

***Andrews v Kronospan Ltd* [2025] EWHC 2429**

Background

The factual background to the case was simple. *Andrews* concerned a group litigation environmental nuisance claim which had been brought by local residents, represented by Andrews ('A') against the operator *Kronospan Ltd* ('K') of a wood production factory. K's factory was the largest factory in the local area. K's principal products were particleboard, medium density fibreboard ('MIF') and laminate flooring and worktops.

A claimed that the operation of the defendant's factory had, over a prolonged period (ie 6 years) emitted dust, noise and odour, to such an extent and with such a degree of regularity, and unpleasant consequences, that it constituted a legal nuisance.

K claimed that whilst the operation of its factory inevitably had an occasional impact on those living nearby, its actual impact fell well below the level of intensity or continuity to amount to a legal nuisance. K also argued that its factory operations:

- (1) formed part of the existing pattern of uses in the local area,
- (2) had been tightly regulated and conducted responsibly, in accordance with Best Available Techniques ('BAT') so as to mitigate any environmental impact and:
- (3) constituted an ordinary and reasonable user of its site, which did not cause any substantial interference to the claimants.

Alternatively, K argued that A was unable to complain of nuisance by application of the legal defence of prescription.

Decision

Judge Davies stated that there was no scientific evidence before the court that the dust particles, odour or noise were harmful to the human body. The judge stated that A's case was that the operation of K's factory constituted a legal nuisance. The judge emphasised the word 'legal' because a state of affairs which people might describe in general speech as a nuisance, was a different thing from something which was a nuisance, as a matter of law.

The judge then set out the relevant legal principles which were applicable in the instant case. The subject of nuisance was the wrongful interference the claimant's enjoyment of rights over land, the harm being protected

against, being the diminution in the utility and amenity value of the claimant's land, and not the discomfort to the persons who were occupying it.

He went on to state that the first requirement was that the defendant's use of land had caused substantial interference with the ordinary use of the claimant's land. Substantial meant that it exceeded the minimum level of seriousness to justify the court's intervention, which was to be assessed objectively, judged by the standards of an average ordinary person in the claimant's position.

The second key requirement was that even where the defendant's activity substantially interfered with the ordinary use and enjoyment of the claimant's land, it would not give rise to liability if the activity itself was no more than an ordinary use of the defendant's own land. That was what was meant by a reasonable user of the defendant's land. If that user was not an ordinary user, then it was not a defence for the defendant to say that it was using its land reasonably. The judge added that what was an ordinary user was to be judged having regard to the character of the locality.

The judge stated that the protection which was provided by planning laws was not a substitute, or an alternative, for the protection which was provided by the law of nuisance. Planning law could not cut down private law rights. However, the judge added that that was not to say that compliance or otherwise, with planning law was irrelevant. As far as the instant case was concerned, the implementation of planning permission could give rise to a change in the character of a location, but not if it resulted in the creation of a nuisance.

The judge then stated that on the authority of *Barr v Biffa* and *Coventry v Lawrence* (a) environmental regulatory conditions, might in an individual case, provide a starting point as to where the dividing line lay between emissions which did, and did not amount to a nuisance (b) it was open to a defendant to plead and prove compliance with such regulations, if he sought to rely on them as evidence of the reasonableness of his operation.

The locality principle

Judge Davies then addressed the locality principle. He stated that (a) gradual changes, or modest developments over a lengthy time period, which were each compatible with the existing character of the locality

would not amount to a nuisance, and would result in a change in the established pattern of uses of the locality, even if one could say, that looking back and comparing the start and end point that collectively they had resulted in a considerable change in the character of the locality (b) by comparison, intense increases in activity, or radical new developments which resulted in a nuisance, would not be taken as having changed the established pattern of uses of the locality, unless sanctioned in law, either by prescription or by judicial refusal to grant an injunction.

