IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

No. S ECI 2020

B E T W E E N

NOEL UREN and another

Plaintiffs

-and-

BALD HILLS WIND FARM PTY LTD

Defendant

PLAINTIFFS' OUTLINE OF CLOSING SUBMISSIONS

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INTRODUCTION

1. Noel Uren suffered through a noise nuisance from the Defendant's wind farm for 3½ years, while the Defendant, tone deaf to his complaints and hiding behind the mantra of "MDA says we comply with the planning permit", did nothing to lower the noise at his property.

2. Even after the Plaintiffs informed the Defendant of flaws in MDA's work, the South Gippsland Council found there was a nuisance at the Plaintiffs' properties, the Supreme Court dismissed the Defendant's judicial review of the Council's nuisance finding and more than a dozen neighbours of the wind farm kept complaining about the noise, the nuisance has continued at John Zakula's property to the present day, with nothing at all done by the Defendant to lower the noise.

3. John Zakula is now in his seventh year of enduring the nuisance. The noise is so bad for him that he has bricked in his bedroom window and takes to sleeping in his car when he just cannot endure another night of sleeplessness. Mr Zakula — a qualified engineer — has meticulously logged the noise disturbances from the wind turbines year after year. But no matter how many letters he sent reporting the noise and deaf to the messages Mr Zakula left on the Defendant's phone hotline complaining of the noise, the Defendant has not curtailed a single turbine in response to Mr Zakula's particular complaints. Nor has it repaired the faulty gearboxes which affected its turbines, despite knowing of tonality defects for years and years.

4. It is clear that the Defendant belligerently refuses to accept as true the lived experience of Mr Uren and Mr Zakula that the wind turbines cause them a nuisance unless an acoustic expert of the Defendant's own choosing says the sound exceeds the planning permit limit. But this is a common law nuisance case not a VCAT planning permit case. As explored below, even if there is permit compliance — which the Plaintiffs say the Defendant has not proved — a planning permit does not authorise the Defendant to commit a nuisance.

5. The Court should issue an injunction to abate the nuisance affecting Mr Zakula's property. It should also award both Plaintiffs damages, aggravated damages, and exemplary damages.

6. This outline addresses questions of liability and remedy, as raised in the List of Issues (**List**). In parts, this outline responds to the Defendant's Closing Submissions dated 1 October 2021 (**Defendant's Submissions**).

LIABILITY IN NUISANCE

7. The question of liability encompasses issues 1-11 on the List. We first deal with the question of whether the interference with the Plaintiffs' rights has been *substantial* (addressing issues 1, 4, 8 and 18) before turning to the question of whether that interference is *reasonable* (addressing issues 2, 3, 5-7, 9-11).

SUBSTANTIAL INTERFERENCE

8. The noise from the turbines has caused a substantial interference with the Plaintiffs' use and enjoyment of their land (issue 1). Issue 1 raises threshold questions as to Mr Uren's property rights after 18 March 2016 (issue 18) and whether the Plaintiffs are hypersensitive (issue 8). After addressing those threshold issues we deal below with the nature and extent of the interference (issue 4).

Mr Uren's property rights

9. Mr Uren's evidence was that he stayed in his house, after its sale, pursuant to a written agreement with Mr Svenson (later misplaced), under which he paid rent.[1] The Defendant did not challenge this evidence, or put to Mr Uren that he was a mere licensee. It did not call Mr Svenson (despite the pleadings and particulars squarely giving it notice of Mr Uren's position). In those circumstances, the Court can be satisfied Mr Uren was a tenant with exclusive possession of at least the house. The fact that, *after* the agreement was made, Mr Uren sometimes "stopped" elsewhere, does not undermine the existence of the lease in the first place.

Hypersensitivity of Plaintiffs

10. The Defendant has failed to prove the Plaintiffs were hypersensitive. First, there is evidence that nineteen neighbours were affected in a similar fashion to the Plaintiffs.[2] (Contrary to the Defendant's Submissions,[3] Mr Soler *was* one of the persons whose ability to sleep was affected.) Seven of those neighbours gave evidence in the proceeding. They presented as witnesses of ordinary fortitude. It was not put to them that they were hypersensitive. Save in the case of Mr Jelbart,[4] it was not even put to them that their opposition to the wind farm might have affected their perception of the noise. On the balance of probabilities, it should be accepted that the seven neighbours' evidence illustrated the effect of the wind farm noise on ordinary people. It is clear from the Plaintiffs' lay witnesses and the complaints in the Defendants' records that the Defendant's turbines tend to be so noisy that they annoy neighbours during the day and frequently wake them up at night, particularly in cooler weather.

11. Second, the witnesses called by the Defendant do not prove the Plaintiffs were hypersensitive. Mr O'Halloran and Mr Furlong only experienced the turbine noise against the backdrop of office

[1] T367.16-17, T433, T434.712-31.
[2] Don & Dorothy Fairbrother; Don & Sally Jelbart; Andrew, Stuart & John Kilsby; John & Alex McDougall; Roberto Solar and his partner Katie; Andrew Kram; Phil Western; Elizabeth Fairbrother; Tim Le Roy; Sascha Fox & Tristan Wilson; Andree & Michael Fox. These persons are identified as complainants in the complaints register (ex P5), in the Council resolutions (CB4231, 4288), or in oral evidence.
[3] Cf Defendant's Submissions [69(e),(i)].
[4] T524.25.

noise (with the sound of air-conditioning, printers, the dishwasher, phone calls, people coming and going in the background[5] plus the sound of the substation next door[6]), and they have no experience of the noise at night. Mr Anderson sleeps well despite the noise (and perhaps because, being closer to the sea, ocean noise masks[7] the turbine noise), but given 19 other neighbours do not, it can only be concluded that Mr Anderson is the outlier, not the Plaintiffs. The delightfully mild mannered Mr Anderson was not even troubled by hearing what sounded like a shifter stuck in the turbine for some months;[8] he seems to be insensitive to noise.

12. Third, despite having the burden of proof on hypersensitivity, the wind farm made a forensic decision not to call others in the local area who could give evidence about their experience of noise impacts at night,[9] including "stakeholders" who lease land to the Defendant. The inference to be drawn is that their evidence would not have assisted the Defendant.[10]

The nature and degree of the interference

13. The evidence is clear that the Plaintiffs have suffered a very significant interference with the use of their properties, particularly at night. A number of considerations lead to that conclusion.

14. First, there is the force of the Plaintiffs' own evidence. Mr Zakula and Mr Uren explained in oral evidence how their sleep had been regularly interrupted over the course of 6½ years, and 3½ years, respectively, with the problem particularly bad in cooler seasons. The logs, diary notes and the defendant's spreadsheet recording their contemporaneous complaints (Exhibit P5) powerfully corroborate this evidence and bear out that the interference was both very frequent and very severe.

15. In Mr Uren's case, there is no doubt that the sole cause of the loss of sleep was the turbine noise. It was not put to Mr Uren otherwise. While Mr Zakula conceded that stress due to legal proceedings "may have" contributed to his inability to sleep,[11] the Defendant did not go on to suggest let alone prove that all or even *most* of his sleep problems were due to stress, rather than noise. One would not brick up one's window, or sleep in one's car, if one's sleeping problems were due to stress rather than noise. It is simply illogical to conclude that the stress of litigation — where that litigation did not start until after 2017 — caused a pattern of sleep disturbance to

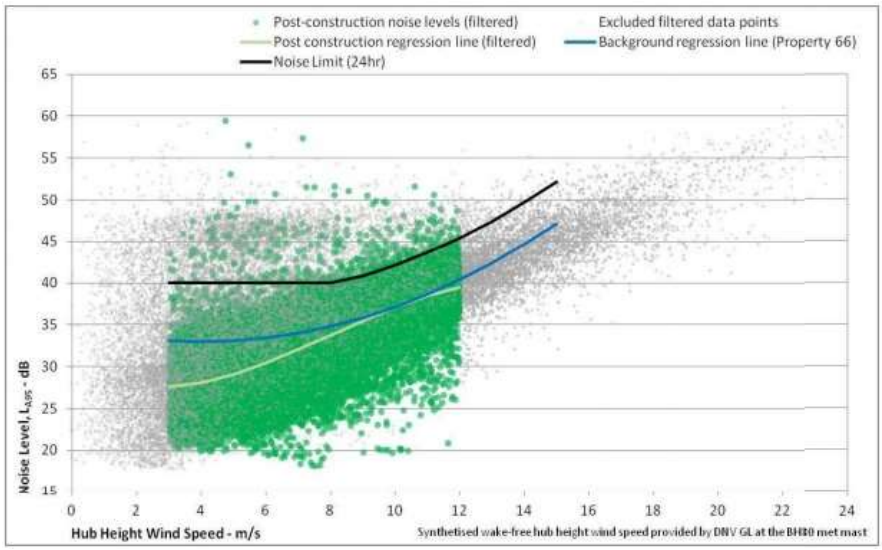
[5] T897.14-18; T899.13-15
[6] T907.3-6
[7] T879.27.
[8] T884.5-25
[9] According to the Agreed Map (starting at top left and moving counter-clockwise), the following families or individuals live in the area: Lindsay Marriott, Voros, Western [see T332.28], Lobo, Glover [see T883.02], Ann Box [see T882.17], Dickson, Alsop, Overall, Tim Le Roy [see T332.24], O'Sullivan, Elizabeth Fairbrother, residing at the Dunmore property [see T332.12], Latham, Summers, Fox & Wilson, Andree & Michael Fox.
[10] *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361, [63] referring to the rule in *Jones v Dunkel*.
[11] T294.18.

begin for Mr Zakula in 2015 and continues to the present, particularly when the sleep disturbance worsens in cooler weather and caused him to brick up his bedroom window in January 2016.[12]

16. Contrary to the Defendant's Submissions,[13] it was not shown in evidence (nor suggested to Mr Zakula) that when he slept in his car, it was louder than it would have been had he stayed in his bedroom.

17. Second, the corroborating evidence from those neighbours who gave evidence, on oath or affirmation, as to similar severe sleep disturbance, demonstrates that the sleep impacts on the Plaintiffs were genuine, severe, were caused principally (solely, in Mr Uren's case) by the turbine noise and were not imaginings by the hypersensitive.

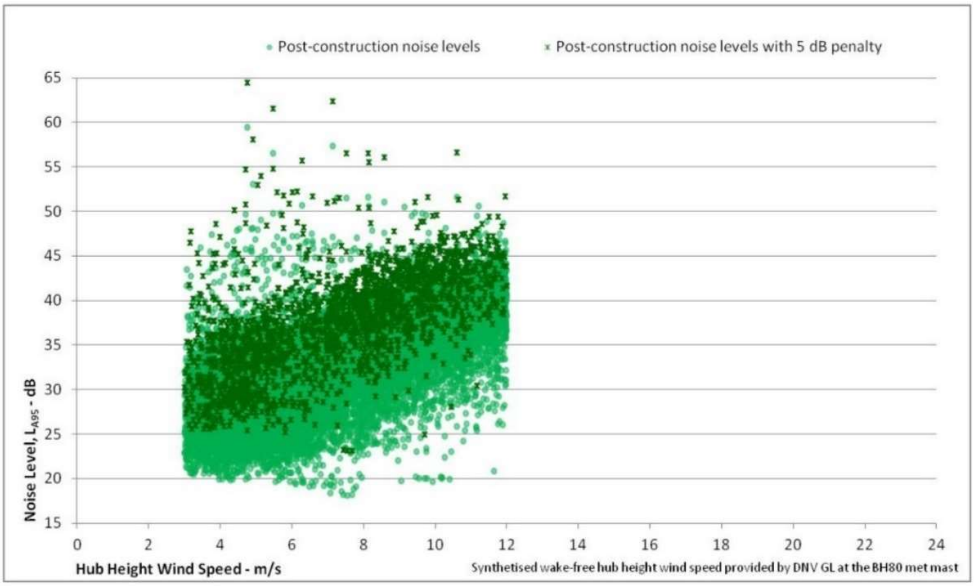
18. Third, even the Defendant's own evidence supports the conclusion that the impacts are substantial. Consider MDA's post-construction graph for Mr Zakula's property, for recordings taken over a 10 month period. Recall the green dots are the data points remaining *after* filtering for extraneous noise (and so should represent windfarm-only noise). It can be seen that the windfarm frequently produces noise louder than 40dB, particularly in wind speeds greater than 8m/s, and recalling that the noise produced by the wind farm at 12m/s is likely to be replicated in all higher windspeeds, up to cut-out speed (which Mr Turnbull said was 25m/s).[14]



[12] T234.6.
[13] [73].
[14] T1309.22.

19. While Mr Turnbull might claim that 40dB is "only" as loud as an air-conditioner,[15] air-conditioners do not make an annoying rhythmic "whoosh whoosh" sound (let alone produce thumps and grinds). After all, a dripping tap can interfere with sleep at objectively quiet levels.

