Jones v Ministry of Defence **[2021] EWHC 2276**

Background and decision

The claimants, Mr and Mrs Jones ('J') resided in Anglesey. J owned property (known as 'Parc Cefni') which was situated on the south shore of a reservoir which was situated in the centre of Anglesey. J intended to develop the land to create a holiday and leisure park. A mile to the west of Parc Cefni there was situated Mona Airfield (the 'Airfield'). The Airfield had been used by the Royal Air Force as a relief landing ground for the nearby base at RAF Valley, and also as runway where trainee pilots undertook circuit drills, using fast jets and turbo prop aircraft.

J claimed that an increase in the noise which had been created by the operations in and around the Airfield since 2007, had blighted their land. J claimed that the noise constituted an actionable nuisance and or, alternatively, that the noise had infringed their rights under Art 8 and the First Protocol to the European Convention on Human Rights ('ECHR'). J sought a remedy by way of a declaration and/or damages.

Judge Sephton began by addressing J's claim in terms of the law of nuisance. In short, J claimed that the activities which had been conducted by the defendant, the Ministry of Defence (the 'MoD') had caused an interference with J's reasonable enjoyment of their land. The judge emphasised that the essential question which fell to be answered by the court was whether the activities which had been conducted by the MoD, constituted a reasonable user of land. That question was to be answered objectively: at [7]. Of particular importance, in the present case, was the principle of locality: at[8]. That was to say, whether an interference with the amenity of land was a nuisance depended upon the character of the locality in which the interference occurred.

The judge then addressed the question as to how the court should go about assessing the locality. The leading case was *Lawrence v Fen Tigers Ltd.* [2014] UKSC 13. In that case, Lord Neuberger gave guidance on that issue, and in particular, what part the defendant's activities should play in assessing the locality. Lord Neuberger had stated that the concept of character of the locality might be too monolithic in some cases. A better description might be something like the 'established pattern of uses' in the locality: [2014] UKSC 13 at [60]. He then stated that in determining the relevant established pattern of uses, one started off with the proposition that the defendant's activities were to be taken into account: [2014] UKSC 13 at [63]. However, Lord Neuberger was of the view that those activities which constituted a nuisance should be left out of account: [2014] UKSC 13 at [65][74]. Correspondingly, activities which did not constitute an actionable nuisance, could be taken into account: [2014] UKSC 14 at [75].

Judge Sephton stated (at [11]) that in *Lawrence* Lord Carnwath had appeared to take a different view, which was more easily understood. Lord Carnwath had stated that a change in the intensity of the character of an existing activity could result in a nuisance, no less than the introduction of a new activity: [2014] UKSC 14 at [190]. It was a matter for the judge, as an issue of fact and degree, to establish the limits of the acceptable.

Judge Sephton stated that between 1958 and 2003 Parc Cefni was used for the purposes of supplying water and was not used for any other commercial or residential purpose, irrespective of its designation for planning purposes: at [17]. After J purchased Parc Cefni in 2003 J had obtained planning permission to erect *inter alia* wooden lodges (the 'leisure development') and convert outbuildings on the property into three holiday units and a dwelling. Two lodges were erected in 2006. However, J claimed that they were unable to sell the lodges, even at a much lower price than originally asked: at [19]. There were other buildings which were situated on Parc Cefni which had

previously formed the water company's depot. J had intended to rent out some of the buildings for purposes which were ancillary to the holiday development (the 'commercial development'). Some units, including a children's nursery, were let. However, since 2007 the number of tenants and also the income from the lettings dwindled: at [20]. J decided to sell the property and had been trying to sell the property since 2016. J alleged that the reason why they had been unable to do so was because of the intolerable noise from overflying aircraft using the base at RAF Mona.

