his apartment.

3. The master wrongly asked the question of whether injunctive relief was 'appropriate', when he was required to apply the relevant legal principles to ameliorate private nuisance established on the evidence.

Ground 1 - substantial and unreasonable interference

Appellant's submissions

96 As the submissions referred to below indicate, Mr Ammon relied heavily on the EP Act and the Regulations as the basis for challenging the master's finding that Mr Ammon had not established that the noise emissions from the hotel were a substantial and unreasonable interference with Mr Ammon's beneficial use of his premises. Mr Ammon nevertheless accepted that, whilst the statutory standards were relevant, they were not determinative of the issue.[125]

97 In oral submissions, Mr Ammon focused on the propinquity of the apartment with the beer garden and the upstairs bar known as the Riverside Room.[126]

[125] Appellant's written submissions, pars 32, 35; appellant's reply, par 9; appeal ts 14, 72.
[126] Appeal ts 7 - 8, 50 - 51.

Ground 1.1 - significant interference

98 Mr Ammon submitted that a breach of the prescribed standard in the Regulations must be taken into account as relevant evidence as to whether that noise constitutes a substantial and unreasonable interference with quiet enjoyment.[127] Mr Ammon submitted that the ongoing breach of the Regulations was inconsistent with what is reasonable, given that the breach is unreasonable for the purposes of the EP Act.[128]

99 Mr Ammon submitted that the Regulations must work with and add content to the common law action in private nuisance.[129] Mr Ammon submitted that a useful test for reasonableness was what was 'reasonable according to the ordinary usages of mankind living … in a particular society'.[130] Mr Ammon submitted what is reasonable is resolved by statutory schemes, and that the Regulations cover a wide range of activities and are used by the Department of Environment Regulation and local governments to maintain acoustic amenity and health standards.[131] Mr Ammon submitted that any failure to recognise the substantial and unreasonable nature of an ongoing and significant breach of the Regulations undermines the operation, administration and enforcement of the Regulations in Western Australia.[132]

100 Mr Ammon also acknowledged other factors which must be considered in determining if noise is an unreasonable interference with quiet enjoyment, including the nature of the interference and whether it is on-going.[133]

Ground 1.2 - reasonable noise

101 Mr Ammon criticised the master's finding that the noise levels were consistent with what was reasonable. Mr Ammon submitted that that finding contradicts the statutory definition at s 3(3) of the EP Act as to what constitutes 'unreasonable noise', and contradicts matters of fact established by the expert evidence. Mr Ammon submitted that

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[127] Appellant's written submissions, par 32; WB 14; appeal ts 14, 71.
[128] Appellant's written submissions, par 26 - 27; WB 12 - 13.
[129] Citing ***Cohen v City of Perth*** [2000] WASC 306 [147].
[130] Citing ***Sedleigh-Denfield v O'Callaghan*** [1940] AC 880, 903; adopted by the High Court in ***Elston v Dore*** [1982] HCA 71; (1982) 149 CLR 480, 487 - 488.
[131] Appellant's written submissions, pars 30 - 36; WB 13 - 15; appeal ts 14.
[132] Appellant's written submissions, par 26 - 27; WB 12 - 13.
[133] Appellant's written submissions, pars 37 - 38; WB 16; citing ***Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management*** [2012] WASCA 79; (2012) 42 WAR 287 [118] - [119].

expert empirical evidence should be preferred to 'iterative or other less probative forms of evidence'. [134]

102 Mr Ammon also referred to the evidence of Colonial's expert witness, Ms Ireland, in which she agreed that if a 'measured level' of noise is a certain amount, an increase of 10 decibels above that is perceived as twice as loud, and (in effect) that decibels are measured on a logarithmic scale.[135] Ms Ireland also accepted that exceeding the assigned levels by 17 decibels is 'significant'.[136]

103 Mr Ammon criticised the master's acceptance of Colonial's submission below to the effect that no other complaints were made by other occupiers of the Apartments regarding the noise. Mr Ammon submitted that there was evidence of complaints made by other residents of the Apartments made both before and after Colonial made attempts to mitigate the noise, and that the expert evidence also contradicted that finding. Mr Ammon submitted that the empirical measure of the noise interference provided by the acoustic expert evidence contradicted the assessment of a reduction in complaints.[137]

104 Mr Ammon submitted that the steps taken by Colonial to ameliorate the noise had a negligible benefit and did not make the Raffles Hotel compliant with the permitted Regulations. Mr Ammon submitted that Colonial had conceded that compliance with the Regulations was impossible. Mr Ammon observed that Colonial's acoustic engineers had stated that it was not reasonably practicable for the Raffles Hotel to meet assigned noise levels.[138] In addition, Mr Ammon's expert evidence, accepted by the master, was to the effect that the operations of the beer garden of the Raffles Hotel would never comply with assigned noise levels. Mr Ammon observed that Mr Watts' evidence was to the effect that the measured noise levels remained significantly and consistently higher than the noise levels permitted by the Regulations.[139]

Respondent's submissions

105 Colonial submitted that ground 1 was alleged to raise an error of law, in that it alleged, in effect, that the master's evaluative judgment

[134] Appellant's written submissions, pars 39 - 42; WB 16 - 17.
[135] ts 240 - 241.
[136] ts 255.
[137] Appellant's written submissions, pars 44 - 47; WB 18.
[138] SLR's report dated 30 August 2016, GB 315.
[139] Appellant's written submissions, pars 48 - 51; WB 18 - 20.

