Noise Nuisance

***Lawrence v Fen Tigers Ltd* [2014] 2 WLR 13**

Background and decision

In 1975 the fourth defendant obtained planning permission to construct a stadium, which was to be used for various motor sports, including speedway and also stock car racing. In 1992 he obtained planning permission to use agricultural land which was situated towards the rear of the stadium as a motocross track for one year. He constructed a track there. The permission was renewed on a number of occasions until permanent permission was granted in 2002. The permissions placed limits, both on the frequency and also the times of the activities at the stadium, but did not place any conditions on the level of noise which was to be emitted during those activities. In 2006 the claimants bought a house which was situated close to the stadium and track. In response to complaints about the noise which was generated by motor sports at the stadium and track, the local authority served abatement notices, in terms of the Environmental Protection Act 1990, on the second defendant who organised events at the stadium, and also upon the third defendant, who had been granted a lease of the land on which the track was situated. After works were carried out to reduce the noise, the planning authority took no further action. The claimants then took proceedings in private nuisance against the second to fourth defendants, amongst others.

At first instance, the judge held that the planning permissions for the uses of the stadium and the track did not change the character of the area so as to affect his assessment of what noise levels and frequency would constitute a nuisance, and that on all the evidence which was before him, the operation of the activities at the stadium and track both before, and also after, the abatement works, constituted a noise nuisance to the claimants. The judge also rejected a claim, by way of defence, that the defendants had acquired a prescriptive right to create the nuisance in question by virtue of the activities which took place at the stadium having lasted for more than 20 years. On appeal, the Court of Appeal held that the implementation of planning permission had changed the character of the land for the purposes of the law of nuisance in such a way that the noise from both the stadium and track were to be regarded as simply an established part of the character of the locality. The claim in nuisance, therefore, failed. The claimants successfully appealed to the Supreme Court.

The Supreme Court held:

1. that it was possible for the owner of land to acquire, by prescription, an easement (ie a legal right to allow one to carry out an activity over another parcel of land) to emit noise, provided that the noise had been emitted for 20 years, albeit not continuously. However, it would be open to the defendant to claim that the complaint could only have arisen because of some post-acquisition change of use of that property by the claimant;
2. that, in determining whether an activity caused a nuisance by noise, the court had to assess the level of noise which,

objectively, a normal person would find it reasonable to have to put up with, given the established pattern of uses, or character, of the locality in which the activity concerned was carried out. For that purpose, the defendant could rely on his own activity on his land, in so far as it could be shown that such activity was a lawful part of the established pattern of uses of the area. In this respect, any implementation of planning permission for the defendant's activity could be relevant to an evaluation of the established pattern of uses in the locality. Similarly, the terms and conditions of planning permission could be taken into account in order to evaluate the acceptability of the complained of noise. However, the defendant could not rely on a planning permission which permitted the very noise which was alleged to constitute a nuisance as making that noise an established part of the locality. Furthermore, planning permission was not a major determinant of liability, notwithstanding the fact that the grant related to a major development;

3. that where a claimant had established that the defendant's activities constituted a nuisance the primary remedy was an injunction. However, the court had power to award damages instead of an injunction. In considering whether to do so, the court was free to take account of the effect on persons, other than the claimant, who would remain badly affected by the nuisance if an injunction was not granted;

4. allowing the appeal; (a) the noise from the defendant's activities had not caused a nuisance to the claimant's land for a sufficiently long period as to establish a right by prescription; (b) the defendants could not rely on any defence that the claimants had come to the nuisance; and the existence of planning permission was not determinative of the character of the locality in terms of the law of nuisance.

For Lord Neuberger, there was no doctrinal reason why a right to make a noise could not be acquired by prescription. In His Lordship's view, the extent of the right to transmit sound waves by prescription was highly fact-sensitive and might often depend, not only on the amount and the frequency of the noise emitted, but also on other factors, including the character of the neighbourhood and the give and take between neighbours. Lord Neuberger emphasised that for the defence to succeed, the noise in question required to constitute a nuisance for the relevant prescriptive period.

Lord Neuberger also recognised the well-established principle that, 'coming to a nuisance,' was no defence in law. However, His Lordship stated *obiter* that it might well be a defence, in certain circumstances, for a defendant to contend that the defendant's pre-existing activity constitutes a nuisance only because the claimant has either changed the use of, or built on his land.