Judge Sephton explained that since the early 1950s student pilots had learned to fly fast jets at RAF Valley. RAF Valley was the only base in the UK from which pilots were trained on fast jets. RAF Mona was an important adjunct to RAF Valley: at [23]. The former was primarily used for pilot training and as an emergency diversion airfield, in case of emergency or poor weather. RAF Mona was primarily used for circuit training, that is, take off and landing. In October 2010 J wrote to Group Captain Hedley complaining that low flying aircraft caused a deafening noise directly above the nursery: at [31]. As a result of J's complaints the Flying Order Book ('FOB') for pilots was changed to the effect that pilots were required to avoid flying over the nursery on Parc Cefni. In November 2011 and February 2012 J wrote to more senior RAF officers, alleging that aircraft were still overflying the nursery: [33][34]. J claimed that they were being victimised and persecuted. In 2013 J wrote to the MoD alleging that pilots were flying closer to Parc Cefni, and that J was being punished for complaining: at [38]. However, on the evidence presented to the court by the MoD, the judge held that J's allegation that there had been an increased use in RAF Mona was incorrect: at [42]. The judge also found that flights generally avoided Para Cefni: at [50]. However, probably less than 5% overflew Parc Cefni. The judge also rejected J's allegation that pilots directly overflew Parc Cefni in order to intimidate them: at [51]. However, the judge concluded that the noise of aircraft flying over Parc Cefni was and continued to be very loud: at [57]. He concluded that the noise interfered with J's current use and enjoyment of Parc Cefni.

Judge Sephton then considered if the noise in question ranked as a nuisance in law: at [61]. He stated that Parc Cefi was situated at the centre of Anglesey. The area was largely agricultural. However, the bucolic tranquillity of the area had been disturbed for many years by the sound of fast jets making circuits around and landing at Mona airfield. The noise had been part of the environment for generations. A witness who had lived in the area since his infancy, stated that noise was part of everyday life when he was growing up. The judge stated that whereas it was appropriate to describe the locality as largely agricultural, it was also one where noise from aircraft using RAF Mona was heard on frequent occasions. He went on to state that on the authority of *Lawrence,* he would take that noise into account when determining the nature of the locality: at [62]. In short, the flying of military aircraft at RAF Mona in 2003 or 2021 was an ordinary use of land at RAF Mona. Further, the officers at RAF Valley had taken all measures, which they reasonably could have done, to minimise noise at Parc Cefni: at [64]. The judge also held that pilots did not deliberately fly over the Nursery and the Activity centre. In short, the noise in question did not rank as a nuisance: at [65]. The judge went on to state that the MoD's activities, prior to 2003 were part of the character of the locality, did not rank as a nuisance, and caused no greater nuisance than when J first carried out building works or changed the use of the land: at [70]. He concluded by stating that if an occupier of land had conducted an activity in a reasonable manner for many years, it was unfair if a new neighbour, who wished to do something which was sensitive to the occupiers activity, could complain that the activity in question would disrupt the sensitive use of his land, that the neighbour wished to introduce: [71].

Judge Sephton then addressed J's claim under the ECHR. Art. 8 provided that everyone has the right to respect for private and family life, his home and his home and his correspondence. Public

authorities were placed under a duty not to interfere with this right, subject to certain exceptions. J claimed that the overflying aircraft constituted a failure, on the part of the MoD, to respect J's private and family life and their home: at [74]. The judge held that the aircraft noise had disturbed J's lives and their home: at [75]. However, in his view, such interference was in accordance with the law, and was also in the interests of national security. He rejected J's submissions that the MoD's activities were unreasonable and disproportionate. The judge held that the training of air force pilots and promoting cordial relations with our allies, engaged the interests of national security.

A more difficult question was whether a proper balance had been struck between the competing requirements of national security, and J's human rights, such as to justify the conclusion that the interference was necessary: [76]. However, the judge held that a balance had been lawfully struck in the instant case, for two reasons. The first reason was that the MoD operated a noise amelioration scheme for householders affected by noise. The public purse afforded relief to those most affected by noise. The reason why J did not qualify for such assistance was that they had not established that the noise was sufficiently loud. The second reason was that the MoD had taken steps to minimise the noise of overflying jets. Pilots had been instructed to avoid the most sensitive parts of J's property. Judge Sephton rejected a possible suggestion that if a private individual's interests were being interfered with, because of a public interest, the individual was bound to be compensated. The judge concluded that a breach of Art 8 had not taken place.