20. Indeed, the graph we have shown above displays MDA's assessment *prior to* the application of penalties for SACs. Although MDA only applied penalties for "prominent" tones (rather than all "clearly audible" tones, impulses, or amplitude modulations),[16] even with those limited penalties applied, the result is as follows:[17]

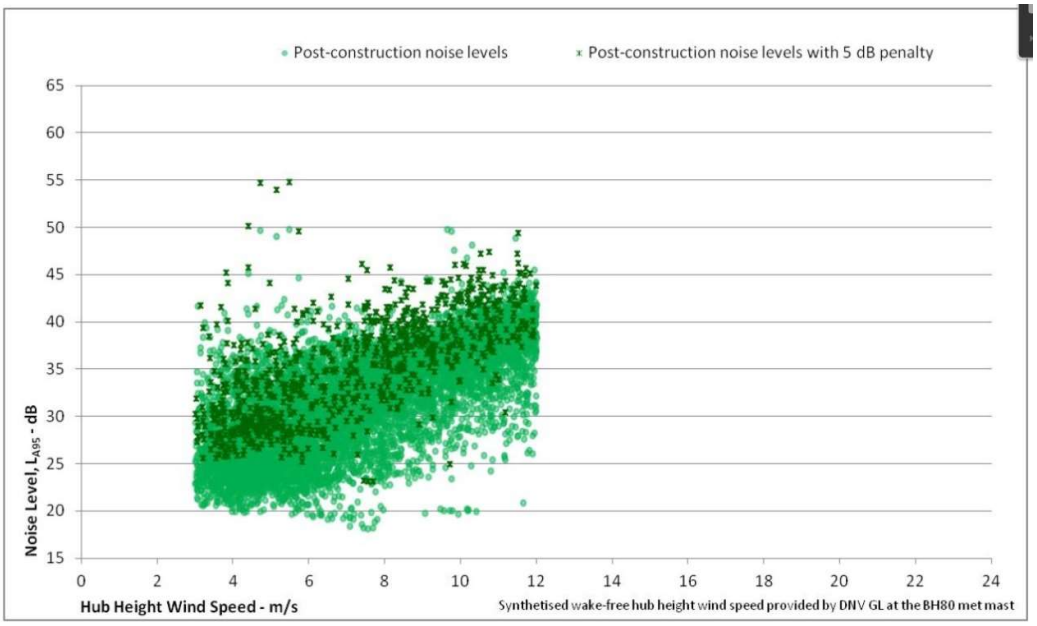


21. It can be seen that once the annoying character of the wind farm noise is even *partly* taken into account, there is a much higher proportion of data points which lie above the 40dB line, particularly above 8m/s, and again recalling that MDA has declined to show data for wind speeds greater than 12m/s, when the turbines are likely to be producing significant noise.

22. In the above graph, there are dozens and dozens of data points at 45dB or higher, up to 65dB (as adjusted for SACs),[18] recalling that every 10dB increase in sound energy is perceived by the human ear as a *doubling* in loudness. As such, this MDA graph supports Mr Zakula's evidence that the wind farm can be very loud in certain wind conditions, day and night.

[15] T1284.27.
[16] See paragraph 132(g) below.
[17] CB2772.
[18] Mr Huson suggested that the very loudest result on these graphs (the 60dB, adjusted to 65dB with the SAC penalty) was an "outlier" which should have been filtered out. However, these MDA graphs have already filtered out what MDA assessed as "extraneous" noise, and the application of the SAC penalty to this data point in particular suggests that MDA did assess the data point as representing wind farm noise. Accordingly, it would seem that the data point is valid.

23. The equivalent MDA graph, showing only data for the for the night-time period, is set out below.[19] It is also consistent with Mr Zakula's evidence about intermittent difficulties in getting to sleep, and staying asleep, in the period in question.



24. Finally, it is important to note that each data point is a L95 measure, meaning it records the quietest sounds (those heard 95% of the time) in the 10 minute audio sample.[20] Accordingly, any loud thumps or grinds from the wind farm which last for less than 30 seconds (being 5% of the time) simply are not captured.

REASONABLENESS

25. The next substantial question is whether the interference caused by the noise is reasonable (issue 3). This in turn requires consideration of the evidentiary burden (issue 2), established land use (issue 9), social utility (issue 7), precautions (issues 10-11) and permit compliance (issues 5-6). Hypersensitivity has already been addressed above.

Evidentiary burden

26. An issue estoppel clearly prevents the Defendant from disputing the previous holding[21] that the Defendant bears the evidentiary onus in proving reasonableness once a *prima facie* case of nuisance has been established. The Defendant cannot rely[22] on the fact the Plaintiffs did not

[19] CB2772.
[20] T939.11.
[21] *Bald Hills Wind Farm Pty Ltd v South Gippsland Shire Council* [2020] VSC 512, [68].
[22] Defendant's Submission [62(a)].

plead issue estoppel; they could not have, as the issue was only raised by the Defendant after the close of pleadings.[23]

27. In any event, the holding is clearly correct, at least in cases (such as this one) where the Defendant *pleads* reasonableness and goes into evidence in support of that position. In such a case, the "evidentiary burden" is merely a reflection of the common-sense position that the evidence is to be weighed "according to the proof which was in the power of one side to have produced, and in the power of the other to have contradicted".[24] The position *might* be different, say, in a default judgment application, where the defendant has stayed silent as to the reasonableness issue.

28. The Defendant cannot say there is no injustice to the Plaintiffs in permitting the Defendant to change position now and (despite both the issue estoppel and their positive defence) cast the burden of persuasion on reasonableness onto the Plaintiffs. The Plaintiffs reasonably conducted the trial on the basis that reasonableness matters were for the Defendant to prove; this necessarily affected the nature of the evidence called by the Plaintiffs, what witnesses it called and what questions it asked of the defendants' witnesses. In particular, the Plaintiffs reasonably proceeded on the basis that the *Defendant* bore the risk if there were gaps in the evidence on topics regarding reasonableness, and that is indeed the approach taken in these submissions.[25] If the Defendant were allowed now to change their position, the Plaintiffs would suffer unavoidable prejudice — even if a re-trial was ordered so that the Plaintiffs could lead different evidence. Even with an order that the Defendant pay the costs thrown away on the first trial, there would be residual prejudice to the Plaintiffs in terms of cost and delay.

Established land use

29. The relevant question under this topic is: what were the *existing* land uses in the area, and the *existing* noise levels, prior to the commencement of the wind farm. If that is the question, then it is clear that prior to February 2015, the area was quiet, including at night. There is no evidence of any loud activity at night. No witness said they had any trouble sleeping before the wind farm arrived.

30. Rather than squarely addressing the question of existing uses, the Defendant relies on a number of irrelevant, or marginally relevant, matters. First, it seeks to show that the farming zone *generally* is noisy.[26] But it is *farming* noise which is usually heard in that zone (which zone

[23] Defendant's opening submission (2 Sep 21) [5].
[24] Blatch v Archer [1774] EngR 2; (1774) 1 Cowp 63.
[25] See the many *Jones v Dunkel* type submissions made below.
[26] Defendant's Submissions [146(f)].

Mr Milner says is "relatively quiet").[27] Such noise does not generally occur at night, and there is no evidence farming noise occurs at night in Tarwin Lower.

31. Second, it seems the Defendant seeks to show that the Planning Panel anticipated the turbines would create a great deal of noise, and submits that from the date of the panel report, the "character" of Tarwin Lower changed to accommodate the noise produced by the future wind farm.[28] But obviously, the Panel's opinion (and even the recommendations it made) could not change existing uses.

32. Third, the Defendant seems to say that the moment the permit was granted, the character of the locality changed, to include as reasonable any noise generated by the future wind farm in compliance with its permit.[29] But again, obviously, the mere grant of a permit cannot change the existing *uses* of land.

33. It may be accepted that the actual *construction* of the windfarm, and the commencement of its operation, worked a change in existing uses at Tarwin Lower. However, while one can include *this* change when considering "existing" uses, in undertaking that consideration, one must ignore the wind farm's activities *insofar as they cause a nuisance*.[30] Accordingly, the Defendant cannot make the "bootstraps" argument it does, to the effect that now that the wind farm operates and produces "lawful noise" (meaning noise generated in conformity with the permit), that noise becomes part of the established land use, against which reasonableness must be measured,[31] even if the noise would otherwise constitute a nuisance.

34. The Defendant makes submissions, under the heading of issue 8, directed at the fact that Mr Zakula built his house after the permit was granted. This does not go to "existing uses" issue, but rather to Mr Zakula's entitlement to relief. We therefore respond to these submissions below, in the section dealing with remedy.

Social utility

35. The Defendant points to the fact that the wind farm produces "green" electricity,[32] representing 0.19% of the electricity generated annually on the east coast.

36. However, the question is not whether the Defendant produces a public benefit. The question is whether it is *reasonable* for the Defendant to substantially interfere with the Plaintiffs' rights, to

[27] See Milner [84].
[28] Defendant's Submissions [146(g)].
[29] Defendant's Submissions [147].
[30] *Lawrence v Fen Tigers Ltd* [2014] 1 AC 822, 843 [65] (Lord Neuberrger PSC), with agreement from Lord Sumption (at [154]), Lord Mance (at [162]), and Lord Clarke (at [169]). Cf Lord Carnwath (at [187]).
[31] Defendant's Submissions [147].
[32] Defendant's Submissions [141].

the extent which it does, in order to produce some or all of that benefit. That requires a balancing exercise.

37. Tellingly, the Defendant does not say that it could *not* produce clean energy, in approximately the same amounts, without causing a nuisance. It has made the forensic decision not to reveal to the Court the details of how it produces the electricity it does: from which turbines, at which time of day or night, in what wind speeds, and what diminution in green energy would be caused by a curtailment strategy designed to lessen the noise at Mr Zakula's property.

38. The Defendant's decision not to reveal that information should assist the Court in concluding more comfortably that it is *not* a necessary feature of the wind farm's operation that it should emit the noise it does, particularly from the turbines located near the Plaintiffs, and particularly at night, and in cooler seasons.

39. Further, although the Defendant led evidence that it sells its electricity to Alinta Energy,[33] it chose to stay silent on the question of what would occur if it generated slightly less electricity, due to abating the nuisance. That silence allows the Court to more comfortably conclude that Alinta would simply purchase additional green power from another provider, meaning there is no net loss of environmental benefit to the community.

Precautions

40. The Defendant asserts it has taken various precautions to avoid the nuisance.[34] In reality, the steps taken were *not directed* towards avoiding the nuisance. However, as a preliminary matter, it should be noted that the Defendants seem to treat the taking of precautions as a tick-a-box exercise, with the logic being "since we took some precautions, that means we must have been acting reasonably, and so there cannot be a nuisance". In contrast, the Plaintiffs say that — as the language of issue 11 brings into clear focus —the real question is whether there existed any way for the Defendant to use its land in a way which was *less burdensome* on its neighbours.

41. Understood in that way, the *Jones v Dunkel* submission made above under "social utility" is also relevant to precautions. That is to say, that there would appear to have been ways in which the Defendant *could* have run its wind farm *without* causing a nuisance, or at least without causing *so much of* a nuisance, and yet the Defendant has chosen not to disclose the inner workings of its operation so that this assessment could be carried out. In those circumstances, the Court can more comfortably conclude that not all reasonably available precautions were taken.

[33] Arthur [19].
[34] Defendant's Submissions [42(c)].

42. Similarly, the Defendant's complaint[35] that the Plaintiffs have not identified specific precautions to be taken is not to the point. The Defendant has the evidentiary burden, and thus it was for the Defendant to show it had taken all reasonable precautions. The Defendant has studiously avoided any examination of whether it was economical, and hence reasonable, for it to turn down some of its turbines, for some of the time to allow the Plaintiffs some peace and quiet.

43. Let us now examine the precautions relied upon by the Defendant. First, the Defendant says it ensured it complied with the permit at those 13 properties which the Minister required to be tested.[36] But since the Minister never required compliance to be shown at the Uren or Zakula properties, this is not a relevant precaution against nuisances affecting those two properties.

44. Further, since the permit laid down rules for *average* noise emissions measured over the monitoring period (which could be up to 535 days long[37]), steps taken to ensure permit compliance at a particular property were nonresponsive to *intermittent* nuisances of the kind complained about. (The Defendant misunderstands[38] the Plaintiffs' point about averaging. The Plaintiffs' point is that the post-construction regression curve averages *all* of the data points, thereby allowing quiet points to cancel out loud ones, for the purposes of constructing the regression curve. The point has nothing to do with the L_{95} criterion applied to each individual data point.)