The judge then applied the law to the facts of the instant case. He stated that in 2011 it would not have been possible for local residents to complain about dust, odour and noise emitted from K's factory, or the impact of HGVs and other vehicles visiting the factory, on the simple basis that before 1971 it was farmland, whereas by 2011 it had become a substantial factory, even though the overall change in position in 2011 had happened by a series of incremental events. Instead, they would be required to identify individual developments, or intense increases in activity, within that period, which themselves amounted to a nuisance in legal terms, and about which they could still complain, in order to show that the established pattern of uses had not changed, so as to include these new nuisances.

Applying that approach the judge stated that he needed to consider whether or not each stage, in the expansion of K's activities, over the 40 year period between K's acquisition of the site, and the start of the relevant claim period, did not result in a position which was so significantly different in nature and extent from the position as it stood, immediately before that period of expansion, that it amounted to a nuisance. If it did not, then it should be included in the established pattern of uses in Chirk. If it did, then subject to the defence of prescription, it should not be included.

The judge stated that in considering that question he required to have regard to all relevant factors, including the fact that the expansions were sanctioned by the relevant planning authority, and were subject to regulation by the relevant environmental authorities. Furthermore, no enforcement proceedings had ever been brought on the basis that the permissions or the permits had been seriously or persistently breached.

The judge went on to endorse the view of Lord Carnwath in *Lawrence* to the effect that in determining whether the defendants user of land was

unreasonable, one could consider the relevant planning and other regulatory conditions.

The judge then addressed the potential of liability for isolated incidents. He stated that the interference with the claimant's land required to be substantial to amount to a nuisance. Furthermore, there was no general principle that a substantial interference from an isolated incident could not amount to a nuisance, unless it fell within the principle of *Rylands v Fletcher*. The judge went on to reject the proposition that reasonable user provided a defence. Rather it was the principle of ordinary use which provided a defence. The judge added that even where there had been an ordinary user there would be liability for nuisance, where the defendant had not complied with his obligations to take all reasonable steps to ensure that the nuisance was not kept to a reasonable minimum. He stated that an activity which had been conducted in contravention of planning or environmental controls was unlikely to be reasonable. However, the converse did not follow. The judge added that emissions in breach of a permit did not in themselves amount to a nuisance. There could be cases where despite having taken all viable steps to prevent or minimise a nuisance, the impact of the activities of the operator, nonetheless amounted to a nuisance in law against neighbouring occupiers. If that was the case, then in the absence of a defence of statutory authorisation the law of nuisance provided a residual control mechanism which neighbouring proprietors could use to seek either an injunction, or damages or both.

The judge then summarised the relevant regulatory regime. The relevant operations were subject to control by environmental permits which from 1999, applied the European concept of BAT. The concept of BAT was derived from the Industrial Emissions Directive on Integrated Pollution Prevention and Control (2010/75/EU) ('the Emissions Directive.')

The judge then considered the character and established pattern of uses during the pre-claim period, which commenced in 2011.

(a) The development of Chirk up to 2011

The judge stated that originally Chirk was rural village. Its development was associated with transport links. The local landscape around Chirk remained predominantly pastoral and wooded, with relatively little, large-

scale arable land use in its immediate vicinity. In the late 1960s and early 1970s modern industry came to Chirk in the form of a cocoa bean processing factory and Kronospan's original particle board plant. The judge then gave an account of the development of the site.

(b) Environmental permits

The judge stated that the permit in force immediately before the claim period stated that the site was located in close proximity to residential housing, which gave rise to receptors which were sensitive to emissions to air. K was required under its obligations under BAT, to prevent or where that was not practicable, reduce emissions from the installation in relation to any aspect of the installation which was not regulated by any other condition of the permit.