The judge then went on to address J's claim in terms of Art 1 of Protocol 1, which provides *inter alia* that every natural or legal person is entitled to the peaceful enjoyment of his possessions. The judge stated that 'peaceful' in the Protocol meant without interference: [80]. It did not mean 'without noise.' J submitted that their possessions had been interfered with by aircraft noise. The judge held that J had invested in their land, with the hope of running a profitable future business. However, that hope did not represent a hope which was capable of being protected by Art 1: [83].

In conclusion, Judge Sephton held that very loud noise from aircraft using RAF Mona had been part of everyday life in Anglesey for about 70 years: at [86]. Before J moved into Parc Cefni the noise did not interfere with the enjoyment of the land, because the land was used for water supply and ancillary purposes. Unfortunately, the businesses which J introduced were much more sensitive to noise. The noise had not become worse since J moved in. Furthermore, the officers at RAF Valley had taken all the steps they reasonably could, to accommodate J's requirements. In consequence, J's claims in nuisance, and also under the Human Rights Act 1998, fell to be dismissed.

Comment

Jones raises several interesting issues as far as the law of nuisance is concerned. The first, and most important, concerns that of locality and the second, sensitivity on the part of the claimant.

As far as the issue of locality is concerned, it is a well-established principle that where relevant, the courts take account of the nature of the relevant locality, when determining whether any given state of affairs ranks as a nuisance in law: see eg *Trotter v Farnie* (1830) 9 S 144; *Bamford v Turnley* (1862) 31 LJQB 286 and *Inglis v Shotts Iron Co.* (1881) 8 R 1006. Essentially, the more typical of a relevant area the adverse state of affairs complained of is, the less likely that the state of affairs will rank as a nuisance. The rationale of this principle is that if the state of affairs is typical of a given locality, a reasonable person who resides in the locality is presumed to be less likely to be annoyed, by having become habituated, at least to some extent, to the state of affairs in question. However, importantly, whereas the courts may be less inclined to castigate as a nuisance a state of affairs which is indigenous in the area, the courts are not prepared to accord the defender carte blanche to

create a nuisance there. This point is well-illustrated in the House of Lords case of *Rushmer v Polsue and Alfieri Ltd.*[1907] AC 121 at 123 where Lord Lorburn, after stating that a dweller in towns cannot expect to have as pure air, as free from smoke, smell and noise, as if he lived in the country, whether an excess of smoke, smell and noise may give a cause of action, became one of degree, and the question was in each case whether it amounted to a nuisance, which would give a right of action. That was a question of fact.