45. Second, the Defendant says it implemented curtailment strategies designed to redress permit non-compliance at various properties (and not including the Uren or Zakula properties).[39] Merely repeating the submission is enough to demonstrate that this step was not at all responsive to the nuisance being experienced at the Uren and Zakula properties. Mr Arthur's answers to Her Honour's questions at T856.20-T857.10 reveal that the Defendant's curtailment strategy was not directed at making it less noisy for Mr Zakula or Mr Uren.

46. There is no evidence that the curtailing of turbine 16,[40] proximate to Mr Zakula's property, incidentally (and indeed, accidentally) abated some of the noise affecting his property. There are many good reasons to conclude it did not. To begin with, since curtailment occasionally failed,[41] the Court can have no confidence that the alleged curtailment of turbine 16 was in place at all times. Next, turbine 16 was only curtailed in south-easterly and northerly winds,[42] which would

[35] Defendant's Submissions [156].
[36] Defendant's Submissions [152].
[37] CB2606, property
[38] Defendant's Submissions [134]-[136].
[39] Defendant's Submissions [152(e)-(f)], [155(a)].
[40] See Defendant's Submissions [37].
[41] CB2599.
[42] CB3466.

not abate the problem Mr Zakula experienced when the wind was blowing from the west. The ineffectiveness of the "precaution" can be seen from the fact that there was no amelioration of the problem from the point of view of Mr Zakula after curtailment was begun. Mr Zakula's testimony and log books prove that the noise nuisance has continued at his property.

47. Third, the Defendant says it engaged MDA to ensure permit compliance at the Uren and Zakula properties.[43] But again, this effort was directed at issues of permit non-compliance, not nuisance, and the averaging approach used to determine permit compliance was apt to ignore the very nuisances about which the Plaintiffs complained.

48. Fourth, the Defendant says it spoke to the Plaintiffs.[44] This obviously is not a "precaution", particularly in circumstances where the Defendant already knew the Plaintiffs' positions. Indeed, it is the failure of the Defendant to change any aspect of the wind farm's operation *after* these discussions (and indeed, after earlier complaints) which is the important matter, not the fact of the discussions themselves.

49. Fifth, the Defendant says it responded to the Plaintiffs' complaints by having MDA investigate and prepare memos.[45] However, the investigations were extremely crude, if not farcical. For example, in response to Mr Uren's complaint that on 29 May 2015, the wind farm sounded like "brakes coming on",[46] what MDA did was to listen to 11 one-minute audio recordings (being 0.6% of the 1,881 minutes falling in the period under consideration)[47] collected at the *Dunmore* house[48] (about 2km north of Mr Uren's house), and conclude that there were no "prominent" characteristics[49] of the wind farm noise that was heard on the recordings. Such investigations do not count as precautions.

50. Sixth, the Defendant says that by letter dated 14 December 2020 it "offered" to improve the acoustic amenity at Mr Zakula's property.[50] Two responses should be made. Firstly, the Defendant (which had the onus) has not established that the letter was ever sent. Mr Zakula certainly did not see it; Mr Arthur did not say[51] he or any other agent of the Defendant sent it.[52] Secondly, even if the letter was sent, since no particular monetary sum or acoustic treatment was

[43] Defendant's Submissions [153(a)-(c)].
[44] Defendant's Submissions [153(d)].
[45] Defendant's Submissions [153(e)-(g)].
[46] CB2081.
[47] CB2084: there are 31 hours and 21 minutes between 8:30pm on 28/5/15 and 3:51am on 30/5/15.
[48] CB2082.
[49] CB2085.
[50] Defendant's Submissions [154].
[51] See Arthur statement [43].
[52] And so there was no occasion for the Plaintiffs to challenge any evidence of his. Cf Defendant's Submissions [72].

identified in the letter, the "offer" cannot represent anything other than an invitation to discuss. As such, it cannot itself be treated as the taking of a precaution.[53]

51. Seventh, the Defendant says that it tested its turbines for tonality.[54] However, the testing was only done in August 2017, years after the Plaintiffs complaints began; only 11 out of 52 turbines were tested[55] (and no other turbines were tested even after it was found there was a tonality problem in 10 of the 11 turbines tested); and the problem is still yet fixed, 4 years after the issue was identified. Accordingly, no "precaution" has actually been taken, to date. As such, on the issue of whether the interference is "reasonable", the Defendant cannot point to reasonable precautions taken to avoid causing nuisance to the Plaintiffs.

Permit compliance

52. Although permit compliance is a large topic, it must be steadily borne in mind that ultimately the question is whether the *Defendant* has shown that, merely because it complied with its planning permit, its emissions of noise were *reasonable*, and therefore not a nuisance.

53. An inconsistency in the Defendant's position must be noted. On the one hand its formal defence to nuisance is that it complies with its *permit*,[56] and it embraces the position that if there is an absence of dissatisfaction from the Minister, then compliance is demonstrated.[57] On the other hand, since it appreciates that permit compliance can be no defence to Mr Zakula's claim, it adopts an alternative (unpleaded) position to the effect that since it complies with the NZ Standard at his residence, there can be no nuisance.

(a) <u>Relevance of permit and NZ Standard</u>

54. A threshold issue is the relevance of the permit and the NZ Standard to the assessment of reasonableness (issue 6).

55. The courts are slow to accept that planning controls, imposed administratively (and often with economic or political consideration in mind), cut down on landowners' common law rights to be free of nuisances. Accordingly, the mere fact that an activity is authorised by a planning permit is normally of "no assistance" to a defendant. Then again, when the permit includes "carefully considered" noise limits, the limits may provide a "useful starting point" for a court's assessment

[53] If the Defendant is *now* willing to pay for acoustic treatment to reduce the wind farm sound inside Mr Zakula's house then it must be verified that the treatment works before any assumption can be made that the treatment reduces any part of the nuisance. In any event, acoustic changes to the house will not help the sound outside and may fail when windows are open.
[54] Defendant's Submissions [155(b),(d)].
[55] CB3769.
[56] Defence [28(b)(ii)], 28B[d)]
[57] Defendant's Submissions [26], [86].

of reasonableness, particularly if the court is able to test the opinions of those who recommended the limits by cross-examination.[58]

56. Let us now apply this approach to the facts of this case. Formally it was the Minister who issued the permit, but he simply adopted the recommendation of the Planning Panel as to noise conditions. Why did the Planning Panel adopt the NZ Standard as the basis of condition 19? Was it because it was unanimously agreed, by experts in the field, to be a suitable noise limit for a wind farm? No: indeed, a number of acoustic experts told the Panel that the NZ Standard methodology was *not* adequate to protect sleep.[59] In that case, why was the NZ Standard adopted? It is clear it was adopted because *State government policy* was to use it.[60] But in circumstances where there is no evidence of the *government's* reasons for embracing the NZ Standard (to negative the prospect that doing so was dominated by political or economic considerations), let alone any cross-examination of those responsible, the Court can place no real weight on the fact that the Panel selected the NZ Standard to use as the basis of condition 19.

57. More weight can be placed on the fact that the Panel (independently of government policy, and apparently based on the acoustic evidence it heard) modified the NZ Standard by adding condition 19(c) to the permit. However, even still, it is clear that condition 19(c) was an experiment of sorts, and it cannot be said that its imposition reflects any acoustic or community consensus that excessive noise which "merely" occurs 9% (but not 10%) of the night is reasonable and therefore not a nuisance. In particular, there is no evidence that the Panel members had any acoustic or psychological expertise which would empower them to lay down such a rule with any credibility, and they have not been cross-examined on their reasons.

58. What about the text of the NZ Standard itself? The Defendant relies on assertions contained within the 1998 standard (and even the 2010 standard) to the effect that its methodology is a reasonable one for protecting sleep.[61] A number of responses can be made.

59. First, the Defendant has not established the identity or expertise of the drafters of the NZ Standard, and they would appear to include electricity-generators and for-profit entities which would have an interest in promoting more rather than less wind energy.[62] Of course, none of the drafters have been cross-examined in this case as to their reasons for agreeing to the standard.

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[58] *Lawrence v Fen Tigers Ltd* [2014] 1 AC 822, [90]-[96] and see [75]-[99] generally (Lord Neuberrger PSC), [156] (Lord Sumption JSC), [165]-[166] (Lord Mance JSC), [169] Lord Clarke JSC). See also [217]-[229] (Lord Carnwath JSC).
[59] Panel Report, section 13.3.
[60] Section 4 of the PPG-WEF, extracted at [5.3.3] of the Panel's report [PSCB70]. See also the Panel's comments at the end of 5.3.3 [PSCB71], 5.7.1 [PSCB 85], and 13.4 [PSCB 224, paragraph commencing "That being said…"].
[61] Defendant's Submissions [129]-[132].
[62] CB1125.

Further, it is unlikely the drafters intended for the standard to be used in Australia, and the Defendant has not furnished the Court with any evidence to show that the context of wind farms in New Zealand (such as typical proximity to houses) is similar to the context in Victoria.

60. Second, the NZ Standard does not achieve what it sets out to do. On the one hand, it embraces the "internationally accepted" goal of keeping internal noise at night to 30-35dB.[63] On the other hand, by imposing an *escalating* noise limit (background-plus-5dB), it does not ensure quiet bedrooms in high-wind conditions. Further, by embracing a noise limit which is an *average*, it would *permit* noisy bedrooms at night for much of the time, so long as these loud data points were cancelled out by other quiet ones, even if (as the Panel recognised) those quiet ones occur during the daytime.

61. Third, even the 30-35dB indoor limit is not a hard and fast rule. The Berglund & Lindvall paper which the drafters rely upon suggest that even *lower* limits may be appropriate for quiet environments with low background levels, or for cases where a "combination of noise and vibration" is produced.[64]

62. Fourth, while the drafters in 1998 may have thought the 40dB external limit was appropriate, those were early days in wind farm development, and in the 2010 update of the standard a lower 35dB limit has been introduced, applicable to "habitable spaces",[65] such as the Plaintiffs' residences.

63. That 40dB is too high a limit is also reflected in the fact that 35dB is also used as a standard or guideline in South Australia (for rural locations),[66] in Tasmania (for sensitive uses),[67] in NSW,[68] Western Australia,[69] and Queensland (at night).[70]

64. The 35dB standard has now been embraced to some extent in Victoria, in that newer windfarms (those given planning permission after 2010) must comply with the 2010 NZ Standard[71] (not the 1998 standard, as the Defendant suggests[72]) and non-compliance is a criminal offence.[73]

65. The Defendant seeks[74] to support the reasonableness of the 1998 NZ Standard by the fact that the new regulations require the Defendant's wind farm (as one of the older ones) to comply with that

[63] Clause 4.4.1.
[64] Section 7.5.10, DSCB 895.
[65] 2010 standard, cl 2.4 (definition of "Noise Sensitive Location") [PSCB476].
[66] SA EPA, Wind farms: environmental noise guidelines [2.2]
[67] Tasmanian EPA, Board Communiqué (4 Aug 2020).
[68] NSW Department of Planning & Environment, *Wind Energy Guideline* (Dec 16) p 7.
[69] WA Planning Commission, Planning Bulletin 67 (May 04).
[70] Qld government, State code 23: Wind farm development – Planning guideline (July 2017) p 37.
[71] Environment Protection Amendment (Wind Turbine Noise) Regulations 2021 (Vic) r 131B.
[72] Defendant's Submissions [133(b)].
[73] *Environmental Protection Act 2017* (Vic) s 166.
[74] Defendant's Submissions [133(b)].

standard. But that is not to give the NZ Standard any significant let alone binding status for the purposes of the law of nuisance. To begin with, the new regulations represent the view of the executive as to what noise is sufficiently unreasonable *so as to be criminalised*. They do not represent the view of the whole community (as expressed in Parliament) as to what noise is unreasonable for the purposes of any civil dispute. Further, the regulations do not exhaust the definition of "unreasonable noise"; noise may be unreasonable notwithstanding that it meets the requirements laid down by the regulations.[75]

66. Fifth, the NZ Standard is badly drafted and ambiguous in critical parts, including (critically) as to how to assess the *contribution* of windfarm noise as measured at the residence, and also whether it is to be applied in the "far field" only. It leaves much to the discretion (or whim) of the persons purporting to implement it. This fundamentally cripples its utility as any kind of benchmark for reasonableness.

67. For all of these reasons, the NZ Standard, whether as drafted or as modified by the Panel, is a very poor "starting point" for determining reasonableness, and it certainly should not stand as the end point in that assessment.

(b) <u>Whether permit complied with</u>

68. We now turn to the question of whether the *Defendant* has shown that the noise conditions in the permit have been complied with, at all material times (issue 5). We emphasise that as the Defendant has the onus on this issue, it must first convince the Court of the proper *meaning* of the permit (and of the NZ Standard which it adopts), and secondly, show that the requirements imposed by the permit have, in fact, been met.