'ought to have started and stopped' with Mr Ammon's expert evidence and the Regulations. Colonial submitted that this was not a correct approach as a matter of law.[140]

106 Colonial submitted that ground 1.1, in effect, alleged that the finding that the noise exceeded the Regulations must, in itself, lead to a conclusion that the noise caused unreasonable interference. Colonial submitted that the noise exceeding the Regulations was a factor to be taken into account but was not determinative, and it submitted that the master followed this approach. It submitted that the master followed the approach in ***Cohen***, which counsel for Mr Ammon at trial submitted was correct. It submitted that the master noted that the evidence of Mr Watts was largely quantitative rather than qualitative, and involved assessing noise levels inside Mr Ammon's apartment on two Wednesdays and two Friday nights, with noise levels on the balcony being indicated as higher than inside the apartment.[141] Colonial submitted that Mr Watts' evidence was one factor, but was not determinative.[142]

107 Colonial submitted that ground 1.2 wrongly asserted that the master made a finding as to 'noise levels *at* [Mr Ammon's] apartment', whereas the finding actually referred to noise coming *from the* Raffles Hotel. It submitted that the ground took the master's finding out of context.[143] Colonial submitted that the master found that he was not satisfied from Mr Ammon's evidence that the interference with his occupation of his apartment was substantial and unreasonable. Colonial submitted that the master's finding that the noise from the hotel was consistent with what was reasonable was made in the context of his finding that Colonial took steps to reduce the interference. It submitted that Mr Ammon's allegation that complaints were made by other residents after Colonial took steps to minimise noise were incorrect, save for complaints in respect of a one-off event on 17 January 2018.[144]

[140] Respondent's written submissions, pars 21 - 22; WB 39 - 40.
[141] Primary decision [69].
[142] Respondent's written submissions, pars 23 - 31; WB 40 - 41.
[143] Referring to primary decision [82] - [84].
[144] Respondent's written submissions, pars 32 - 42; WB 41 - 43.

Ground 2 - expectation of noise and noise meeting expectation

Appellant's submissions

108 Mr Ammon submitted that the master equated the noise that was reasonable in private nuisance with the noise levels Mr Ammon could have anticipated when he purchased his apartment. Mr Ammon submitted that it was not a defence that he came to the nuisance, and that the character of a neighbourhood could not be defined by the nuisance, so no defence existed because the nuisance occurred prior to him coming to it.[145]

109 Mr Ammon submitted that it was not relevant that he should or could have been aware, having purchased an apartment next to the Raffles Hotel in 2009, that he would experience the measured noise levels produced by the Raffles Hotel following its redevelopment in 2013/2014, or any noise over the Regulatory assigned levels. Mr Ammon also submitted that there was no problem with noise prior to the Raffles Hotel re-opening in late 2014.[146]

110 Mr Ammon submitted that, as a purchaser of an apartment next to the Raffles Hotel, he could only have expected the hotel to comply with the EP Act and the Regulations. He submitted that he could not have anticipated, when he purchased his apartment, the noise levels generated at the time of trial, as those noise levels exceeded the prescribed Regulatory limits.[147]

Respondent's submissions

111 Colonial submitted that ground 2 isolated the master's words from their context.[148] It submitted that there was no error in the master referring to Mr Ammon's expectations of the site. It submitted that the master's findings in relation to Mr Ammon's expectations were consistent with ***Marsh v Baxter***,[149] where it was said the expectations of an ordinary average resident of the site are relevant to whether there was a substantial interference with the use and enjoyment of property. It submitted that the master's finding's regarding Mr Ammon's expectations also went to identifying the nature of established uses in the locality, with the master identifying that the site was not a 'quiet

[145] Citing ***Sturges***; ***Miller***.
[146] Appellant's written submissions, pars 52 - 56; WB 20 - 21.
[147] Appellant's written submissions, pars 59, 61; WB 21 - 22.
[148] Referring to primary decision [84].
[149] ***Marsh v Baxter*** [2015] WASCA 169; (2015) 49 WAR 1 [779].

suburban backwater', but a busy precinct with levels of ambient noise.[150]

112 In the alternative, Colonial submitted that the master did not materially rely on Mr Ammon's expectations as to the level of noise. It submitted that the master based his decision on the unsatisfactory nature of Mr Ammon's evidence as to interference, the Raffles Hotel history, the way the Raffles Hotel was run at the time of trial, and the fact that no other residents currently complained about the noise.[151]

Ground 3 - injunction

Appellant's submissions

113 Mr Ammon submitted that the master declined to grant an injunction because Mr Ammon came to the nuisance by purchasing an apartment next to the Raffles Hotel and because Colonial had adjusted its business due to noise complaints. In essence, he submitted that he did not come to the nuisance, as it was only after the Raffles Hotel re-opened following the redevelopment in 2014 that noise became a problem. When he bought his apartment in 2009, it was reasonable for Mr Ammon to expect that the hotel would comply with Regulations. As to Colonial adjusting its business, Mr Ammon submitted that the steps taken by Colonial to mitigate noise from the beer garden and the upstairs bar in the Riverside Room had a negligible benefit, and did not make the noise compliant with the Regulations. Mr Ammon again submitted that Colonial conceded that compliance with the Regulations was impossible, and that it did not comply with the 2016 Environmental Protection Notice.[152]

114 Mr Ammon submitted that an injunction was appropriate where a use of land constituted a nuisance and it was intended that the nuisance would continue. He submitted that he sought an injunction limiting when Colonial could play music in the beer garden and Riverside Room, to eliminate the primary hardship caused by the nuisance.[153]