As far as the assessment of the character of the locality for the purpose of assessing whether a defendant's activities constituted a nuisance, Lord Neuberger was of the view that, at times, it might be difficult to identify the precise extent of

the locality, or the precise words to describe the character of the locality. Thus, in the view of His Lordship, the concept of the 'character' of the locality may be too monolithic in some cases. A better description might be, 'the established pattern of uses' in the locality. In the instant case, the defendant's activities were to be taken into account in determining the character of the locality. However, in so far as the defendant's activities constituted a nuisance, such activities should be disregarded in determining the character of the locality.

Lord Neuberger then went on to discuss the inter-relationship of planning permission and nuisance. For His Lordship the grant of planning permission for a particular use was potentially relevant to a nuisance claim in two ways. First, the grant of planning permission could permit the very noise which was alleged by the claimant to constitute a nuisance. In such a case, the question was to the extent, if any, to which the planning permission could be relied on as a defence to the nuisance claim. Secondly, either the grant of planning permission or the conditions which were attached to such permission could permit the defendant's property to be used for a certain purpose. The question which would fall to be answered here would be to what extent, if any, that permission had changed the character of the relevant land.

For His Lordship, the significance of planning permission in terms of the law of nuisance was that the implementation of such permission could give rise to a change in the character of the locality in question. However, such implementation, in His Lordship's view, was no different (subject to one possible point) from any other building work or change of use which, indeed, did not require planning permission. Thus, if the implementation of the planning permission results in the creation of nuisance to the claimant, the implementation of that permission could not be said to have changed the character of the locality in question, save as to the extent to which such implementation would not have created a nuisance, or that the defendant could show a prescriptive right to create the nuisance, or that the court has decided to award the claimant damages rather than an injunction in respect of the nuisance.

Lord Neuberger then went on to discuss the possible proviso which he alluded to above. That was the extent, if any, to which the defendant, in seeking to rebut a claim in nuisance, could rely on the fact that planning permission had permitted the very noise (or other disturbance) which is alleged by the claimant to constitute a nuisance. In order to answer this question, Lord Neuberger discussed the cases where the courts accepted the proposition that whilst planning decisions and planning permission cannot, *per se,* authorise the creation of a nuisance, such administrative acts can change the character of the locality for the purpose of the law of nuisance. In the most recent case, namely, *Watson v Croft Pro Sport Ltd.* [2009] 3 All ER 249, the majority of the judges in the Court of Appeal were of the view that only if such permission authorised a major development, could such a decision have this effect. However, in the opinion of Lord Neuberger, this approach was untenable. In His Lordship's view, no distinction fell to be drawn between a strategic

planning decision and other planning decisions. Such a view was underpinned by the Court of Appeal decision in *Barr v Biffa Waste Services Ltd* [2013] QB 455 where Carnwath LJ (as he then was) expressed the view that the common law should 'march in step' with statutory law. Lord Neuberger, therefore, concluded that normally the fact that the activity which causes the alleged nuisance had been granted planning permission was of no assistance to the defendant in a nuisance action. However, His Lordship stated that there could be occasions where the grant of planning permission could be of some relevance in a nuisance case. For example, the fact that the noisy activity is acceptable after 0830hrs or the noise is limited to a certain decibel level in a particular locality, may be of real value, at least as a starting point, in a case where the claimant is contending that the activity gives rise to a nuisance if such activity starts before 0930hrs.

As far as the relevance of the defendant's activity was concerned, in determining the character of the relevant land, Lord Carnwath was of the opinion that an existing activity could be taken account of in determining the character of the relevant land. However, for Lord Carnwath, the most difficult problem which was raised by the appeal was what His Lordship described as the planning history of the defendant's activity. At the outset, Lord Carnwath drew attention to the fact that the law of private nuisance, which was of far greater antiquity than modern planning law, also fulfils the function of protecting the interests of property owners. However, there were fundamental differences between planning law and the law of nuisance. Whereas the former exists to protect and promote the public interest, the latter exists to protect the rights of particular individuals. His Lordship then went on to review the cases where the courts had held that the grant of planning permission had authorised a change to the character of the relevant land against which the reasonableness of the defendant's use of the land was to be judged.