(i) Threshold matters

69. A number of threshold issues may be dealt with first.

<u>Compliance with which conditions?</u>

70. The first is whether the Defendant must show it complies with *all* of the "noise conditions" (being conditions 18-25 and 28-29), as pleaded by the Defendant,[76] rather than just condition 19. If the Defendant must show compliance with all conditions, to the satisfaction of the Court (rather than to the satisfaction of the Minister), it faces insurmountable difficulties. For example, conditions 23 and 24 required the post-construction report to be commissioned by the Minister and to be "independent" of the operator, and yet in breach of these requirements, the MDA post-

[75] *Environmental Protection Act 2017* (Vic) s 166 and definition of "unreasonable noise" in s 3(1).
[76] Defence [28B(a)-(b)].

construction report was commissioned by the Defendant, and the Defendant was permitted to see and edit MDA's draft report.

Compliance as assessed by whom?

71. The second threshold issue is whether condition 19 itself lays down an objective noise standard, enforceable by VCAT and the courts, or whether compliance with the noise limit is solely a matter of the Minister's satisfaction (even if erroneously formed). The Defendant submits that the latter position is correct, relying in part on Mr Paul Connor QC's opinion.[77]

72. With respect, the Defendant and Mr Connor are in error. The words "to the satisfaction of the Minister" appearing in condition 19 clearly attach to the question of which dwellings exist at the date of the permit. That this matter was made to turn on the Minister's satisfaction is understandable given there could well be controversy about what structures counted as a "dwelling", and whether a partly-built structure might be said to "exist" at the test time; it would be convenient and expedient for the Minister to be the final arbiter of such straightforward matters. Indeed, conditions 28 and 29 makes the Minister's role in determining these matters (based on his "satisfaction") crystal clear.

73. Conversely, there would be no sound policy reason to read condition 19 as making the Minister the arbiter of factually complicated, technical questions as to whether or not condition 19 itself has been complied with. VCAT (or, in rare cases,[78] the courts) would be the natural forum for such disputes,[79] where compliance could be tested in a transparent and rigorous way, so as to uphold public confidence in the system of regulation of wind farms. Maintaining public confidence is particularly important given the regulation of wind farms has been a topic of public controversy.

74. In VCAT (or a court), the operator would need to establish compliance through admissible evidence given on oath or affirmation. The challenger would have the opportunity to call countervailing evidence, and to cross-examine the operator's witnessers. The decision would be made by an independent tribunal member (or judge), with no possibility of a suggestion of any political or other improper influence on the outcome.

75. In contrast, if the Defendant's construction is correct, then condition 19 would allow the Minister to make a secret decision about compliance based on representations made only by the operator (neighbours would presumably have no right to be heard as they are not directly "affected" by the decision.) The operator's material would not be on oath and there might be no testing of it by

[77] Defendant's Submissions [27].
[78] See *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) s 52.
[79] See *Planning and Environment Act 1987* (Vic) pt 6.

the Minister or by any party with an opposing interest. If the Minister's decision came to light, there could be the perception it was politically motivated, thereby undermining public confidence in the regulation of wind farms.

76. It is wholly unlikely that the Panel would have intended such an unfair and secretive scheme. What the Panel said was that is intended for the Minister to have responsibility for "monitoring and enforcing acoustic conditions".[80] The Minister's monitoring role is clear, and is contained in conditions 23-25. The Minister's enforcement role is contained in condition 22, namely that "[w]here condition 19 is found to have been breached", the Minister may take certain action. However, it is telling that condition 22 does not say that "where condition 19 is *found by the Minister* to have been breached", and the Plaintiffs submit that the Panel clearly anticipated that it would be VCAT or a court which would make the *finding* of non-compliance.

77. For these reasons, the better view is that it is for VCAT or a court to decide if condition 19 has been breached.

(ii) Requirements of conditions 19(a)-(b)

78. Before assessing whether the Defendant has demonstrated compliance with the permit, it is necessary to set out what the permit requires. As set out above, it is ultimately for the Defendant to convince the Court of its preferred meaning of the permit and NZ Standard. What follows is the Plaintiffs' construction of condition 19, excluding condition 19(c).

79. To begin with, we note that the meaning of the permit is a question of law. The search is for the "true meaning" of the document, given its words read in the context of the presumed intention of its maker, the Minister.[81] It is submitted that where the Minister has adopted the Panel's findings and recommendations, the presumed intention of the Panel stands as the presumed intention of the Minister.

80. The Plaintiffs submit that the **first step** required by the permit was for the Minister to determine, under conditions 19 and 28, which were the existing dwellings to be protected by the permit.

81. The **second step** was for background sound measurements to be taken at each of those properties. This is clear from condition cl .5.1 of the NZ Standard, which requires the testing to be done "at or within the … affected residential property boundary". Mr Turnbull asserts that the remaining words of cl 4.5.1 permit proxy locations to be used. This should be rejected, but even if he is correct, the NZ Standard must give way to inconsistent terms in the permit itself.

[80] Panel Report, section 13.4 [PSCB 230, paragraph commencing "In this case, the Minister…"].
[81] See, eg, *Parramatta City Council v Shell Company of Australia Ltd [No 2]* [1972] 2 NSWLR 632, 637 (NSWCA).

82. Such inconsistent terms exist. The chapeau to condition 19 requires compliance "in relation to" the dwelling. Condition 19(a) requires that post-construction noise at a protected dwelling must not exceed the "background level"; this surely refers to the level at the dwelling in question and not at some other location. That this was is the "true meaning" intended by the Panel is confirmed given the Panel explicitly rejected MDA's proposal to attribute to the Fox residence background data which was collected at a different location.[82]

83. Also implicit in condition 19 and the very word "background" is the fact that that this data must be collected in genuinely background conditions, namely conditions representing the normal sounds of the area, prior to the coming of the wind farm. Once again, this construction is reinforced having regard to the Panel stressing that background data had to be "representative" of the "pre development" noise levels, and had to be of "good integrity".[83]

84. Another important rule was that background testing must be done long enough to capture data for winds from 0m/s up to the "rated" windspeed of the turbines (the speed at which they cut out), which Mr Turnbull suggested was 25 m/s at the Defendant's wind farm: cl 5.2.3 and A1.1(g).

85. Finally, a note below clause 4.5.6 requires that 1440 data points are needed in order to have a statistically valid sample.

86. The **third step** was for wind speed to be measured, for the same period that sound was being recorded at residences. An important aspect of this step is the proper selection of the site to take wind measurements. The measurements could be taken anywhere within the "windfarm site" [cl 4.5.3], but since the post-construction wind measurements would be taken from the same location [cl 4.5.4], and there was a risk that the turbines (when built) could affect post-construction measurements due to wake, then "care must be taken" to avoid a "significant" wake problem.

87. Given the NZ Standard requires wind speed to be measured with a tolerance of only 0.5m/s [cl 3 (definition of "wind speed")], these rules mean that the Defendant was *bound* to select a site for pre-construction wind turbines which would *not* likely be affected by wake turbulence after construction.

[82] PSCB224 (paragraph commencing "Marshall Day evidence…"). See also the paragraph above, where the need for background data of "good integrity" is stressed.
[83] PSCB224 (paragraph commencing "Firstly, in relation to…").

88. The **fourth step** was for the sound data collected to be correlated with wind speed, and for those correlations to be plotted on a graph, *without* any filtering for "extraneous noise". The NZ Standard simply does not provide for this kind of filtering.

89. The **fifth step** was to take that data and derive a regression curve, for *all* wind speeds lying between turbine cut-in and cut-out: cl A1.1(f), graph below cl A1.2.4, graph below A1.2.6.

90. The **sixth step** was to derive a noise limit curve from that background curve: initially a flat 40dB, but at higher wind speeds, at the background-plus-5dB level. This noise limit would run from 0m/s winds up to *rated* wind speed: cl 4.4.2, graph under A1.2.6.

91. That completes the pre-construction steps. What follows are the post-construction, or compliance level testing steps.

92. **Step 7** in that process is to determine whether the residence in question is in the "far field", where the cyclic sounds ("whoosh whoosh") are no longer discernible: cl 5.1.1. If they are still discernible, then the NZ Standard cannot be used any further to establish compliance.

93. Assuming the residence is in the far field, **step 8** is to again record sound <u>at</u> the residence, being the "same location" used previously: cl 5.2.1. Mr Turnbull relies on the words "where practical" as allowing for proxy locations to be used. That must be rejected in the present case, given that condition 19(a) explicitly stipulates that the testing is to be done "within 10 metres" of the dwelling in question. In other words, the permit itself prohibits the use of proxy locations.

94. Once again, the testing must last long enough to capture data for the same wind speeds as previously tested for, namely 0m/s up to the *cut out* wind speed, which was 25m/s in this case: cl 5.2.2, 5.2.3.

95. Recording higher wind speeds is particularly important at Tarwin Lower, because it is a windy area near the coast. For example, during winter, at night (for these purposes, midnight to 6am) the wind blows stronger than 8m/s for 17% of the time.[84]

96. **Step 9** is to collect wind speed data, from the same location as previously [cl 4.5.4], but *conditional* upon the original site having been selected to avoid wake turbulence. In circumstances where the wrong site was selected initially, the NZ Standard simply does *not* allow for that error to be "corrected"; that is, for the true wake-unaffected windspeeds to be *guessed at*, whether using mathematics, wind speeds from proxy locations, or any other workaround. Similarly, if the anemometers used to conduct the background testing have since

[84] CB280, figure of "17.25" appearing in the 6th column, 4 rows from the bottom.

failed, that must be accepted, and it is not permitted to use *other* anemometers at other locations (or ground heights) as a proxy.

97. Alternatively, if (contrary to this submission) workarounds for these problems are permitted, they must be solutions in which there is very high confidence that the 0.5m/s tolerance level for wind speed data has been maintained.

98. The **tenth step** is to apply penalties for SACs: cl 5.1.2, 5.3.2. A SAC is one of three kinds of characteristics (tones, impulses or amplitude modulation) which the NZ Standard recognises, in cl 5.3.1, to be annoying, when "clearly audible". The phrase "clearly audible" carries its ordinary meaning. Contrary to Mr Turnbull's assertion, the word "special" does not mean that the SACs only attract a penalty when they are special, unusual or atypical for a wind farm. They attract a penalty because they are atypical compared to "sound without such characteristics": cl 5.3.1.

99. The NZ Standard requires a "subjective assessment" to detect SACs of any kind. The assessment is subjective in that it is carried out by the person assessing compliance, using their ears. The ordinary meaning of "assessment" suggests the assessor must consider and *evaluate* the data, namely the character of the noise produced by the wind farm, in different conditions. The fact that the assessor is to consider different conditions (time of day, wind speed, wind direction, and atmospheric conditions) is seen from the requirement that they "document" these matters: cl 6.4(h), (j), (s). There would be no need for these matters to be documented if they were not relevant to the SAC assessment.

100. While the NZ Standard does not say how *much* listening is needed to perform such an assessment, it is implicit that he or she must conduct *enough* listening so as to have a logically sound basis for their assessment as to the kinds of conditions in which SACs occur. For example, an assessor could not listen to the wind farm for one minute, hear no SACs, and thereby conclude that SACs are never present.

101. Once a subjective assessment is done, the assessor must decide whether an objective (computer-based) assessment is "appropriate": cl 5.3.2. For example, if SACs were heard on a continuous basis, there would be no utility in conducting an objective assessment to confirm that result. However, perhaps if the assessor is unsure whether the different frequencies contained in the aggregate noise they hear is sufficiently coherent to have crossed the line into "tonality", it may be "appropriate" to use objective analysis to make that assessment.

102. If objective analysis is "appropriate", the note below clause 5.3.2 of the NZ Standard makes clear that in terms of detecting tonality, a *specified* standard from the IEC (International Electrotechnical Commission) must be used. The NZ Standard does *not* permit different

standards, such as ETSU-R-97 to be used, even if it might be the case that both standards are based on the same "Joint Nordic Method".

103. The Defendant did not put the relevant IEC standard into evidence. That being so, the Court cannot assess the degree to which the ETSU-R-97 standard may differ from the stipulated IEC standard.

104. Finally, it must be noted that, contrary to Mr Turnbull's position, the NZ Standard clearly requires a subjective assessment to be made of tones in every case, and it is not permissible *only* to conduct the objective test. That is important because the Joint Nordic Method (and so presumably also the stipulated IEC standard) involves a computer searching for "prominent" tones, defined as tones which are "6.5dB above audibility",[85] and yet it will be recalled that the NZ Standard requires a penalty to be imposed once a tone is "clearly audible", even if it is not a full 6.5dB above audibility.

105. As set out above, the question of when a tone is "clearly audible" is a question of fact. There is no rule that only tones 6.5dB above audibility are "clearly" audible. Indeed, the ETSU standard suggests that "audibility criteria" are seriously contested between acousticians, and that on one approach (the DIN 45 681 approach) even a 2dB-above-audibility tone emitted from a wind farm would be penalised.[86]

106. Once the assessor has conducted the subjective test, and any objective assessment needed, a post-construction plot of sound levels versus windspeed is to be prepared, but then a 5dB penalty is to be applied to *all those* data points correlated with the representing the times of day, windspeeds, or atmospheric conditions in which the assessor has determined that SACs may occur: cl 5.3.2.