115 Mr Ammon submitted that there was no public policy considerations against the grant of an injunction in the appeal, but that the public policy consideration weighed in favour of granting an

[150] Respondent's written submissions, pars 43 - 48; WB 43 - 44.
[151] Respondent's written submissions, pars 49 - 50; WB 44; referring to primary decision [1] - [2], [28], [50], [82] - [84].
[152] Appellant's written submissions, pars 62 - 67; WB 22 - 24.
[153] Appellant's written submissions, pars 68 - 73; WB 24 - 25.

injunction to protect the operation, administration and enforcement of the Regulations.[154]

Respondent's submissions

116 Colonial submitted that ground 3 only arose if ground 1 or ground 2 was upheld, as otherwise no question as to the appropriate relief arose and the master's observations on injunctions were *obiter*. As to ground 3.1, Colonial repeated its submissions for ground 2 as to the master's consideration of Mr Ammon's expectations. As to ground 3.2, Colonial submitted that Mr Ammon did not quote the master correctly, and that the master held '[t]o now seek to shut down the operations of that hotel, even to the limited extent now sought, is not in my view appropriate'.[155] As to ground 3.3, Colonial submitted that the master's use of the word 'appropriate' was a short-hand summary of his Honour's value judgment as to whether or not an injunction should be issued.[156]

117 In the alternative, Colonial submitted that even if ground 1 or ground 2 were made out, the Court of Appeal was not in a position to determine whether there had been actionable nuisance and whether an injunction should be issued. It submitted that Mr Ammon produced a minute after the parties had closed their cases which significantly changed the relief sought by Mr Ammon. It submitted that it opposed the amendment of the relief sought by Mr Ammon, and it submitted that it should not have been shut out from leading relevant expert evidence as to the hotel's commercial viability in relation to the orders ultimately sought by Mr Ammon. It submitted that the court must consider the impact of granting an injunction on the rights and interests of third parties,[157] and that the court must consider whether hardship to Colonial was disproportionate to the benefit to Mr Ammon in granting or refusing the injunction.[158] Colonial submitted there was no finding as to whether the orders sought in Mr Ammon's minute achieved the whole benefit sought by him. It submitted that the Court of Appeal was not in a position to substitute its own view in the absence of findings by the master.[159]

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[154] Appellant's written submissions, pars 57 - 58, 74; WB 21, 25.
[155] Referring to primary decision [88].
[156] Respondent's written submissions, pars 51 - 56; WB 44 - 45.
[157] Citing ***Cohen*** [174] - [176].
[158] Citing ***Jessical Estates Pty Ltd v Lennard*** [2007] NSWSC 1434 [50].
[159] Respondent's written submissions, pars 57 - 70; WB 45 - 47.

Disposition

Nuisance

118 The legal principles concerning private nuisance were outlined by this court in ***Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management***[160] and ***Marsh v Baxter***[161] and need not be detailed here. The following general observations are sufficient for present purposes.

119 The essential purpose of an action for private nuisance is to protect an owner or occupier's use and enjoyment of land, or of a right in relation to it.[162] To constitute a nuisance, the interference with the plaintiff's use or enjoyment must be both substantial and unreasonable.[163]

120 The test of unreasonableness is objective.[164] The reasonableness enquiry involves a balancing exercise between the defendant's right to use his or her land freely, and the right of the plaintiff to enjoy his or her land without interference.[165] The reasonableness requirement thus reflects the need for give and take between neighbours living within a community.[166]

121 Among the factors relevant to whether interference is unreasonable are the nature and extent of the harm or interference, the social or public interest value in the defendant's activity, any hypersensitivity of the user or of the use of the plaintiff's land, the nature of established uses in and character of the locality, whether all reasonable precautions were taken to minimise any interference, and the type of damage suffered.[167]

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[160] ***Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management*** [2012] WASCA 79; (2012) 42 WAR 287 [118] - [119].
[161] ***Marsh v Baxter*** [2015] WASCA 169; (2015) 49 WAR 1 [242] - [257], [765] - [774].
[162] ***Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*** [1937] HCA 45; (1937) 58 CLR 479, 493, 507; ***Gartner v Kidman*** [1962] HCA 27; (1962) 108 CLR 12, 22; ***Southern Properties*** [118]; ***Marsh v Baxter*** [243], [765].
[163] See, for example, ***Brown v Tasmania*** [2017] HCA 43; (2017) 261 CLR 328 [385]; ***Marsh v Baxter*** [245], [766] - [771].
[164] ***Marsh v Baxter*** [247], [770].
[165] ***Southern Properties*** [119]; ***Marsh v Baxter*** [246].
[166] ***Gartner v Kidman*** (47); ***Don Brass Foundry Pty Ltd v Stead*** (1948) 48 SR (NSW) 482, 487; ***Cambridge Water Co v Eastern Counties Leather Plc*** [1993] UKHL 12; [1994] 2 AC 264, 299; ***Marsh v Baxter*** [245]; ***State of Queensland v Baker Superannuation Fund Pty Ltd*** [2018] QCA 168; [2019] 2 Qd R 146 [194].
[167] ***Southern Properties*** [118]; ***Marsh v Baxter*** [248].

122 The fundamental question raised by grounds 1 and 2 for this court[168] is whether, on the facts agreed or found by the master, the emission of noise from the hotel substantially and unreasonably interferes with Mr Ammon's beneficial use of his apartment.

