***Ray v Windrush Riverside Properties Ltd* [2022] EWHC 2210**

**Background and decision**

The facts of the case were simple and straightforward. The claimant Ray (‘R’) owned a property (‘Kevinscot’) in High Street, Bourton-on-the-Water, Cheltenham. The defendants, Windrush (‘W’) owned adjoining property (‘St Kevins’). The boundaries of the two properties adjoined at the back. However, they were separated by a common neighbouring property, on their High Street frontage. R had acquired ownership of Kevinscot in January 1996. At the date of the trial, Kevinscot was a four-bedroom property, which could sleep up to seven people.

From early 2000 until 2015 Kevinscot had been used as ‘The Living Green Centre,’ to demonstrate what R described as ‘sustainable lifestyle demonstration.’ Kevinscot was open to day visitors, who would use its secluded walled garden and shop. In 2015 R had obtained planning for a change of use of Kevinscot, so that it could be let as holiday premises. The house had been adapted, in order to provide four bedrooms. W had acquired ownership of St Kevins in October 2006. The premises were marketed as ‘eco-friendly,’ and offering the particular amenity of a ‘tranquil and fresh-aired garden.’

In 2016 and 2017 W had obtained planning permission and building consent, to extend the premises, and make alterations, in order to allow St Kevins to operate as fish and chip takeaway and restaurant. After St Kevins had been closed, in order to enable building works to take place, the restaurant re-opened for business in March 2018. The new takeaway opened a month later. The mechanical plant, about which R complained, comprised *inter alia* of air extraction units, an air intake fan unit, air conditioning units and a refrigeration system. Both the restaurant and the takeaway had closed for business in March 2020, as a consequence of the pandemic. They had not since re-opened. R claimed that during the operation of the expanded food business, between March 2018 and April 2020, the emissions of noise and odours from the mechanical plant had been such as to interfere unreasonably with the use and enjoyment of Kevinscot.

In August 2018 Cotswold District Council (‘C’) had served an abatement notice on W, under s80 of the Environmental Protection Act 1990, requiring the abatement of noise which amounted to a statutory nuisance, from St Kevin’s ventilation, extraction and refrigeration system. However, W did not appeal the abatement notice. In June 2018 C had refused retrospective planning and listed building consent for the mechanical plant, which had been installed without planning permission. In October 2018 C served two enforcement notices on W, requiring the removal of the plant. W had appealed against the enforcement notices. The planning inspector had refused the appeal. In concurring with C’s decision, the inspector concluded *inter alia* that the noise which was generated by extract fan and air conditioning units, had had a negative impact on the living conditions of those living, or working, close to, and adjacent to St Kevins.

Judge Russen stated that R claimed that the noise and odours from the mechanical plant constituted a private nuisance, in that R’s right to reasonable enjoyment of her property had been infringed: [135-136]. After citing relevant case law, the judge stated that in a nuisance action, one was required to ascertain whether the defendant was making reasonable use of his property: at [138]. In determining that question, one was required to take into account the fact that there required to be, ‘give and take,’ (or ‘live and let live,’) between neighbours. In other words, a state of affairs was not always actionable, notwithstanding it had harmed a neighbour. The judge added that even a substantial interference of the enjoyment of property would not rank as a nuisance, if the state of affairs was the consequence of the common and ordinary use and occupation of land, and that the interests of neighbours had been given due consideration. The judge added that here one was required to ascertain what a neighbour might reasonably be expected to have to put up with: at [139]. The judge stated that on the authority of *Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 at [36] the broad unifying principle in nuisance was reasonableness between neighbours.

The judge added that in order to ascertain whether the defendant was making a common and ordinary use of his land, one was required to make an assessment of the locality. That would allow the court, in ascertaining whether a neighbour should reasonably be expected to put with the alleged nuisance, to apply the standards of the reasonable person: at [140].

The judge then addressed the relevance of sensitivity in a nuisance action. He cited relevant case law, to the effect that the court would not give redress to the over-sensitive: at [141]-[143].

As far as the question of locality was concerned, the judge stated that the past use of the parties respective properties, required to be taken into account: at [144]. The judge added that, on the authority of the Supreme Court case of *Lawrence v Fen Tigers* [2014] AC 822, the previous grant and implementation of planning permissions (and any conditions attached to them) for the development of the parties properties, and other properties in the neighbourhood, would also be relevant, in the court determining the character of the locality. However, the judge added that planning permission for a development, the operation of which led to the alleged nuisance, could not be a major determinant of the issue of liability. It followed that the absence of planning permission for the installation of the mechanical plant in St Kevins, was not determinative of the issue, as to whether W was liable, in terms of the law of nuisance: at [145].