107. The fact that the penalty is to be applied to data points correlated with the particular *conditions* in which SACs have been assessed as likely to occur is made explicit in the 2010 Standard.[87]

108. Once penalties have been applied to the relevant data points, the **11th step** is to derive a regression curve for the adjusted data points, and to plot that curve against the background regression curve: cl 5.4.

109. The NZ Standard at this point anticipates a scenario whereby the assessor might not have background data for the property being assessed. In that case, the NZ Standard does *not* permit

[85] ETSU-R-97 p 78 (paragraph commencing "The Joint Nordic…").
[86] ETSU-R-97 p 78-79, esp Table 9 at top of p 79.
[87] Cl B3.1.

the assessor to use background data from a proxy location. Rather, what is to be done is on/off testing to obtain background data for the residence in question: cl 5.4.

110. Like the background curve, the post-construction regression curve must be based on data collected from turbine cut-in speed up to cut-out speed: cl 5.2.2, 5.2.3, A1.1(f),(g), A1.3.

111. As was the case for background testing, and contrary to Mr Turnbull's position, the NZ Standard does *not* permit any filtering of data points, prior to the construction of the regression curve, to delete data points which include "extraneous noise" such as insect noise.

112. The **12th step** is to undertake a "comparison" between the post-construction and pre-construction regression lines: cl 5.4. The comparison is a simple visual comparison. In many cases, (particularly for residences in the "far field", where the turbines are distant), what one would see is that the post-construction regression overlays the background line, demonstrating that the wind farm has not added to aggregate sound levels at the residence, on average. If so, then the conclusion would be that the wind farm complies with the noise limits.

113. However, in some cases the post-construction regression line will lie above the background line. In those cases, the **13th step** is to consider whether it "*may be necessary*" to "adjust" any measurements to "determine the 'windfarm only' levels": cl A1.3. The 2010 standard makes it clear that the adjustment in question is the subtraction of background sound. [88]

114. Contrary to Mr Turnbull's position, nothing in the 1998 Standard (or the 2010 Standard, for that matter) suggests that the "adjustment" permitted is the *deletion* of data points which are assessed as not being "dominated" by wind farm sound. Nor is there any warrant to delete data points where there happens to be, for the same moment, a lower sound level recorded at some proxy location situated closer to the turbine.

115. The word "may" makes it clear that the subtraction of background will not be appropriate in every case, and for all parts of the regression curve. It is clear why that is so: it is because (as even the 2010 standard notes) background subtraction is "not strictly mathematically correct".[89] As Mr Huson and Mr Turnbull agreed, it produces inaccuracies.[90] MDA took the view that background subtraction could only be done (with acceptable margins of error) when the post-construction curve lies more than 3dB but less than 6dB above the background line.[91] Mr Turnbull took the view that background subtraction could only be done in the "near field".[92]

[88] Clause 7.5.36 [PSCB493-4].
[89] Clause 7.5.36 [PSCB493-4].
[90] See Turnbull XXN: T1144.08, T1144.17, T1144.29; Huson XN: T1311.06.
[91] CB2743, Figure 2.
[92] T1145.07.

116. As such, what clause A1.3 of the NZ Standard requires is for background subtraction to be applied only in cases, and to the extent that, it can be applied with rigour (as distinct from the 2010 standard, which apparently requires it to be applied in every case).

117. Accordingly, in cases where the post-construction regression line lies above the background line, the **14th step** is to subtract the background, for parts of the graph where it is appropriate to do so. Once that is done, the remaining line (the orange line in various MDA reports[93]) represents the *contribution* of sound from the wind farm, and so the task is simply to see whether that line lies below the noise limit (the black line, in MDA reports). If so, the wind farm prima facie complies with the limit.

118. We say "prima facie" because the **15th step** must be to check that the post-construction measurements were taken over a period in which the wind farm was operating normally and at full power, and did not include any unusual periods where it was operating at reduced power, with turbines switched off, and so forth. This requirement is implicit in the chapeau to condition 19, which requires the "operation" of the wind farm to comply with the NZ Standard; there would be no point in condition 19 permitting an operator to show compliance based on only half of its turbines spinning.

119. We note MDA considered it sufficient if 50 of the 52 turbines were operating.[94] Mr Turnbull thought it would be acceptable if even fewer were operating.[95] However, recall that condition 19 is concerned to protect identified dwellings, particularly for sleep protection purposes. In those circumstances, the Plaintiffs say that the permit, properly construed, requires at the very least that all of those turbines which are *proximate* to the residences in question should be operating normally during the testing period, in order for the result of the compliance testing to be considered valid.

120. If one or two turbines on the *far side* of the field are shut down for maintenance during the testing period, then the testing can continue, and produce valid results. But if, for example, turbine 16 were not operational for any part of a testing period, then it is inconceivable that the results obtained could be used to show compliance at the Jelbart Tenement, which is only 890m away from turbine 16.

[93] See, eg, CB2623.
[94] CB2740.
[95] T1150.12.

(iii) Requirements of condition 19(c)

121. Condition 19(c) turns less on the meaning of the NZ Standard and instead on the meaning of the condition itself. That meaning arises from the text, read in light of the context and the presumed intent of the Minister, in adopting the Panel's recommendations.

122. It is tolerably clear that condition 19(c) imposes two linked requirements, one procedural and one substantive. The procedural requirement is to "separately assess" compliance at night.

123. It is clear that a separate assessment requires the various steps under the NZ Standard (outlined above) to be applied "with regard to night-time data". That means, uncontroversially, that pre-construction and post-construction curves must be separately derived for night-time only data. The Plaintiffs submit it is also clear that the step relating to SACs must also be applied "with regard to" the night-time data; that is, the assessor must *specifically* consider whether SACs occur during the night-time period. Further, the requirement to have a minimum of 1440 data points for both background and post-construction plots remains.

124. The substantive requirement is more difficult. We begin with the text. The rule laid down is that a breach of condition 19(a) for 10% of "the night" amounts to a breach of condition 19(c). One infelicity of the rule is that in not referring also to condition 19(b), it might be thought that it does not require the application of penalties for SACs to the night-time data. The Plaintiffs submit that is not so: the penalties for SACs are an integral part of the NZ Standard's methodology which is embraced by condition 19(a). Indeed, condition 19(b) itself is superfluous, as condition 19(a) on its own would require the application of penalties, because it picks up the NZ Standard generally.

125. Further, the Panel's report shows it expected the 10% rule to be assessed using the whole of the NZ Standard. In the body of its reasons, it said the 10% rule was to be assessed against "NSZ6808" [sic].[96] In its formal recommendation, it said that compliance should be assessed against the "standard".[97] There is nothing to suggest the Minister rejected this recommendation.

126. The next question is whether "the night" refers to an individual night, or multiple nights. The reference to "the night", rather than to "all nights" or even just "nights", strongly indicates a single night is intended. This is made clear in the Panel's report, commencing with the final paragraph on page 207 of the report. [98] That paragraph begins by considering the issue of averaging "within the night". The Panel then accepts that the character of wind farm noise can

[96] PSCB228, top of page.
[97] PSCB 329, recommendation 15.
[98] PSCB227.

make sleep "significantly more difficult to obtain after a disturbance". This shows the Panel's concern was the ability of residents to *resume sleep* within a single night.

127. The Panel then says that in order to form a "hard measure" against which sleep can be protected, a breach of the NZ Standard for more than 10% of "a SEPP N1 night" would constitute a breach of the permit. The reference to "hard measures" and protection within "a" night clearly show that the Panel was intending to prohibit the emission of loud noise for more than 10% of a single night.

128. The fact that the Panel had in mind the scenario of a single loud night can be seen from the following paragraph, where it sketches out the sequel to such a night. It says it anticipates that following such a breach, a "complaint would be lodged" (once again, consistent with the noise being a one-off event), and monitoring conducted. Then, if a further "substantiated instance of 10% breach were recorded", enforcement action would be taken. The Panel is clearly imagining both the original breach, and the second instance, as events occurring during a single night.

129. Once it is accepted that condition 19(c) deals with single nights, then the issue becomes: what does a breach of the NZ Standard for 10% of a particular night mean, and how would it be assessed? There is a straightforward answer. One would record sound levels over one night, and obtain 54 data points.[99] One would plot those points against the wind speed recorded for that night. If certain of the points attract penalties for SACs (for example, because it was previously concluded that when the wind blows lightly from the west, SACS are likely to be present), then those affected data points are increased by 5dB. Then, on the same graph, show the night-time background regression line for the property, and the noise limit. If the background line (at relevant wind speeds) is at or above the level of the 54 data points, there is no need to consider background subtraction; alternatively, if the background line is lower, and it is mathematically rigorous to do so, background subtraction can be applied to some or all of the 54 points, which would have the effect of bringing them down slightly. Having made all of those adjustments, if 6 or more of the remaining data points (representing 10% of the night[100]) lie above the noise limit line, then a breach of the Standard has been shown for 10% of the night.

(iv) Compliance at the Zakula property

130. The Defendant's case is that, had the permit applied to the Zakula property, the requirement of condition 19 of the permit would have been met, at all times.[101] In setting up this case, the

[99] 9 hours = 540 minutes = 54 x 10 minute data points.
[100] 6 out of 54 points = 11%.
[101] Defendant's Submissions [50].

Defendant sets a high bar for itself, as it must therefore show that *all* of the steps outlined above were taken correctly.

131. The Defendant supports its case by suggesting that: (1) MDA's testing shows compliance for the period December 2015 to September 2016;[102] and (2) Mr Turnbull has shown compliance for the period 21 February to 6 April 2021.[103] But none of these propositions are sound. Further, although the Defendant seeks to show compliance at *all* times, it does not explain how compliance can be demonstrated at times *other* than those two periods in which testing was done.

132. In terms of the MDA testing, compliance has not been shown with conditions 19(a)-(b), for the following reasons:

    (a) background testing was done at the Fox & Wilson property, not the Zakula residence (cf step 2). It should also be noted that even the background testing for the Fox & Wilson property was non-compliant, in that:

        (i) the background wind speed measurements were taken at MM80, which was an invalid location as it would be affected by wake turbulence after construction of a kind which could not be corrected to within the 0.5m/s tolerance (cf steps 3, 9);

        (ii) MDA filtered the background data for extraneous noise (cf step 4);

        (iii) MDA's background regression curve (and hence its noise limit line) was based on data collected between 3-14m/s, rather than between 0 and the rated speed of 25m/s (cf steps 5-6);

    (b) MDA purported to show compliance using the NZ Standard despite Mr Zakula's property lying in the near field (cf step 7);

    (c) MDA used MM80 for post-construction windspeed data, despite being warned that the two anemometers had "begun to fail" and that the mast should be "refurbished to ensure valid wind data is available",[104] and so where there was no confidence that the post-construction wind data would be within the 0.5m/s tolerance (cf step 9);

    (d) MDA did not adequately conduct a subjective test for SACs, listening briefly on only three occasions[105] (cf step 10);

[102] Dates of testing at CB2744.
[103] Dates of testing at CB932, [22].
[104] CB2760.
[105] CB2770.

(e) MDA did not use the IEC standard to test objectively for tonality, but instead used the ETSU standard (cf step 10);

(f) MDA's objective test was looking for "prominent" tones rather than "clearly audible" tones (cf step 10);

(g) MDA only applied a SAC penalty for tones,[106] and did not apply penalties for amplitude modulation or impulses (cf step 10);

(h) MDA filtered the post-construction data for extraneous noise (cf step 11);

(i) MDA ignored data collected at windspeeds above 12m/s when constructing the post-construction regression curve (cf step 11);

(j) MDA did not check to ensure that turbine 16 (the one very close to the residence) was operating during the whole testing period (cf step 15).

133. Further, MDA did not comply with condition 19(c) because, in addition to the above deficiencies:

(a) MDA did not seek to ascertain whether SACs occurred at night;

(b) MDA did not conduct any assessment of non-compliance over individual nights.

134. In terms of Mr Turnbull's testing, compliance has not been shown with conditions 19(a)-(b), for the following reasons:

(a) in adopting MDA's background measurements, Mr Turnbull has fallen into the errors described in paragraph 132(a) above;

(b) Mr Turnbull purports to show compliance using the NZ Standard despite Mr Zakula's property lying in the near field (cf step 7);

(c) Mr Turnbull purports, at least in part of his report, to show compliance based on post-construction data collected other than at Mr Zakula's house (cf step 8);

(d) Mr Turnbull used de-waked MM80 for post-construction windspeed data,[107] despite there being no evidence that the faulty anemometers on the mast had been fixed, and where (given DNVGL's original advice) in any event there can be no confidence that the de-waking process would keep the wind data within the 0.5m/s error tolerance (cf step 9);

[106] CB2747. See also CB2772.
[107] CB989 [206].