123 As noted earlier, Mr Ammon's submissions centred upon the noise levels emitted from the beer garden which Mr Ammon's apartment overlooked, and the upstairs bar known as the Riverside Room which was in close proximity to his apartment. Also, as noted earlier, the unchallenged findings as to the operation of those areas of the hotel were that:[169]

1. The beer garden operates rarely in winter, and operates on Wednesdays, Fridays, Saturdays and Sundays during the summer months.

2. The upstairs bar known as the Riverside Room is on the river side of the complex, overlooks the beer garden, has a balcony and is used only on Wednesday evenings from 7.00 pm to midnight, the first Friday of each month, and if private functions are booked (including Tuesdays for salsa dancing).

Appellate intervention

124 Colonial contended that appellate intervention in this case depended upon the application of the principles in ***House v The King***.[170] That was because, it was said, the master's judgment involved 'an evaluative … judgment, applying an amorphous standard as to whether there was a nuisance'.[171] Colonial referred in this regard to various cases including ***Norbis v Norbis***,[172] and ***Singer v Berghouse***.[173]

125 Colonial also placed considerable reliance on the observations of Gageler J in ***Minister for Immigration and Border Protection v SZVFW***.[174] In that regard, Colonial contended, in effect, that:

1. Gageler J in ***SZVFW*** had referred to two standards of appellate review, the first being a 'more general correctness standard of appellate review' (correctness standard), and the second

[168] Appeal ts 14 - 17.
[169] See [3] above.
[170] ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499, 504 - 505; ***Cohen*** [152]; appeal ts 83.
[171] Respondent's written submissions, par 16; WB 38.
[172] ***Norbis v Norbis*** [1986] HCA 17; (1986) 161 CLR 513, 517 - 518.
[173] ***Singer v Berghouse*** [1994] HCA 40; (1994) 181 CLR 201, 212.
[174] ***Minister for Immigration and Border Protection v SZVFW*** [2018] HCA 30; (2018) 92 ALJR 713.

applying to 'value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right' (deferential standard).[175]

2. The master's decision attracts the deferential standard of appellate review.[176]

126 The relevant passages of Gageler J's judgment in ***SZVFW*** are set out below.

127 Gageler J said:[177]

> 35. *Whilst the conception of error is integral to the conception of an appeal, what amounts to 'appealable error' in a judgment cannot be understood without reference to a standard of appellate review*. Subject to constitutional limitations, a standard of appellate review amounts to a legislative or common law allocation of decision-making authority between the trial court and the appellate court.
>
> 36. *In relation to an appeal from a final judgment of a primary judge* sitting without a jury, *essentially two standards of appellate review have come to be recognised in Australia*. The present case provides no occasion to consider the 'added restraint' and 'particular caution' which an appellate court should exercise in reviewing a judgment on a matter of practice and procedure.
>
> 37. *If and to the extent that the judgment under appeal turned on the exercise of what can be characterised as a 'discretion' committed to the court of which the primary judge was a member, the long-settled understanding is that members of an appellate court cannot substitute on appeal a judgment which turns on their own exercise of discretion 'merely because they would themselves have exercised the original discretion, had it attached to them, in a different way'*. For appealable error in the exercise of judicial discretion to be established, the appellate court must be satisfied that what was done by the primary judge in the judgment under appeal amounted 'to a failure to exercise the discretion actually entrusted to the court'.
>
> …
>
> 39. *For a period during the 1960s and 1970s* (before the introduction in 1984 of the current comprehensive requirement

[175] Respondent's written submissions, pars 7 - 11; WB 36 - 37.
[176] Respondent's written submissions, par 16; WB 38.
[177] ***SZVFW*** [35] - [37], [39] - [41], [43] - [50].

> for special leave as a precondition to an appeal under s 73 of the Constitution), some *Justices of the High Court expressed support for importing similar considerations into appellate review of an evaluative conclusion reached by a primary judge when applying imprecisely defined legal criteria to findings of primary fact, even where the appellate court's ability to apply those criteria* to those findings of primary fact so as to form its own opinion as to the correctness of the primary judge's conclusions *was unimpeded by any limitation inherent in proceeding on the record*. In an appeal from a judgment of a judge sitting without a jury in a common law negligence case where there was no challenge to the judge's findings of primary fact, for example, some Justices would have refrained from finding error in the primary judge's conclusion that conduct failed to measure up to 'the conduct of a hypothetical reasonable man in the circumstances' unless convinced that the primary judge had overlooked some relevant primary fact or unless convinced that the conclusion was 'clearly wrong' in the sense that 'no rational interpretation of the facts' would sustain it.

40. *That approach of 'judicial restraint' in undertaking appellate review of evaluative conclusions ...* The approach, *however, never commanded the assent of a majority of the High Court. It was firmly rejected - 'despatched' - by the majority in* ***Warren v Coombes***.

41. Rejecting the approach of appellate restraint and reaffirming the approach more commonly taken in Australian and English case law of treating correctness as the general standard of appellate review, the majority in ***Warren v Coombes*** stated:

> 'Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it.'

In language significant for its studied generality, the majority in ***Warren v Coombes*** went on to state:

> 'The duty of the appellate court is to decide the case - the facts as well as the law - for itself. In so doing it must recognize the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better

> position to decide the particular question than they are themselves, or if, after giving full weight to his decision, they consider that it was wrong, they must discharge their duty and give effect to their own judgment.'