Lord Carnwath then summarised how planning permission may be relevant in a nuisance action in two distinct ways. Firstly, such permission may provide evidence of the relative importance of the permitted activity as part of the pattern of uses of the area. Secondly, where a relevant planning permission includes a detailed and carefully considered framework of conditions governing the acceptable limits of a noise use, such conditions may provide a useful starting point or benchmark for the court's consideration of the same issues.

As far as the first point was concerned, Lord Carnwath addressed the question as to whether the relative importance of an activity was relevant to a nuisance action at all. After stating that there should be a strong presumption against allowing private rights to be overridden by administrative decisions, the relevance of public utility fell to be confined to the context of remedies rather than liability. However, His Lordship stated that in exceptional circumstances (in relation, in effect to large scale developments) a planning permission may be the result of a considered policy decision by the competent authority, leading to a fundamental change in the pattern of uses which cannot sensibly be ignored in

assessing the character of the area against which the acceptability of the defendant's activity is to be judged. Apart from such strategic cases, Lord Carnwath stated that planning permission might also be of some practical utility in a different way. Where evidence shows that a set of conditions has been carefully designed to represent the authority's view of a fair balance (ie of the relevant competing uses of land) there was much to be said for the parties and their experts adopting such conditions as a starting point for their own consideration. Evidence of failure to comply with such conditions, while not determinative, may re-enforce the case for a finding of nuisance under the reasonableness test.

Comment

Lawrence is the first nuisance case to be heard in the Supreme Court. The author, therefore, eagerly awaited the outcome of the case. The decision certainly means that a planning permission and a development plan are not to be accorded as much status as was formerly the case. However, to what extent such planning decisions are relevant in a private nuisance action remains uncertain. Lord Neuberger's judgement to the effect that planning permission is of, 'real relevance' on occasions, is confusing, to say the least. Lord Carnwath, unfortunately, did not clarify matters here by stating that planning permission could be of relevance in a nuisance action if it struck a balance between competing uses of land. Furthermore, Lord Carnwath's saying that the public utility of the defendant's activity should only be taken into account when the court is considering the appropriate remedy flies in the face of weighty authority.

By way of conclusion, the Supreme Court had a splendid opportunity to clarify the law as to whether planning permission which has been granted by the local planning authority can change the character of land in terms of the law of nuisance. Unfortunately, the opportunity was missed, and the relevance of planning permission in a private nuisance action remains a notoriously grey area of law. *Lawrence,* of course, is not binding on the Scottish courts. It is suggested that the Supreme Court's decision does not represent the law of Scotland, that is to say, that planning permission has no relevance in a private nuisance action north of the Border.

Francis McManus **April 2014**

Noise Nuisance
***Lawrence v Fen Tiger Ltd* (No 2) [2014] UKSC 46; *The Times* July 29th 2014**
Background and decision

The claimants brought an action in nuisance in relation to noise which emanated from motorsport activities which took place in a stadium, which was situated close to the house which was occupied by the claimants. The Supreme Court had previously held that the occupiers of the stadium were liable in nuisance (see (2014) 163 SPEL 64). The claimants now brought an action in nuisance, against the landlords of the stadium. The Supreme Court held (by a majority) that in order for a landlord to be liable for a nuisance which was caused by his tenant, it was not sufficient that the former be aware of the nuisance and take no steps to prevent it. Rather, in order to be liable either, (a) the landlords were to be taken to have authorised the nuisance by letting the property, or (b) the landlords were directly participating in the commission of the nuisance. As far as (a) was concerned, there was required to be a very high probability that a letting would result in a nuisance before the landlords could be liable. As far as (b) was concerned, landlords were not liable merely by accepting rent and refraining from taking any proceedings against their tenant, once they became aware that their tenant was causing a nuisance. There was required to be actual participation in the nuisance.

In the present case, as a far as (a) was concerned, the fact that the landlords knew that the site would be used for motorsport activity did not render them liable in nuisance since the relevant activities could have been carried out without causing a nuisance. As far as (b) was concerned, the fact that the landlords had fought statutory nuisance proceedings which had been instituted by the local authority, and also had opposed the claimant's civil action, did not constitute active or direct participation in the nuisance.

Comment

This sad case (the claimant's home had been raised to the ground by fire, before the case was heard) does not take the law further forward in terms of the law of nuisance. The decision simply emphasises the fact that primary liability for nuisance rests with the author of the nuisance, who is normally the occupier of the relevant premises whence the nuisance emanates. The decision of the Supreme Court in *Lawrence,* in the author's view, represents the law of Scotland.