(e) Mr Turnbull did not conduct a proper subjective test for SACs (cf step 10). He visited the Zakula property three[108] times only, and there is no evidence the different visits were in different wind or atmospheric conditions, let alone at night.[109] Further, it is clear that at the Zakula residence, he was only listening for tonality, not impulses or amplitude modulation.[110]

(f) Mr Turnbull did not use the IEC standard to test objectively for tonality, but instead used another (unexplained) method, the ISO 1996 method[111] (cf step 10). It seems, though is not entirely clear, that this method, like the ETSU standard, looked for "prominent" tones only;

(g) Mr Turnbull filtered (aggressively) the post-construction data for extraneous noise, and also by reference to noise detected at proxy locations (cf step 11);

(h) Mr Turnbull ignored data collected at windspeeds above 12m/s when constructing the post-construction regression curve (cf step 11).

135. Further, Mr Turnbull has not shown compliance with condition 19(c) because, in addition to the above methodological flaws:

(a) he did not conduct any subjective assessment for SACs at night;

(b) he only used 973 data points[112] to assess night noise (cf step 2);

(c) he did not consider whether the NZ Standard was breached within any single night.

(v) Compliance at the Uren property

136. We now turn to consider whether the Defendant has demonstrated compliance with condition 19 of the permit at the Uren residence, at all material times, namely between February 2015 and December 2018 when Mr Uren moved out of his house.

137. Unlike Mr Zakula's house, Mr Uren's former house was explicitly protected by the permit, as it was an existing dwelling to the Minister's satisfaction.[113] Despite that, for some unexplained reason, it was not identified as one of the properties to be dealt with in the post-construction report required by condition 23, and so no background testing was done there prior to the construction of the wind farm.[114]

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[108] T1265.23.
[109] T1265.23.
[110] CB990 [209]; the only claimed listening for impulses and amplitude modulation occurred at the Marriott property, not at the Zakula property: T1263.24, T1264.12.
[111] T1263.14.
[112] CB999 table under [222].
[113] CB2163.
[114] See, eg, CB3483, last paragraph.

138. Once again, the Defendant supports its case by suggesting that: (1) MDA's testing shows compliance for the period October 2015 to September 2016;[115] and (2) Mr Turnbull has shown compliance for the period 21 February to 6 April 2021.[116]

139. Once again, it does not explain how compliance can be shown at other times. In particular, it is not at all clear how the Defendant says that Mr Turnbull's brief round of summer/autumn-time testing, conducted in 2021, can be used to provide there was also compliance at Mr Uren's property when he was living there, several years ago, particularly during cooler seasons when the noise problem was worst.

140. It seems that the Defendant's fallback is to rely on the absence of dissatisfaction from the Minister, throughout the period in which Mr Uren was living in his home. But as already set out, compliance with condition 19 does not turn on the Minister's satisfaction.

141. Further, insofar as the Defendant relies on the Minister's letter of 23 March 2019,[117] that letter only expresses satisfaction that there is permit compliance at the 13 properties for which the Minister was asked to express his satisfaction. Mr Uren's house was not among them.

142. Accordingly, given the irrelevance of the Minister's position, we now turn to examine the MDA and Turnbull testing. This analysis can be brief, because MDA and Mr Turnbull, respectively, made the same kinds of errors as identified above in relation to the Zakula property, subject to the following two modifications:

    (a) in the absence of a pre-construction noise limit derived for Mr Uren's property, MDA and Mr Turnbull instead use the limit derived for the Fairbrother house (cf steps 1-2). Incidentally, the background testing at that location was also flawed, for the same reasons as identified for the Fox & Wilson house, but additionally because the recordings taken at the Fairbrother house were likely affected by construction noise occurring day and night during that period;[118]

    (b) Mr Turnbull did not conduct a proper subjective assessment for SACs. Although he visited the Uren property five times, it is clear that when he was there he was bust installing his loggers, rather than conducting a proper listening study.[119]

143. Further, Mr Turnbull has not shown compliance with condition 19(c) because, in addition to the above methodological flaws:

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[115] Dates of testing at CB3475.
[116] Dates of testing at CB932, [22].
[117] CB4192.
[118] The testing took place between 24 November and 15 December 2015: CB2113.
[119] T1265.24ff.

(a) he did not conduct any subjective assessment for SACs at night;

(b) he only used 695 data points[120] to assess night noise, which is less than half of the 1440 points required (cf step 2); and

(c) he did not consider whether the NZ Standard was breached within any single night.

144. The insufficiency of data points means that the reliability of the analysis is seriously questionable. It can be seen from the relevant graph that each part of the regression curve (the black line) is supported by only a handful of data (lying on an imaginary vertical line perpendicular to the black line). For example, the 12 m/s result is supported by only *seven* data points.[121] There can be no real confidence in a conclusion based on so few data points.

(vi) Conclusion on permit compliance

145. The Defendant has taken upon itself the task of showing it has complied, to the letter, with each and every part of condition 19 of the permit, and for all material times, at the Zakula and Uren houses.

146. While it is not for the Plaintiffs to prove non-compliance, the above analysis shows that the Defendant has failed in its endeavour to prove compliance.

REMEDIES

147. This section addresses remedies. The primary remedy in nuisance is an injunction. The remedies addressed here are damages of the ordinary kind (issues 15-21), aggravated and exemplary damages (issues 22-23), and an injunction (issues 13-14). The consideration of ordinary damage also involves consideration of whether the nuisance is likely to continue to affect Mr Zakula's property (issue 12).

THE LIKELY FUTURE

148. The question under issue 12 is whether Mr Zakula will continue to experience a nuisance on his property. The answer is yes, absent an injunction.

149. That is primarily because the Defendant is not prepared to voluntarily abate the nuisance.[122] Secondarily, it is because it is unlikely that Mr Zakula will, in future, install soundproofing at his house.

[120] CB999 table under [222].
[121] CB1003, Fig 42. The seven points sit on an imaginary vertical line extending upwards from the 12m/s figure on the x axis
[122] Defendant's Submissions [159].

150. Mr Zakula was understandably reluctant to perform works he considered ugly and out of keeping with his value system but he ultimately was amenable to considering soundproofing in his residence.

151. There is no guarantee that soundproofing would be effective.[123] Indeed, Mr Mitchell concedes in his report that his treatments would only eliminate wind farm noise when it was less than 40 or 45dB,[124] and his assessment did not take into account the particularly annoying features of the sound.[125] Accordingly, there remains the prospect that Mr Zakula would still be woken at night by wind farm noise even after the acoustic treatment is done.

152. Furthermore, and perhaps most importantly, the cost of implementing proofing is approximately $173,000.[126] In cross examination Mr Mitchell, who is not a builder, and had not inspected the property in person, agreed it could cost more and that he could not guarantee the sound problem would be solved.[127] Annual running and maintenance costs would also be additional[128]. There is no evidence that Mr Zakula has this kind of money at his disposal. Without those funds, the soundproofing is simply not likely to occur.

153. Accordingly, where soundproofing is both expensive and unlikely to be totally effective, it is not reasonable to conclude it will probably not occur.

154. Further, it must be noted that soundproofing could only abate the nuisance in the house, and would do nothing to abate the nuisance outside, meaning that Mr Zakula's enjoyment of his garden, and ability to pursue organic farming, would still be affected.

155. There are no works suggested by Mr Mitchell to abate the nuisance on Mr Zakula's outside areas and paddocks.

ORDINARY DAMAGES

156. The threshold question on the issue of ordinary damages is to establish the proper approach to assessing each Plaintiff's loss and damage to date (issues 15, 19, 21). Once the proper principles are established, issues of quantum can be addressed (issues 16-18, 20).

[123] See Mitchell XXN T1067.16.
[124] Mitchell report [4.4.3]. See also [7.1.1].
[125] See Mitchell XXN T1067.23.
[126] $157,000 plus GST: Mitchell Supplementary Report [4.1.1].
[127] T1066.28-29; T1067.16-17.
[128] T1068.11-12.

The proper approach

157. The fundamental purpose of awarding damages (of the ordinary kind) in tort is to put the plaintiff in the position he or she would have been in had the tort not been committed.[129]

158. There is no question at law,[130] and no dispute between the parties,[131] that a head of compensable loss is the distress and annoyance felt by the Plaintiffs, which would not have been felt but for the existence of the nuisance.

159. On the other hand, the Defendant says that Mr Zakula is not entitled to be compensated for the decline in his land value, and is only entitled to the costs of remediation.[132] That misstates the position.

160. For torts affecting land, the appropriate measure of damages is either diminished value or reinstatement costs. The courts will start with what the plaintiff has asked for, and then consider whether that measure of damages is fair and reasonable in light of the injury suffered, the quantum recoverable under the alternative method, and any special value in the land.[133]

161. Applying that test, in this case, if an injunction is granted in terms effective to abate the nuisance, then it may be accepted that Mr Zakula's property loss will also abate, and so no claim would be pressed for property loss.

162. Alternatively, if an injunction is not to be granted, then Mr Zakula seeks compensation for diminished land value. That claim is fair and reasonable considered in its own right, in the sense that when he comes to sell his property, he will receive less for it because of the nuisance. It is also fair compared to the other method: the diminution claim is $200,000,[134] versus acoustic treatment costs of more than $173,000. Further, the diminution approach recognising the special value of the property has his home, and respecting his wish not to have it altered contrary to his aesthetic and environmental sensibilities.

163. Finally, and obviously, Mr Zakula only presses the diminution approach if the $200,000 assessment is accepted by the Court. If it is rejected, he will take the acoustic treatment value ($173,000 but say $190,000 because it is likely to cost more), and he should also be awarded a further $5,000 to cover ten years' running and maintenance costs.[135]

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[129] *Riverman Orchards Pty Ltd v Hayden* [2017] VSC 379, [233] citing *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 [39].
[130] *Oldham v Lawson (No 1)* [1976] VR 654, 658 [JBA 1918].
[131] Defendant's Submissions [166], [167].
[132] Defendant's Submissions [166].
[133] Winky Pop Pty Ltd v Mobil Refining Australia Pty Ltd [2015] VSC 348, [136]-[137] and [182]-[184], affirmed [2016] VSCA 187, [331].
[134] McMahon report [CB1016].
[135] Supplementary Mitchell Report [3.7.2].

Quantum

164. The quantum of ordinary damages (issues 20, 21) is the next question. We address the quantum of Mr Zakula's property loss first, and then the quantification of annoyance damages.

(a) <u>Property loss</u>

165. The Court should accept Mr McMahon's valuation, of $200,000. There is no dispute he was a qualified and experienced valuer. He visited Mr Zakula's property and his reports are thorough.

166. Although the Defendant engaged Mr Kininmonth to criticise Mr McMahon's methodology, it is telling that he was not briefed to put forward his own valuation. That circumstance permits the Court to accept Mr McMahon's valuation with more confidence.

167. In any event, the Defendant's criticisms of Mr McMahon's valuation are misplaced. First, the Defendant says that Mr McMahon erred in considering losses due to non-nuisance factors.[136] But the Second Report was *explicitly* based on nuisance-only factors.[137] It is also clear the First Report was based only on nuisance factors. This can be seen from the facts that:
(1) Mr McMahon's instructions directed him to the nuisance issue;[138] (2) on his inspection, only the nuisance issue was raised;[139] (3) in the discussion section, it is clear the sole focus is on nuisance;[140] (3) conversely, there is no discussion of non-nuisance factors, such as loss of visual amenity;[141] and (4) the 25% severance factor he arrived at is precisely the same as the one he used in the Second Report,[142] which is what one would expect if both reports were based on the assumption that noise nuisance was the problem.

168. Another reason to reject the Defendant's criticism on this score, and others, is that (due to no fault of the Plaintiffs) Mr McMahon was not able to give oral evidence where he might have better explained his approach in writing the First Report, in cross-examination or re-examination.