Defending the correctness standard against the criticism that it opens a final judgment to a multiplicity of judicial opinions none of which is more likely to be better than the first, the majority explained:

> '*The fact that judges differ often and markedly as to what would in particular circumstances be expected of a reasonable man seems to* us in itself to be a reason why no narrow view should be taken of the appellate function. The resolution of these questions by courts of appeal should *lead ultimately not to uncertainty but to consistency and predictability*, besides being more likely to result in the attainment of justice in individual cases.'

…

43. *The line of demarcation between conclusions of a primary judge which attract the deferential standard of appellate review applicable to an exercise of judicial discretion articulated in* ***House v The King*** *and conclusions of a primary judge which attract the more general correctness standard of appellate review rearticulated in* ***Warren v Coombes*** *was in due course squarely addressed in* ***Norbis v Norbis***. The ***House v The King*** standard was there held to apply to appellate review of an order made by a judge in the exercise of a statutory power conferred on the Family Court to 'make such order as it thinks fit altering the interests of the parties' in matrimonial property. Mason and Deane JJ, with whom Brennan J agreed, explained that making the order involved an exercise of 'discretion' in the sense in which that term had been deployed in ***House v The King*** because application of the statutory criterion called for 'value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right'.

44. *The holding in* ***Norbis v Norbis***, and their Honours' explanation of the reason for it, *accorded with earlier decisions which had applied the* ***House v The King*** *standard to appellate review* of evaluative conclusions *in respect of which the applicable legal criteria permitted of some latitude of choice or margin of appreciation such as to admit of a range of legally permissible outcomes*. Conclusions as to 'just and equitable' apportionment of responsibility between tortfeasors under contribution legislation, as to assessment of general damages at common law, as to the valuation of property, and as to the best interests of the

child under child welfare legislation furnish examples. *Their Honours in **Norbis v Norbis** went on to explain that the line of demarcation which they identified stemmed from the fundamental conception of an appeal as a process for the correction of error: '[i]f the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance'*.

45. ***Norbis v Norbis*** was not departed from in ***Singer v Berghouse***, where the ***House v The King*** standard was held to be applicable on appellate review of an opinion formed by a primary judge, as a precondition to the exercise of discretion to make a maintenance order in testator's family maintenance proceedings, as to whether an applicant for the order had been left with 'inadequate' provision for his or her 'proper maintenance, education and advancement in life'. Explaining that holding, the majority expressed agreement with the statement that '[u]nless appellate courts show restraint in disturbing the evaluative determinations of primary decision-makers they will inevitably invite appeals to a different evaluation which, objectively speaking, may be no better than the first'. To describe a second evaluative determination as 'no better than the first' is necessarily to postulate that both determinations are legally permissible.

46. ***Warren v Coombes** itself illustrates that it is not sufficient to justify departure from the correctness standard of appellate review that a conclusion of a primary judge has been arrived at by a process of reasoning which can be characterised as evaluative*. In ***Warren v Coombes***, the conclusion of the primary judge to which the general standard was held to be applicable was a conclusion that the defendant had not failed to exercise reasonable care. The point is further illustrated by the outcome in ***Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd***. There the conclusion of the primary judge which was the subject of appellate challenge was that certain conduct in which a corporation was found to have engaged answered the statutory description of 'conduct that is unconscionable'. A submission to the effect that the evaluative character of that conclusion triggered application of the standard of appellate review applicable to an exercise of judicial discretion was unanimously rejected: implicitly by three members of the High Court, and explicitly by the other two. Callinan J, with whom Kirby J specifically agreed on this point, suggested that 'every judgment

of a trial judge requires an evaluation of facts' and pointed out that '[a]n evaluation of facts found is precisely one of the exercises which an appellate court is obliged, when an unrestricted right of appeal is available, to undertake'. Like a common law duty of care, a statutory prohibition on conduct that is unconscionable posits a standard of conduct which, on proven facts, a person obliged to meet that standard either has met or has not.

47. The ***Norbis v Norbis*** explanation of when the standard of appellate review applicable to an exercise of judicial discretion is attracted and when it is not was reiterated in ***Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission***. *In the context of restating the ordinary incidents of an appeal by way of rehearing, and with reference to* ***House v The King****, it was reiterated that 'discretion' in the sense applicable to appellate review of an exercise of judicial discretion refers to a decision-making process in which 'the decision-maker is allowed some latitude as to the choice of the decision to be made'.*

48. *The course of High Court authority since* ***Warren v Coombes*** *has accordingly proceeded on a consistent understanding of how the line of demarcation is to be drawn between those of a primary judge's conclusions which attract the correctness standard of appellate review reaffirmed in that case and those which attract the deferential standard applicable to appellate review of an exercise of judicial discretion.* Without excluding the potential for other considerations to affect the standard of appellate review in a particular category of case, the understanding provides a principled basis for making at least the principal distinction.

49. *The line is not drawn by reference to whether the primary judge's process of reasoning to reach a conclusion can be characterised as evaluative or is on a topic on which judicial minds might reasonably differ. The line is drawn by reference to whether the legal criterion applied or purportedly applied by the primary judge to reach the conclusion demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the* ***House v The King*** *standard applies.* The resultant line is not bright; but it is tolerably clear and workable.

50. That understanding has in the past been acknowledged and applied to guide appellate review in the Full Court of the Federal Court. There is no reason to depart from it now. (emphasis added) (citations omitted)

128 Colonial's submissions that the deferential standard is applicable in the present appeal should be rejected. As Gageler J made clear in ***SZVFW***,[178] and as the High Court has recently emphasised,[179] the deferential standard does not apply whenever minds may reasonably differ on a question or the question may be characterised as evaluative. Although the question of whether there has been a substantial and unreasonable interference with the beneficial use of Mr Ammon's land is evaluative in nature, it involves the application of a legal standard, in respect of which there is only one uniquely correct outcome. The character of the finding is more like a finding of negligence,[180] or an ***Anshun*** estoppel (the touchstone of which is the question of unreasonableness),[181] rather than the exercise of a judicial discretion.