Francis McManus **November 2014**

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Background and decision

In 1975 the fourth defendant obtained planning permission to construct a stadium, which was to be used for various motor sports, including speedway and also stock car racing. In 1992 he obtained planning permission to use agricultural land which was situated towards the rear of the stadium as a motocross track for one year. He constructed a track there. The permission was renewed on a number of occasions until permanent permission was granted in 2002. The permissions placed limits, both on the frequency and also the times of the activities at the stadium, but did not place any conditions on the level of noise which was to be emitted during those activities. In 2006 the claimants bought a house which was situated close to the stadium and track. In response to complaints about the noise which was generated by motor sports at the stadium and track, the local authority served abatement notices, in terms of the Environmental Protection Act 1990, on the second defendant who organised events at the stadium, and also upon the third defendant, who had been granted a lease of the land on which the track was situated. After works were carried out to reduce the noise, the planning authority took no further action. The claimants then took proceedings in private nuisance against the second to fourth defendants, amongst others.

At first instance, the judge held that the planning permissions for the uses of the stadium and the track did not change the character of the area so as to affect his assessment of what noise levels and frequency would constitute a nuisance, and that on all the evidence which was before him, the operation of the activities at the stadium and track both before, and also after, the abatement works, constituted a noise nuisance to the claimants. The judge also rejected a claim, by way of defence, that the defendants had acquired a prescriptive right to create the nuisance in question by virtue of the activities which took place at the stadium having lasted for more than 20 years. On appeal, the Court of Appeal held that the implementation of planning permission had changed the character of the land for the purposes of the law of nuisance in such a way that the noise from both the stadium and track were to be regarded as simply an established part of the character of the locality. The claim in nuisance, therefore, failed. The claimants successfully appealed to the Supreme Court.

The Supreme Court held:

that it was possible for the owner of land to acquire, by prescription, an easement (ie a legal right to allow one to carry out an activity over another parcel of land) to emit noise, provided that the noise had been emitted for 20 years, albeit not continuously. However, it would be open to the defendant to claim that the complaint could only have arisen because of some post-acquisition change of use of that property by the claimant;

that, in determining whether an activity caused a nuisance by noise, the court had to assess the level of noise which, objectively, a normal person would find it reasonable to have to put up with, given the established pattern of uses, or character, of the locality in which the activity concerned was carried out. For that purpose, the defendant could rely on his own activity on his land, in so far as it could be shown that such activity was a lawful part of the established pattern of uses of the area. In this respect, any implementation of planning permission for the defendant's activity could be relevant to an evaluation of the established pattern of uses in the locality. Similarly, the terms and conditions of planning permission could be taken into account in order to evaluate the acceptability of the complained of noise. However, the defendant could not rely on a planning permission which permitted the very noise which was alleged to constitute a nuisance as making that noise an established part of the locality. Furthermore, planning permission was not a major determinant of liability, notwithstanding the fact that the grant related to a major development;

that where a claimant had established that the defendant's activities constituted a nuisance the primary remedy was an injunction. However, the court had power to award damages instead of an injunction. In considering whether to do so, the court was free to take account of the effect on persons, other than the claimant, who would remain badly affected by the nuisance if an injunction was not granted;

allowing the appeal; (a) the noise from the defendant's activities had not caused a nuisance to the claimant's land for a sufficiently long period as to establish a right by prescription; (b) the defendants could not rely on any defence that the claimants had come to the nuisance; and the existence of planning permission was not determinative of the character of the locality in terms of the law of nuisance.

For Lord Neuberger, there was no doctrinal reason why a right to make a noise could not be acquired by prescription. In His Lordship's view, the extent of the right to transmit sound waves by prescription was highly fact-sensitive and might often depend, not only on the amount and the frequency of the noise emitted, but also on other factors, including the character of the neighbourhood and the give and take between neighbours. Lord Neuberger emphasised that for the defence to succeed, the noise in question required to constitute a nuisance for the relevant prescriptive period.

Lord Neuberger also recognised the well-established principle that, 'coming to a nuisance,' was no defence in law. However, His Lordship stated *obiter* that it might well be a defence, in certain circumstances, for a defendant to contend that the defendant's pre-existing activity constitutes a nuisance only because the claimant has either changed the use of, or built on his land.