169. Next, the Defendant says that the decline in value of the Zakula property was at most 17.75%, because that was the decline observed at a nearby property, 1080 Buffalo-Waratah Rd.[143] But Mr McMahon correctly distinguished that property (182ha, with no dwelling, and so of no

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[136] Defendant's Submissions [187].
[137] See the instructions at [3.2] of the report: [CB1018].
[138] Section [2.6] at CB493.
[139] CB516, 4th dot point from the bottom.
[140] Especially the "Other considerations" sections at CB516-17.
[141] The only text which comes close is on CB517, where Mr McMahon notes that the sale of 87 Kings Flat Road (Mr Uren's property) fell through because of the purchaser's concern with "light fleck" (which, incidentally, may be a nuisance of a different kind in any event). But since the purchaser was also concerned about "gear grinding", it is clear that Mr McMahon was taking this into account as an instance of the impact of *noise* nuisance.
[142] Contrary to the Defendant's position that this is an odd or suspicious result: see Defendant's Submissions [188(c)].
[143] Defendant's Submissions [188(f)].

interest to rural/lifestyle purchases) from the context of Mr Zakula's small holding.[144] He went on to find that a 25% severance factor was the most appropriate approach for such "lifestyle" properties.[145]

170. Third, the Defendant says there are inappropriate rounding adjustments made.[146] While Mr McMahon engaged in some rounding, it is only the Defendant (and not its expert, Mr Kininmonth) who says this is inappropriate. Particularly in circumstances where the inappropriateness of the rounding was not put to Mr McMahon (though not due to any fault of the Defendant), the Court should accept that the rounding adjustments are proper to have been made. Rounding stands to reason in an inherently uncertain field such as valuation. Mr McMahon was an expert valuer with extensive experience in valuing rural land. He inspected the land, evaluated comparable properties and considered evidence of severance factors where land was acquired at between 0.5 and 50%. Mr McMahon's opinion that there was a 25% reduction in value in circumstances where the rural lifestyle market was knocked out because of the nuisance should be accepted by the Court. Mr McMahon's reasoning that purchasers would learn of the nuisance via the s 32 statement or from the Council should also be accepted. If the Court finds a nuisance in this case, it is even more likely that potential purchasers would not buy the property to live in it.

(b) <u>Annoyance damages</u>

171. The task of the Court is to award a "reasonable" amount of compensation.[147] The Defendant's submission that $10,000 per annum is a reasonable sum[148] is manifestly wrong, having regard to the following considerations.

172. First, the nature of the nuisance was severe and persistent. It caused significant distress and annoyance to the Plaintiffs, as recorded in their logs and diaries, as observed by their neighbours (who gave evidence about the Plaintiffs being upset by the noise), and as they testified in Court. Loss of sleep is exhausting and debilitating. It is also notable that, living alone, both Plaintiffs had to suffer through the nuisance on their own, through many long and lonely nights.

173. Second, although of course caution must be exercised in comparing awards in other cases, in *McFadzean*, the loss of only two nights' sleep attracted an award of $2,250 (in 2004 dollars).[149] In this case, the Plaintiffs lost very many nights' sleep every year (particularly in cooler seasons),

[144] CB1038, CB1041.
[145] "Similar to compulsory acquisition" section, first and second dot points: CB1045
[146] Defendant's Submissions [188(g)].
[147] *Oldham v Lawson (No 1*) [1976] VR 654, 858.
[148] Defendant's Submissions [5(c)].
[149] *McFadzean v CFMEU* [2004] VSC 289, [2554], [2559].

over a period of 3½ years for Mr Uren, and 6 ½ years in the case of Mr Zakula. The disruption to them was orders of magnitude more severe and of much longer duration than the than in the *McFadzean* case. The evidence supports a finding that on at least 150 nights a year the Plaintiffs were woken up by the wind farm noise. In addition, the noise has been a nuisance during the day and in the evenings.

174. Third, the Defendant does not say that it could not afford a large award. The company is owned by Infrastructure Capital Group, which is clearly a large business, managing seven wind farms, and other infrastructure assets on behalf of investors.[150] The Defendant has assets of $282m, including $7m in free cash,[151] plus a further $11.7m in restricted cash (representing liquidated damages for the tonal defects).[152]

175. In all the circumstances, a figure of at least $100,000 per annum should be awarded to each Plaintiff for the period during which they suffered the nuisance.

AGGRAVATED AND EXEMPLARY DAMAGES

The proper approach

176. The Plaintiffs agree with the Defendant's summary of the legal principles regarding aggravated and exemplary damages,[153] except that while the availability of aggravated damages in nuisance might have been described as "uncertain" in 1912 or even 1976,[154] the Plaintiffs submit that by now it is sufficiently established that such damages are available.[155] Indeed, there would be no reason in principle to deny aggravated damages in cases of nuisance, when it is available in most other torts. In particular, there are many situations in which it may be imagined that a defendant commits a nuisance in such an insulting or humiliating way as to merit an award of aggravated damages; if such damages were not available, then the law would not be in a position to provide a complete remedy to a plaintiff.

The relevant facts

177. In considering whether aggravated and exemplary damages should be awarded, a common chronology is sketched out below. In short, since February 2015, the Defendant has parried the

[150] Arthur statement [5]-[9].
[151] 2021 annual report [PSCB1903].
[152] PSCB1927, item 21.
[153] Defendant's Submissions [206]-[209].
[154] See the cases cited in footnote 397 of the Defendant's Submissions, but cf an even older case, *Thompson v Hill* (1870) LR 5 CP 564, where aggravated damages were awarded.
[155] See *Stockwell v State of Victoria* [2001] VSC 497, [615]; *McFadzean v CFMEU* [2004] VSC 289, [134]. See also *De Gruchy v The Owners - Units Plan No. 3989* [2020] ACTSC 65 [182] & [216].

Plaintiffs' complaints of nuisance by hiding behind the mantra of "permit compliance", despite the fact that it should have known that a nuisance was occurring.

178. The Plaintiffs say that that Court should go a step further and find that the Defendant *actually* knew, at least since March 2017 when Mr Arthur began dealing with the matter,[156] that the Plaintiffs were suffering from a nuisance. Mr Arthur was not an impressive witness and his self-serving denials as to his knowledge (and therefore the knowledge of the Defendant, given he was a director with carriage of the matter for the Defendant) and his assertions that he could not comment on the Plaintiffs' claims should not be accepted.[157]

179. We begin on 15 April 2015, when the Defendant first received a complaint from Mr Uren about noise nuisance.[158] Despite the fact that many other neighbours made similar complaints (including Mr Zakula, from 14 September 2015),[159] the Defendant did not adjust the operation of its turbines, in any way which was purposefully directed to ameliorating the problem at the Plaintiffs' properties. Indeed, it did nothing in that regard, over the following years, despite a total of 43 complaints from Mr Uren, and 26 from Mr Zakula (generally listing multiple days on which problems existed).[160]

180. Instead of dealing with the nuisance, what the Defendant did was to commission MDA to produce reports opining that the Defendant complied with its permit. The Defendant was very active in this process, including by it and its lawyers having extensive input into MDA's supposedly "independent" reports.[161] (Indeed, even the Department had influence over its contents.[162])

181. In its December 2016 report, MDA warned that there was a problem with "tonality" at some of the turbines. This was an obvious potential cause of the Plaintiffs' problems. Yet the Defendant did not act appropriately to deal with the tonality issue.

182. For example, although Mr Arthur's evidence was that the Defendant implemented a "Preliminary Curtailment Strategy" in the wake of that MDA report,[163] what he did not admit is that MDA had in fact recommended a much more *aggressive* and likely more effective curtailment strategy

[156] Arthur [15].
[157] See T854.24.
[158] BHWF Complaints register [C0208.xls, Mar 15-Apr 16 tab, entry 4].
[159] Ibid, entry 33.
[160] C0208.xls.
[161] See, eg, PSCB 694, 695-9, 711, 764-5, 1021-2, 1137-57.
[162] PSCB1021.
[163] Arthur [45]-[46].

(including for turbine 16, near Mr Zakula's property),[164] which the Defendant rejected, presumably for financial reasons.

183. In March 2017 and June 2017 respectively, MDA produced reports purportedly showing permit compliance at the Plaintiffs' properties.

184. The Defendant thereafter relied on these documents (indeed, it continues to rely on these documents) like a mantra to rebuff the Plaintiffs, but in circumstances where it knew (or at the very least should have known) that THIS was *not* any kind of answer to a claim of nuisance. After all, the company at all material times had at least one legally-trained director available,[165] and was sufficiently financially resourced to obtain proper external advice, as it in fact did in October 2018 (see below). Further, a reasonable person would have appreciated that the MDA graphs (as set out above) were entirely *consistent* with the Plaintiffs' complaints of an intermittent nuisance. This should have been appreciated and acted upon.

185. Indeed, Mr Arthur read these documents, or at least the one relating to Mr Zakula.[166] Although the documents reported compliance, he well understood this was based on "representative"[167] conditions (the regression curves). As such, he fully understood that *actual* conditions involved an intermittent nuisance, as displayed by the green dots shown in the MDA graphs. Accordingly, it can be concluded that the Defendant *knew* from this time that a nuisance was likely occurring at the Plaintiffs' properties.

186. In May 2017, the Defendant decided upon a strategy of refusing to "engage" with the Plaintiffs, pending what it hoped would be the Minister's decision to find permit compliance.[168] The Defendant simply hoped the Plaintiffs would give up, in circumstances where the Plaintiffs were tiring of repeatedly reporting complaints, only to see no action taken.

187. Of course, the Defendant's strategy was farcical, in that since Mr Zakula's house was not protected by the permit, and because Mr Uren's house was not one of the 13 to be put to the Minister for his satisfaction, the Defendant should have known that the Minister's satisfaction would also be no kind of defence to the Plaintiffs' complaints.

188. In August 2017, the Defendant was advised that 10 out of 11 turbines tested were faulty in respect of gearbox tones, including turbine 16 near Mr Zakula's house.[169] A reasonable wind farm operator would have acted quickly to test the 41 remaining turbines, and to ensure that the

[164] PSCB 1090-3.
[165] Whalen XN T717.06.
[166] T844.13
[167] T847.01.
[168] PSCB1020.
[169] CB3769.

problem with turbine 16 was fixed. That did not occur. Indeed, to date, the other turbines have not been tested,[170] and the gearbox in turbine 16 has not been replaced.[171]

189. Indeed, rather than help the Plaintiffs, the Defendant's main response to the tonality problem was to obtain damages from the turbine manufacturer, apparently in the sum of at least $11.7m in liquidated damages,[172] whilst at the same time continuing to deny any nuisance.

190. In August 2018, the Defendant sought to change its complaints policy so that it would not need to deal with "repeat" complainants like the Plaintiffs.[173] (Mr Arthur's suggestion that this was the Department's idea must be rejected as unlikely, uncorroborated, and inconsistent with the documentary evidence.[174]) Once again, the Defendant was determined to ignore the Plaintiffs and let them suffer the nuisance. Indeed, when in December 2019 the new policy was approved, the Defendant's staff joked that they would enjoy telling repeat complainants (like the Plaintiffs) that they "don't have to do anything further" to respond to their complaints.[175]

191. In September 2018, Mr Smith, an expert engaged by the Council, found that the Plaintiffs were affected by a nuisance. The Defendant unreasonably failed to accept this independent assessment, and instead decided to take its chances in convincing the Council not to adopt the Smith report. When Mr Uren found out that the Defendant had rejected the Smith report, he felt "terrible".[176]

192. On 4 October 2018, the Defendant was given legal advice by Mr Pizer QC and Mr Kruse, explicitly advising that a permit could not authorise a nuisance, and that permit compliance was not necessarily any defence to a claim in nuisance.[177] From this time, at least, the Defendant knew that its mantra of "permit compliance" was not a solid legal defence. Both Mr Whalen and Mr Arthur read this advice around the time it was given.

193. On 8 November 2018, the Plaintiffs' solicitor made submissions to the Council. In those submissions, she explained the flaws in the MDA approach, and made the critical point that the MDA graphs are *consistent* with the existence of an intermittent nuisance. Mr Arthur read these submissions and, it should be found, fully understood the force of the points being made. He well knew that the MDA reports only advised on permit compliance, and not on nuisance.[178]

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[170] T857.19.
[171] T1382.05.
[172] PSCB1927, item 21.
[173] CB4151.
[174] The proposal is not listed in Mr Juttner's email at CB4151-2.
[175] CB4475 (less redacted version is exhibit P97).
[176] T371.30.
[177] [37]-[38].
[178] T846.16.

194. On 27 March 2019, the Council found that the wind farm was causing a nuisance to the Plaintiffs.[179] Once again, a reasonable Defendant would at this point have taken action to abate the nuisance. The Defendant instead chose to press on, using its financial might, secretly bringing a judicial review application.[180] In the face of the legal advice it had received about the common law of nuisance (together with evident weaknesses in its propositions of administrative law) it had very low prospects of success.

195. It made Mr Uren "terribly upset" to learn (belatedly) that the Defendant was challenging the Council decision; he felt that were treating "the little people like rubbish"[181] The Plaintiffs then (reasonably) joined the litigation to defend the Council decision, though this meant they incurred legal costs[182] and had to deal with the stress of the litigation. This expense and inconvenience was caused by the Defendant's unreasonable and aggravating conduct.

196. On 29 August 2019, the Defendant secretly applied to delete condition 19(c) from the permit. This guilty step is consistent with the Defendant's knowledge that it was not complying with the condition, and was also causing a noise nuisance at night.