129 Adopting Gageler J's nomenclature, the correctness standard rather than the deferential standard is to be applied to an appellate review of whether, on primary facts agreed or found by the trial court, there is a substantial and unreasonable interference with the beneficial use of premises so as to constitute an actionable nuisance. That is consistent with the approach taken by this court in ***Marsh*** and ***Southern Properties***.

Grounds 1 and 2

130 The master was correct to conclude that Mr Ammon had not established that the emission of noise from the hotel substantially and unreasonably interfered with the beneficial use of his apartment. That is so for the following reasons.

131 First, it was common ground that statutory standards are relevant, but not determinative, when deciding if interference is substantial and unreasonable in this context.[182] The Regulations are intended to apply generally throughout the community; they provide a legislative response of general application to a range of competing considerations in relation to noise emissions. By contrast, Mr Ammon's action for private nuisance has, as its focus, the particular circumstances of this case in a particular locality, to which the common law provides its own standard.

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[178] ***SZVFW*** [49].
[179] ***R v Bauer*** [2018] HCA 40; (2018) 92 ALJR 846 [61]. See also ***Flessas v The State of Western Australia*** [2018] WASCA 210 [44]; ***G v O*** [2018] WASCA 211; (2018) 369 ALR 346 [50].
[180] ***Warren v Coombes*** [1979] HCA 9; (1979) 142 CLR 531, 551 - 553.
[181] ***Secure Parking (WA) Pty Ltd v Wilson*** [2012] WASCA 230 [56] - [60].
[182] Appellants' written submissions, pars 32, 35; WB 14 - 15; appellant's reply, par 9; WB 74; appeal ts 14.

132 Together with the provisions of the EP Act, the Regulations define the circumstances in which certain offences created by the EP Act may be committed, and when regulatory notices may be issued. Among other things, the Regulations prescribe what 'unreasonable noise' is for the purposes of the EP Act. That is a defined statutory term. The Regulations define the term for the purposes of the EP Act, and do not provide for, or control, what is to be unreasonable noise for other purposes. Exceeding noise levels assigned by the Regulations, while relevant, is not to be equated with a substantial and unreasonable interference under the law of nuisance.

133 Further, the significance, for a nuisance claim, of emissions exceeding the assigned levels under the Regulations must take account of the availability of approval by the Minister. The Regulations provide for the Minister to approve the emission of noise above the prescribed levels where the premises cannot reasonably or practicably comply with the prescribed standard.[183] Emission of noise above the assigned levels identified in reg 7 and reg 8 of the Regulations is thus not absolutely prohibited. Rather those assigned levels identify the point at which regulatory approval is required to avoid committing an offence against the EP Act. A noise emission in excess of the assigned levels will not be 'unreasonable noise' as defined in the Regulations if it occurs in accordance with the Minister's approval.

134 On appeal, Mr Ammon accepted, in effect, that the question of whether ministerial approval should be given would entail considerations specific to the Raffles Hotel, its neighbours and the specific locality. He submitted that the Minister would bring to account many of the factors that this court will consider in determining whether there is a nuisance.[184] Contrary to Mr Ammon's submission, the existence of ministerial approval would not, in itself, mean that a plaintiff in nuisance would get 'short shrift'.[185] The court's assessment of whether a defendant has committed an actionable nuisance will not be controlled, or necessarily significantly influenced, by the Minister's evaluation of whether an approval should be granted under the Regulations. Thus, contrary to Mr Ammon's submission, the fact that Colonial has not sought and obtained ministerial approval is not a matter of great significance for his nuisance claim against Colonial.

[183] Regulations 17, 18B.
[184] Appeal ts 12.
[185] Appeal ts 12.

135 The Regulations provide for ministerial approval of noise emissions exceeding the assigned levels prescribed by the Regulations. That diminishes the significance of measured levels exceeding assigned levels, when evaluating whether there is a substantial and unreasonable interference for the purposes of the law of private nuisance. As already noted, even where a statute absolutely prohibits emissions in excess of a particular level, a breach of the statute is relevant to, but not decisive of, the court's assessment of whether the interference is substantial and unreasonable for the purposes of a nuisance action. Where, as here, the statutory scheme permits assigned levels to be exceeded when ministerial approval is granted, the exceeding of the assigned levels carries less weight for the nuisance evaluation than it would in the context of a statutory scheme involving an absolute prohibition.

136 Secondly, Mr Ammon's subjective appreciation of the noise (see [31] above), whilst entitled to some weight as to the nature and extent of the interference, is not determinative of whether the interference is substantial and unreasonable, as the test is an objective one.[186] That is particularly so where his evidence was not supported by any evidence from other persons staying in or visiting his apartment. Nor was it supported by residents in other apartments after the remedial steps undertaken by Colonial in 2016.[187] The absence of complaints from residents in any other apartment is significant, given that some apartments are just as close as Mr Ammon's apartment, or even closer, to the noise sources from the beer garden and the upstairs bar.[188] The absence of other complaints suggests that Mr Ammon's subjective experience of the noise (as preventing him from reading, watching television and sleeping) may be peculiar to him. Having said that, it may be accepted that Mr Ammon's apartment, by virtue of its propinquity to the upstairs bar and the fact that it is an apartment overlooking the beer garden, would be one of the apartments most significantly affected by noise coming from those areas of the hotel. The recognition of that fact, however, bears upon the consideration referred to next.