In *Jones* the judge held that the noise from the aircraft was very loud. Indeed, the noise disrupted conversations and could frighten small children: at [57]. It was also necessary to increase the volume of the television, if an aircraft passed by. The noise could also startle the unwary. In short, one could reasonably conclude that the negative impact of the aircraft noise on the inhabitants of Parc Cefni was capable of constituting a nuisance in law. However, in order to determine whether the noise in question ranked as a nuisance it required to be assessed in the context of the locality. This was a factor which was accorded particular importance by the judge. The premises were situated in a largely agricultural area, where loud noise from military aircraft had become an indigenous feature of that locality. In effect, the judge held that the character of the locality in which Parc Cefni had been changed by the aircraft noise. However, RAF Mona occupied a relatively small area. The author would suggest, therefore, that the area, perforce, remained rural or agricultural in nature. For Judge Sephton to conclude, in effect, that the cacophony created by the flying of military aircraft in the area had changed the nature of the locality for the purposes of the law of nuisance, seems contrary to authority, in that the courts have determined the character of the locality in question, not by the geographic extent of the relevant pollutant but, rather, by the nature or character of the premises, whence the pollutant emanates. In short, the court determines whether the premises are typical of a given area: see eg *St Helens Smelting Co v Tipping* (1865) 11 HL Cas 642. However, in *Jones* the presence of military aircraft was not at all typical of the locality in question. Indeed, RAF Mona comprised a single runway. The locality remained agricultural. Indeed, in *Dennis v MoD* [2003] Env LR 34 (which was cited in *Jones*) the claimant, Dennis, resided on a large estate which was situated in a rural area. However, the estate was situated in close proximity to RAF Wittering which was home to Harrier jet which was a noisy aircraft. Dennis raised an action against the MoD, claiming that the aircraft noise which both he, his family and his estate workers, were subjected to, constituted a nuisance, and also infringed their rights in terms of Art 8 of the ECHR. As far as the claim in nuisance was concerned, Buckley J held that the noise had not changed the character of the locality, in terms of the law of nuisance. The area remained essentially rural. Importantly, he observed that it would be odd if a tortfeasor could himself, alter the character of the neighbourhood over the years, as to create a nuisance with impunity: [2003] Env LR 34 (at [34]). In the last analysis, the author is of the view that Judge Sephton's characterisation of the relevant locality in *Jones* is contrary to authority and would seem amenable to challenge, on appeal.

It is a general rule in law that courts are unwilling to assist the oversensitive. As far as the law of nuisance is concerned, the courts have deemed certain uses of land as oversensitive and, therefore, not warranting protection: see eg *Armistead v Bowerman* (1888) 15 R 814 (salmon hatchery); *Robertson v Kilvert* (1889) 41 ChD 88 (delicate paper); *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch 436 (reception of television signals) and *Network Rail Infrastructure (formerly Railtrack) v CJ Morris* [2004] Env LR 861 (electric guitars in recording studio). In the leading case of *Heath v Brighton Corporation* (1908) 24 TLR 414 the claimant claimed that the noise and vibrations which emanated from the defendant's premises was denied a remedy, in terms of the law of nuisance, since the only reason why he was discomfited was that he possessed hypersensitive hearing. However, the courts have experienced difficulty in clearly defining the forms of external influences which can be protected by the law of nuisance: see eg *Hunter v Canary Wharf Ltd* [1997] 2

WLR 684. In *Jones* it was held that the operation of a nursery was sensitive to noise and, in effect, that such an activity did not attract protection, in terms of the law of nuisance. However, there is no authority to support Judge Sephton's decision in this respect. The author would argue that such activities are, indeed, normal everyday activities and, therefore, do warrant protection, in terms of the law of nuisance. Furthermore, it is a well-recognised rule that coming to a nuisance is no defence: see eg *Miller v Jackson* [1977] QB 966; *Webster v Lord Advocate* 1984 SLT 13 (reversed on appeal, in terms of the interdict granted, see 1985 SC 173). The author would argue that the fact that in *Jones* the claimants had purchased Parc Cefni years after the RAF had been operating flights in the area, was quite irrelevant, irrespective of whether the activities which were taking place there were sensitive to noise or not.

As far as J's claim in terms of Art 8 of the ECHR was concerned, it was quite clear, on the facts which were before the court, that the levels of noise which J had been subjected to, engaged Art 8. It was equally clear, however, that the UK needs to train RAF pilots. In short, the flying of military aircraft and the noise which inevitably resulted, was necessary in the interests of national security. In balancing J's rights under Art 8 and the those of the state, in terms of national security, Judge Sephton took into account, firstly, the fact that the MoD operated a noise amelioration scheme for those who were most affected by noise, and secondly, the fact that the RAF had taken steps to minimise the noise from the aircraft. There is little authority on the factors which a court is required to take account of, in terms of noise from military aircraft, when conducting such a balancing exercise. *Jones,* therefore, takes the law further forward, in this respect.

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