As far as the assessment of the character of the locality for the purpose of assessing whether a defendant's activities constituted a nuisance, Lord Neuberger was of the view that, at times, it might be difficult to identify the precise extent of

the locality, or the precise words to describe the character of the locality. Thus, in the view of His Lordship, the concept of the 'character' of the locality may be too monolithic in some cases. A better description might be, 'the established pattern of uses' in the locality. In the instant case, the defendant's activities were to be taken into account in determining the character of the locality. However, in so far as the defendant's activities constituted a nuisance, such activities should be disregarded in determining the character of the locality.

Lord Neuberger then went on to discuss the inter-relationship of planning permission and nuisance. For His Lordship the grant of planning permission for a particular use was potentially relevant to a nuisance claim in two ways. First, the grant of planning permission could permit the very noise which was alleged by the claimant to constitute a nuisance. In such a case, the question was to the extent, if any, to which the planning permission could be relied on as a defence to the nuisance claim. Secondly, either the grant of planning permission or the conditions which were attached to such permission could permit the defendant's property to be used for a certain purpose. The question which would fall to be answered here would be to what extent, if any, that permission had changed the character of the relevant land.

For His Lordship, the significance of planning permission in terms of the law of nuisance was that the implementation of such permission could give rise to a change in the character of the locality in question. However, such implementation, in His Lordship's view, was no different (subject to one possible point) from any other building work or change of use which, indeed, did not require planning permission. Thus, if the implementation of the planning permission results in the creation of nuisance to the claimant, the implementation of that permission could not be said to have changed the character of the locality in question, save as to the extent to which such implementation would not have created a nuisance, or that the defendant could show a prescriptive right to create the nuisance, or that the court has decided to award the claimant damages rather than an injunction in respect of the nuisance.

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between a strategic planning decision and other planning decisions. Such a view was underpinned by the Court of Appeal decision in *Barr v Biffa Waste Services Ltd* [2013] QB 455 where Carnwath LJ (as he then was) expressed the view that the common law should 'march in step' with statutory law. Lord Neuberger, therefore, concluded that normally the fact that the activity which causes the alleged nuisance had been granted planning permission was of no assistance to the defendant in a nuisance action. However, His Lordship stated that there could be occasions where the grant of planning permission could be of some relevance in a nuisance case. For example, the fact that the noisy activity is acceptable after 0830hrs or the noise is limited to a certain decibel level in a particular locality, may be of real value, at least as a starting point, in a case where the claimant is contending that the activity gives rise to a nuisance if such activity starts before 0930hrs.

As far as the relevance of the defendant's activity was concerned, in determining the character of the relevant land, Lord Carnwath was of the opinion that an existing activity could be taken account of in determining the character of the relevant land. However, for Lord Carnwath, the most difficult problem which was raised by the appeal was what His Lordship described as the planning history of the defendant's activity. At the outset, Lord Carnwath drew attention to the fact that the law of private nuisance, which was of far greater antiquity than modern planning law, also fulfils the function of protecting the interests of property owners. However, there were fundamental differences between planning law and the law of nuisance. Whereas the former exists to protect and promote the public interest, the latter exists to protect the rights of particular individuals. His Lordship then went on to review the cases where the courts had held that the grant of planning permission had authorised a change to the character of the relevant land against which the reasonableness of the defendant's use of the land was to be judged.

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of the area against which the acceptability of the defendant's activity is to be judged. Apart from such strategic cases, Lord Carnwath stated that planning permission might also be of some practical utility in a different way. Where evidence shows that a set of conditions has been carefully designed to represent the authority's view of a fair balance (ie of the relevant competing uses of land) there was much to be said for the parties and their experts adopting such conditions as a starting point for their own consideration. Evidence of failure to comply with such conditions, while not determinative, may re-enforce the case for a finding of nuisance under the reasonableness test.

Comment

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By way of conclusion, the Supreme Court had a splendid opportunity to clarify the law as to whether planning permission which has been granted by the local planning authority can change the character of land in terms of the law of nuisance. Unfortunately, the opportunity was missed, and the relevance of planning permission in a private nuisance action remains a notoriously grey area of law. *Lawrence,* of course, is not binding on the Scottish courts. It is suggested that the Supreme Court's decision does not represent the law of Scotland, that is to say, that planning permission has no relevance in a private nuisance action north of the Border.

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