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[186] ***Marsh*** [247], [770].

[187] Save for a one-off 'national DJ' event on 17 January 2018 between 9.00 pm and 11.00 pm, in respect of which Colonial received two expressions of complaint (Mr Chowdhury's statement, pars 202 - 221; GB 239 - 242), Mr Ammon did not point to any other evidence of complaints after completion of the remedial works in 2016. The complaints referred to in par 44 of Mr Ammon's written submissions (WB 18), insofar as they referred to complaints by other people, were all made prior to the completion of the remedial works in 2016.

[188] See Ms Johns' witness statement, pars 122 - 130; GB 151 - 153; see also the photograph at GB 348.

137 Thirdly, whilst Mr Ammon said that 'peace and quiet was very important' to him and 'uppermost' in his mind when he was looking at purchasing the apartment,[189] he purchased an apartment near the intersection of two extremely busy highways next to a hotel. Whilst it is not a defence to say that a plaintiff came to the nuisance,[190] the character of the locality, as having high ambient noise, is relevant to what constitutes a substantial and unreasonable interference.[191] Here, there is a single complex with commercial and residential uses, settled on the site of a long-established operating hotel. The long term and consistent use of the Raffles as a hotel gave the locality a character that was a relevant circumstance for the reasonableness enquiry.[192] The character of the locality is reflected in the strata by-laws,[193] which recognise that the close proximity between the hotel and residences mean that operations of the hotel may impact on residences.

138 Fourthly, and related to the last point, whilst the expert evidence indicated that crowd and music noise exceeded the Regulatory assigned levels after the redevelopment in 2014, it was always the case that crowd noise and music would be associated with the common and ordinary use of a hotel. That, in substance, was the point made by the master in the finding referred to in [89.3] above. The redevelopment involving the beer garden and the upstairs bar, completed in late 2014, did not materially change the uses of the hotel or the nature of the locality. The questions remains, in this context, whether there was excessive noise beyond what other 'occupiers in the vicinity [could] be expected to bear, having regard to the prevailing standard of comfort of the time and place'.[194]

139 Fifthly, Mr Watts' expert evidence[195] indicates that on the balcony, the traffic noise generally exceeds the assigned noise levels under the Regulations in any event. Also, the ambient light music and crowd noise on Wednesdays, Fridays and Sundays were not materially higher than the traffic noise otherwise generally experienced on the balcony.[196] These matters are relevant to the character of the locality in the context of which an assessment is to be made as to whether the noise from the

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[189] Mr Ammon's witness statement, par 6; GB 3; see also ts 110.
[190] ***Munro v Southern Dairies Ltd*** [1955] VLR 332, 337.
[191] ***Munro*** (337); ***Marsh*** [248], [770]; ***Southern Properties*** [118].
[192] See, by analogy, ***Seidler v Luna Park Reserve Trust*** (Unreported, NSWSC, 21 September 1995), 46 - 47 (Hodgson J).
[193] Primary decision [16].
[194] *Fleming's The Law of Torts* (10th ed) [21.80] quoted in ***Marsh*** [769].
[195] See [54] and [56] above.
[196] See [55] - [56] above.

hotel constituted a substantial and unreasonable interference with the beneficial use of Mr Ammon's apartment. The emission of noise of 70 decibels in an otherwise quiet environment where the ambient noise was, say, 40 decibels, would have a markedly different significance from an emission of 70 decibels in a relatively noisy environment with ambient noise exceeding 64 decibels. Also, in this context, there was no direct evidence from Mr Ammon that he used the balcony in a way which was interfered with by noise emanating from the hotel. Whilst Mr Ammon relied on a statement in correspondence to the City on 23 December 2015, to the effect that '[i]t goes without saying that I cannot use my balcony at all on the evening in question',[197] the statement was not evidence of the truth of its contents and, in any event, does not describe the use which Mr Ammon would have made of his balcony but for the noise.

140 Sixthly, on Mr Watts' evidence, the measured noise levels inside the apartment ranged from 35 - 44 decibels.[198] These levels were equivalent to levels in a 'quiet countryside' (at the lower end of that range) and a 'quiet suburban area' (at the higher end of that range).[199] An extra 15 decibels is added to the measured noise levels inside where the windows and doors are closed, in order to assess, under the Regulations, the noise levels emitted from the hotel when received at Mr Ammon's apartment. But it is not clear whether, in what manner and to what extent that added factor, which contributes to the overall regulatory assessment of the level of noise emitted from the hotel when received at Mr Ammon's premises, has particular significance when considering the ultimate question here, which is whether the noise from the hotel substantially and unreasonably interferes with the beneficial use of Mr Ammon's apartment. That is particularly so when Mr Ammon essentially conceded that the measured noise levels inside the apartment were the levels of noise that can actually be heard in the apartment.[200] Whether the noise is a substantial and unreasonable inference is a practical question, and it is not clear how the adjusted figure provided a practical guide to resolving that question. Similar observations apply to the requirement to add 10 decibels to the measured levels, on the basis that music cannot reasonably and practicably be made 'free' of tonality, impulsiveness and modification. That 10 decibels is in addition to the 15 decibels required to be added to measured levels inside the apartment.