The judge stated that R’s action in nuisance, centred on her claim that in terms of R being a freeholder (or lessor) W had unduly interfered with R’ profitable use of the affected property: at [175]. However, the judge stated that before that question could be answered, it was necessary to ascertain whether the alleged adverse state of affairs constituted a private nuisance: at [179]. The judge stated that here, the leading case was *Lawrence v Fen Tigers,* which established that the court was required to assess whether a defendant’s conduct was unreasonable, to the extent that it gave rise to a legal remedy.

The judge concluded that R had failed to establish the alleged nuisance against W: at [183]. He stated that the reason for his decision was based on firstly, the character of the locality, and secondly, on R’s ability to let Kevinscot under an AST (assured short tenancy): at [184]. These factors pointed to the conclusion that W had not, during the nuisance period, violated R’s ownership rights in a way which supported her claim.

As far as locality was concerned, Kevinscot was situated in centre of the town: at [185]. It was, therefore, unreasonable for R to expect that an eco-friendly retreat could exist in that environment. The character of the neighbourhood was inconsistent with the calm and meditative environment which R wished to provide for her guests.

As far as the issue of sensitivity was concerned, the judge stated that the standards which R had created for her holiday let business, were too sensitive to attract protection, in terms of the law of nuisance. The judge stated that that question was one of fact and degree, and dependent on the circumstances of the case: at [186]. The judge stated that one reason why W’s activities were not actionable, was that during 16 of the 21 months in question, R had let the property to a Mr Tongue (‘T’) and his family. They were to be taken as the average occupiers, for the purpose of assessing whether or not there was a material interference with the standard of comfort ordinarily to be enjoyed by the occupier of the neighbouring property: at [187]. In his evidence, T had stated that he and his family could ‘live and work around’ the noise and the smell: at [188]. The judge stated that T’s evidence could be said to encapsulate the concept of ‘live and let live’. Another reason why the judge concluded that W had not unreasonably interfered with the amenity of the property, was that R had decided to continue letting the property: at [189].

**Comments**

*Windrush* raises several interesting issues. As stated above, the alleged nuisance consisted of noise and smell which had been discharged from W’s property. The central question which the court was required to address and answer, was whether the level of noise and the intensity of smell, was more than an occupant of Kevinscot could reasonably be expected to tolerate, or was *plus quam tolerabile*: *Watt v Jamieson* 1954 SC 56 at 58 (per Lord Cooper). However, the concept of reasonableness is amorphous. Therefore, over the years, the courts, have introduced a number of factors which (if relevant to the facts of the case before the court) one should take into account, in determining if an alleged adverse state of affairs ranks as a nuisance.

One such factor is locality. In short, if the activity, which is the subject matter of the action, is typical of the relevant area, a reasonable person, who resides in the locality, is presumed to be less likely be annoyed, by having become habituated, at least to some extent, to the state of affairs: See eg *Bamford v Turnley* (1862) 31 LJQB 286; *Inglis v Shotts Iron Co* (1881) 8 R 1006. In *Ray,* T lived in a locality where the activity of which R complained, was in conformity with what one should expect to find in the centre of a town. *Ray* also follows *Lawrence* in that the judge held that planning permission (or lack of such permission) should be accorded little relevance when one is deciding if the state of affairs complained of ranked as a nuisance. It should be observed, at this juncture, that there is no Scottish authority on this point.

Another factor which the court takes into account is possible oversensitivity on the part of the pursuer. In other words, the courts are unwilling to assist the oversensitive. In the leading case of *Heath v Brighton Corporation* (1908) 24 TLR 414 a priest complained about the noise and vibration which emanated from the defendant’s premises. However, the claimant was denied a remedy since the only reason why he was discomfited was that he possessed hypersensitive hearing. More recently, in *Jones v Ministry of Defence* [2021] EWHC 2276 the claimants claimed that noise from military aircraft interfered with the operation of a children’s nursery. However, the court held that the operation of the nursery was sensitive, and therefore, did not attract the protection of the law of nuisance. In *Ray,* in the author’s opinion, it was unsurprising that the court would decide that R’s intended use of Kevinscot, as a place of tranquillity, could not attract protection (especially in relation to the intrusion of noise) in terms of the law of nuisance.

In conclusion, whilst *Ray* does not take the law further forward it provides an interesting example of the practical application of well-established nuisance principles. It is suggested that *Ray* would be followed in Scotland.

Francis McManus

University of Stirling

Nov 2022