197. On 16 March 2020, the Defendant filed its initial defence in this proceeding, denying the nuisance, despite the fact the Defendant knew or at the very least should have known there was/had been a nuisance affecting the Plaintiffs. The denial upset Mr Uren; he found the Defendant's position "disgraceful".[183]

198. On 18 August 2020, the Court dismissed the Defendant's judicial review application. Mr Arthur says that thereafter the Defendant "heeded" the Council's decision.[184] If that is an assertion that after the Court's decision, the Defendant acted to give effect to the Council's decision, it is clearly a falsehood. On the other hand, if that statement amounts to an admission that that after the Court's decision, the Defendant subjectively accepted it was causing a nuisance to the Plaintiffs, then Mr Arthur has laid the foundation not only for exemplary damages, but also for an indemnity costs order, because the Defendant continued to defend the proceeding despite *knowing* that it was liable.

199. Indeed, the Defendant defended the proceeding aggressively. On 26 August 2021, it filed an amended Defence, now insultingly (and without foundation) claiming that the Plaintiffs were

[179] CB4231.
[180] T372.04.
[181] T373.12.
[182] T373.29.
[183] T375.07.
[184] T854.27.

"hypersensitive". When Mr Uren read this defence, he felt terrible, and thought it was "absolutely disgusting".[185]

200. During the trial, including in cross-examination of the Plaintiffs, the Defendant continued to prosecute its case that the Plaintiffs were hypersensitive, to the evident distress of the Plaintiffs.

Aggravated damages

201. The Defendant's conduct towards the Plaintiffs since they first started to complain has, at the very least, been seriously aggravating, and has clearly caused them injured feelings. The aggravation and injured feelings have mounted up, blow by blow, through the chronology set out above.

202. In Mr Uren's case, there is explicit evidence of his hurt feelings. For Mr Zakula, it can be inferred, particularly from his evident frustration in having to continue logging and reporting his disturbed sleep to the Defendant, despite the Defendant never taking any action to abate the problem. The frustration is clear from the content of his logs, particularly the fact he was ultimately driven to write down "Fuck Off", in exasperation after years of logging the sounds, sending his complaints and getting no relief from the ongoing noise.

203. The Court should award both Plaintiffs a significant sum by way of aggravated damages.

Exemplary damages

204. Particularly if the Court accepts that the Defendant has *known* it was causing a nuisance, but even if it does not, the Court should award exemplary damages.

205. The conduct of the Defendant has been high handed, and in contumelious disregard of the Plaintiffs' rights to sleep peacefully in their own homes. The Defendant must be punished for this conduct, to deter repetition by it, and to stand as a warning to other noise-producing businesses, including other wind farm operators.

206. The purposes served by the award of exemplary damages include the punishment of the offender and deterrence of similar conduct in the future: see *XL Petroleum (NSW) Proprietary Limited v Caltex Oil (Australia) Proprietary Limited* (1985) 155 CLR 448, 471. The quantum of exemplary damages, so as to have a punitive and deterrent effect, would be measured with reference to the size and financial resources of the defendant: see eg *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49. Punishment, retribution and marking the Court or jury's disapproval loom large in considering punitive damages: *Amaca Pty Ltd v Latz* [2017] SASCFC 145. Here, given the vast turnover and

[185] T376.02.

profit of the defendant, the award of punitive damages needs to be large, so that the Defendant feels the award.

207. In order to serve as a deterrent, the punishment must have a proper sting. As set out above, the Defendant has $282m in assets, and generates about $40m in revenue each year.[186] Although on *paper* it operates at a loss, the loss is attributable to depreciation and finance costs,[187] with most finance based on intercompany (related party) loans.[188] More realistically, looking at net cash flows from operating activities, it made $4.6m in the year to 31 March 2021,[189] although that is an unusually low figure: over the 5 years to 31 March 2021, the average net cash flow was $12.3m.[190]

208. The Defendant does not say it cannot afford to pay any significant sum which might be awarded by the Court. In all the circumstances, an award of $1m in exemplary damages would be appropriate.

INJUNCTION

209. Although an injunction (issues 13-14) is the primary remedy claimed by Mr Zakula, for various reasons it has been convenient to leave discussion of it until the end.

Whether an injunction should be granted

210. The relevant question (issue 13) is whether an injunction should be granted in favour of Mr Zakula.

211. The Defendant properly concedes that an injunction is the *prima facie* remedy when an ongoing nuisance exists. However, it cites *Lawrence v Fen Tigers* in support of the notion that because the Defendant complies with its planning permit (so it says), neither an injunction nor equitable damages in lieu of an injunction[191] (which Mr Zakula claims in the alternative[192]) should be awarded.[193]

212. The Defendant's position is incorrect. First, *Fen Tigers* is UK authority, and in Victoria, there is a much stronger position that in cases of a continuing tort, the remedy is an injunction (rather than equitable damages) *unless* exceptional circumstances apply.[194] A good working rule is that

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[186] CB1902.
[187] CB1902.
[188] CB1919, item 5.
[189] CB1905.
[190] $12,289,279, being the average of the following figures: 2017: $21,101,985; 2018:$11,169,416; 2019: $15,423,415; 2020: $6,969,222; 2021: $4,596,437. See PSCB 1169, 1433, 1479, 1905.
[191] Available in equity and under *Supreme Court Act 1986* (Vic) s 38.
[192] CB63, prayer C; Plaintiffs' Opening Submissions
[193] Defendant's Submissions [160]-[163].
[194] See *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* (2007) 20 VR 311 (VSCA).

exceptional circumstances only exist where the injunction would be disproportionately oppressive to the defendant, in view of small future losses to be suffered by the plaintiff, which losses are readily estimable.[195]

213. In the present case, the Defendant has not made out any exceptional circumstance. It does not claim, let alone establish, any oppression. Indeed, Mr Arthur indicated that the Defendant could and would comply with any injunction issued.[196] The future losses to Mr Zakula are not small (indeed, the Plaintiffs put them at $100,000 per annnum), and the losses are not readily estimable, given they are non-financial in nature, and given the significant dispute between the parties as to the proper annual value of annoyance damages. Rather than seeking to prove oppression, the Defendant seeks to show it would merely have a "disproportionate" impact on the Defendant and (it asserts) third parties.[197] In terms of the impact on the Defendant, we have already noted that the Defendant has significant financial resources, that Mr Arthur did not resist an injunction, and indeed (remarkably) the Defendant has no submissions to make as to the terms of any injunction which might be issued (for example, whether it should be limited to the night period),[198] suggesting again that any impact on the Defendant will be manageable.

214. Much as it may seem temptingly economically efficient in light of the need for a global transition to renewable energy to meet the threat of climate change, wind farmers cannot — without legislative provision or privately negotiated purchase — simply "pay out" plaintiffs (over their objection) to avoid having to abate a nuisance. The Plaintiffs' property rights existed prior to the wind farm being built. Those rights are being infringed. The natural remedy for this nuisance is an injunction to stop it. Punitive damages are warranted to deter other wind farms from building and operating their assets with cavalier regard to the sleep and wellbeing of adjacent and nearby people. Offshore windfarms may ultimately be the correct public policy solution. Meanwhile, the Plaintiffs' property rights and freedom from nuisance are, on the facts here, to be protected.

215. As to third parties, the Defendant does not explain how DEWLP or "the local community" would be negatively impacted by any injunction.[199] Indeed, given the evidence in the case, it is rather to be thought that other community members living near the wind farm would be grateful for a reduction in noise.

[195] Paraphrasing the test from *Break Fast Investments*.
[196] T859.12.
[197] Defendant's Submissions [163(b),(d)].
[198] Defendant's Submissions [164].
[199] Defendant's Submissions [163(b)].

216. Further, it is not to be accepted that the electricity purchaser, Alinta, would be adversely affected by any injunction.[200] The Defendant has not put its contract with Alinta into evidence, so the Court cannot know how Alinta would be affected. If it was affected, it may well be in a position simply to purchase green energy from elsewhere, as already suggested.

217. Second, as these submissions have sought to show, the Defendant does not comply with its planning permit, and so the *Fen Tigers* approach is inapposite in any event.

218. Finally, it is appropriate here to deal with the Defendant's related submission that because Mr Zakula built his house after the wind farm obtained planning permission (but before it was built), he must suffer the consequences of the wind farm emitting noise which complies with the permit,[201] thereby suggesting that an injunction should be refused on that basis.

219. It has long been held that it is no defence to nuisance that a plaintiff "came to the nuisance", in the sense that the plaintiff acquired their interest in their land *after the nuisance started*. And being no defence to liability, coming to a nuisance should not operate to deny a plaintiff an injunction or damages.[202] But in this case, Mr Zakula did not come to the nuisance, as he bought his land prior to the nuisance commencing, in the not unreasonable hope that the wind farm might never be built, or that if it was to be built, the planning process had been sufficiently rigorous to ensure it did not cause a noise nuisance.

220. In effect, the Defendant is suggesting (though has not pleaded) contributory negligence on Mr Zakula's part,[203] which negligence it wishes to rely upon to deny him a remedy. That course should not be permitted, but Mr Zakula was not negligent in any event.

221. Finally, it (contrary to these submissions) the Court was minded to award equitable damages in lieu of an injunction, those damages should be calculated on the same basis as the annoyance damages ($100,000 per annum) for the likely future period in which Mr Zakula will reside at his house. As Mr Zakula is now 63 years old,[204] and it could conservatively be assumed he will live at least another 10 years, then equitable damages should be in the order of $1 million.

Terms of the injunction

222. The final issue (issue 14) is the appropriate terms of the injunction. In some respects, this is the most difficult issue in the case. As already noted, the Defendants say nothing about this issue, giving the Court significant comfort that the Defendant can adapt to whatever terms are imposed.

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[200] Defendant's Submissions [163(b)]
[201] Defendant's Submissions [148]-[149].
[202] See *Campbelltown Golf Club Ltd v Winton* [1998] NSWSC 257 (NSWCA).
[203] Ibid.
[204] He was born on 12 December 1957.

223. The primary object of the injunction should be to abate the nuisance, and the secondary object should be to minimise the burden of the injunction on the Defendant. However, given the Defendant has not assisted the Court by disclosing the economic basis of its operations, it will be difficult for the Court to do anything but make educated guesses as to the burden of various measures.

224. One option would be for the Court to simply order that the Defendant "abate the nuisance forthwith". This has the advantage of permitting the Defendant to select the abatement method, and it will presumably select the method which costs it the least. It also has the advantage that if there be any doubt about the effectiveness of a proposed method, the Defendant is likely to err on the side of caution, rather than run the risk of contempt; this caution is protective of Mr Zakula's interests, which is appropriate. The disadvantage (if, indeed, it is a disadvantage) is that the order does not directly tell the Defendant what it needs to do.

225. Another option would be for the Court itself to try to select the method of abatement. For example, it could order the Defendant to reduce the power to particular turbines, by particular amounts, at particular times (at night, in all months other in summer, and so forth). However, this approach assumes that the Court is in a position to know what abatement will be effective, and the Court is not in that position, because of forensic decisions taken by the Defendant.

226. A third approach would be for the Court to direct the abatement not to the operation of the turbines, but rather to the circumstances inside Mr Zakula's house. This was the approach taken in *Seidler* (the Luna Park case).[205] For example, the Court could order that the Defendant abate the turbines "so that noise emissions from the turbines do not increase sound levels by more than 5dB inside the residence at any time". However, this approach is inappropriate in this case for a number of reasons. First, it is not clear whether the terms of such an injunction would be effective to ensure Mr Zakula's sleep. Second, if it did protect his sleep, it would not necessarily prevent noise nuisance when outside his house. Third, there would likely be disputation as to how to measure a contribution of noise "from" the turbines.

227. A fourth approach, also taken in *Seidler*, would be for the Court to impose a firm abatement measure on the Defendant, but give it liberty to apply for relief from that measure if and when it can propose something more tailored. For example, the Court could restrain the Defendant from operating the northern section of the wind farm at night, with liberty to apply. However, this approach is extremely unattractive, probably from both parties' point of view. From the

[205] *Seidler v Luna Park Reserve Trust* (Unreported, NSWSC, 21 Sep 1995, Hodgson J) [JBA 2200].

Plaintiffs' point of view at least, the problem is that it does not bring an end to this litigation, and ensures future costly disputation.

228. Having essayed the advantages and disadvantages of various approaches, it seems that the first approach on balance is the best one, and Mr Zakula urges the Court to adopt it.

CONCLUSION

229. The Court should issue an injunction to abate the nuisance affecting Mr Zakula's property, and award damages to both Plaintiffs.

230. For Mr Zakula, as the $200,000 property loss was assessed as at 13 August 2021, interest should run on the loss from that date until judgment.

231. The Plaintiffs wish to be heard on the question of costs.

Dated: 8 October 2021

G A COSTELLO
J FETTER