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[197] GB 347.
[198] See [63], [68], [72], [76] above.
[199] See the guide annexed to Mr Watts' statement dated 28 March 2018; GB 41, 85.
[200] Appeal ts 29, 33.

141 For example, the L_{A10} assigned level for Mr Ammon's apartment between 7.00 pm and 10.00 pm on any evening was 48 decibels. Music measured in the apartment at a level above 23 decibels for more than 10% of the representative sample period at that time would exceed the assigned level, given the need to adjust the measured level by adding 10 decibels for an inside measurement and adding 15 decibels for tonality . According to the guide referred to by Mr Watts,[201] 20 decibels is the typical noise level equivalent to '[i]nside bedroom - windows closed'.

142 Seventhly, while Colonial has taken steps to reduce the level of noise generated by crowds and music, as described by Mr Patching and accepted by the master,[202] the expert opinion appears to be that the hotel cannot reasonably comply with assigned noise levels in adjacent apartments, even without any music, as crowd levels alone would, in all probability, exceed the prescribed noise levels.[203] There appears to be little to be done to prevent the hotel's operations causing or significantly contributing to a level of noise that exceeds the assigned levels under the Regulations, short of stopping the hotel operating as such, where the ordinary operation of the hotel involves attracting patrons and playing music.

143 Eighthly, Mr Ammon did not lead evidence as to what, if any, noise attenuation measures he had taken at his apartment.

144 Accordingly, grounds 1 and 2 have not been made out. That conclusion tends to be confirmed by, but is not dependent upon, this further consideration, relevant to Mr Ammon's subjective appreciation of the noise levels. Mr Ammon's case was, in substance, that it was the redevelopment, completed in late December 2014, which led to the substantial interference with the use of his apartment. Nevertheless, the evidence included, and it was agreed in this appeal, that Mr Ammon had lodged an objection to extended trading hours on 9 December 2014, complaining about the impact of noise from the Raffles Hotel.[204]

Ground 3

145 In light of the conclusion referred to above, it is unnecessary to address ground 3. It may be observed, however, that Mr Ammon, on the hearing of the appeal, indicated that the scope of the injunctive

[201] GB 85.
[202] Primary decision [42] - [45].
[203] See [81] above.
[204] GB 521 - 523; agreed chronology WB 86.

relief sought by Mr Ammon in the appeal[205] was too widely expressed.[206]

Other matters

146 By an application filed 12 August 2019, Mr Ammon applied to adduce additional evidence in the appeal comprising an affidavit from his solicitor, Ms June Kenny, sworn 12 August 2019. By that affidavit, Ms Kenny annexed, relevantly, (1) an email from her firm dated 28 September 2018 to the City, enclosing a copy of the primary decision and asking whether the City intended to proceed further against the Raffles Hotel in relation to the environmental protection notices, and (2) the City's response dated 9 October 2018 to the effect that having considered the master's judgment, the City considered that it would not be in the public interest to pursue the matter to prosecution, and that the City was also mindful of the 'current climate around noise and music venues given the consultation on amending the [Regulations]'.

147 Mr Ammon submitted, in effect, that if error were established in relation to grounds 1 and 2, this additional evidence would be relevant to any re-exercise of this court's discretion in relation to the grant of an injunction.[207] As error has not been established in relation to grounds 1 and 2, it is unnecessary to deal with what might otherwise be the merits of the application. It should be dismissed.

148 Mr Ammon also made an oral application to tender, as additional evidence in the appeal, a document containing the full text of the City's environmental protection notice dated 15 August 2016.[208] It appears that the version of the City's notice dated 15 August 2016 tendered before the master was incomplete. Colonial did not object to the reception of the document in evidence on the hearing of this appeal, subject to relevance.[209] The document is relevant to grounds 1 and 2 of the appeal. The document provides the full text of the City's notice, although it does not alter the effect of the notice as it was evidently understood by the master (and the parties) in the primary proceedings. The document should be received as evidence in the appeal so that the court's record has the full text of the document. The document is marked as exhibit 1 in the appeal. However, the document in its

[205] WB 28.
[206] Appeal ts 60 - 63.
[207] Appeal ts 79.
[208] Appeal ts 73 - 75.
[209] Appeal ts 74.

complete form does not assist in the resolution of grounds 1 and 2 in Mr Ammon's favour.

149 A final matter arises in relation to ground 3. Colonial contended that if the court discerned error in relation to grounds 1 and 2, the matter should be remitted to the General Division to enable it to give further evidence on the commercial impact of any injunction against it.[210] Although it is unnecessary to decide the point (given that grounds 1 and 2 have failed), this point has no merit in any event. Given the scope of the pleaded relief,[211] and the way Mr Ammon's case was opened at trial,[212] the relief sought should have been anticipated by Colonial. Moreover, the master allowed an amendment to the relief sought,[213] and there has been no cross-appeal on that interlocutory decision by the master. Any evidence that Colonial wished to call on the subject of the commercial impact of an injunction on it should have been led at trial.

Conclusion

150 The appeal should be dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

CL
Associate to the Honourable Justice Murphy

17 OCTOBER 2019

[210] See [68] above; appeal ts 107 - 108, 115 - 119.
[211] Which included an injunction in broad terms, including restraining the 'Nuisances' (including the noise emanating from the beer garden and upstairs bar, particularly on Wednesdays through to Saturdays from 7.00 pm to midnight, and Sundays between 5.00 pm and 10.00 pm: BB 48 - 49, 52 - 53.
[212] Trial ts 42 - 45.
[213] Primary decision [6] - [7].