Character of the location

At the start of the relevant claim period the judge found that K was an established presence in Chirk, and had expanded considerably from its initial 1970 imprint, into by far the most substantial industrial presence in Chirk. By the start of 2000, the established impact on Chirk consisted of localised dust, noise and odour from the site operations and from transport to and from the factory. The nuisance claim required to be assessed on that basis. In short, the character of the locality was neither the archetypical peaceful rural market town on the one hand, nor a busy industrial town on the other. It lay in the mid-point between the two. The judge added that the critical question was whether the extent of the dust odour and noise from the beginning of 2000, to the end of the relevant claim period, within which period the judge was satisfied that there had been no material change, such as to cause a serious and legal nuisance, in the context of what was, by the beginning of 2000, an established character of three relatively significant local factories, but with K by far the biggest of the three which would inevitably lead to a certain level of background dust odour and noise emissions but would not have been expected to have been, and nor were they sufficiently substantial, to have caused a serious and legal nuisance.

The judge concluded (for the reasons which he would give later) that they did not. The judge added that his answer would have been the same even if he had had to make a different decision in relation to the period from the beginning of 2000 to the start of the relevant claim period.

The judge went on to state that he considered the witnesses as perfectly reasonable. He found that A's witnesses were convinced that things were fairly bad most of the time, whereas K's witnesses were of the view that there was really no problem most of the time. He concluded that most of the witnesses sometimes consciously, but more often unconsciously, exaggerated their evidence to support A's case or K's case, respectively. However, the judge was of the opinion that the general picture, as portrayed by K's witnesses, was closer to the true position most of the time, than the general picture as portrayed by A's witnesses.

By way of conclusion, on whether K's activities had caused an actionable nuisance, the judge stated that the first question was whether K's activities had caused substantial interference with the ordinary use of each of A's properties. If so, the second question was whether K's use of its site, over the relevant claim period, was more than an ordinary use of the site. The third question was whether even if K's use of the site was an ordinary use, it also took reasonable steps to keep the nuisance to a reasonable minimum.

As far as the first issue was concerned, the judge held that over the claim period the emission of dust from the plant did not constitute a nuisance in relation to any or all, of the residential areas of Chirk. As far as the emission of noise and odour from the plant was concerned, such emissions did not substantially interfere with the enjoyment of the claimants' properties. The judge considered it of relevance that in relation to both odour and noise, the regulator did not take any enforcement action in respect of them. In conclusion, the judge held that the complaints of dust, odour and noise emissions did not constitute an actionable nuisance over the claim period.

As far as the second issue was concerned, the judge stated that if A had established that K was responsible for substantial interference with the enjoyment of their properties over the relevant claim period, then he would not have been satisfied that K could have relied on the defence of ordinary user. That was so, since that level of interference was not the consequence of a slow steady incremental series of changes over an extended period, which did not individually amount to a change in the ordinary user of the site. Instead there was a marked increase over a relatively short period of time. In short, in this relatively short period a relatively modest operation had increased significantly to a very substantial operation. Therefore, from around 2000 K's activities would have amounted to a nuisance.

As far as the third question was concerned, the judge stated that if there had been substantial interference with A's properties, he would have been satisfied that K had been able to demonstrate that K had taken reasonable steps to ensure that any nuisance was kept to a minimum.

Comment

The court held that the pollution from K's plant had not caused a substantial interference with A's enjoyment of their rights over their land and therefore, did not constitute a nuisance. The harm protected by the law of nuisance was the diminution of the amenity and utility value of the land, and not the comfort of those occupying it. Here, the court followed the decision of the Supreme Court in *Fearn v Trustees of the Tate Gallery* [2024] AC 1 where the court departed from the traditional test of reasonableness to determine if the use of the defendant's land constituted a nuisance, and, in its stead adopted the concept of 'ordinary use' to determine if the use of the defendant's viewing gallery, which was in close proximity to the claimants' houses, constituted a nuisance. *Nicholas v Thomas* [2025] EWHC 752 took the law further forward by deciding that the learning in *Fearn* had wider application and applied to the visual intrusion of the claimants land, as well as to noise. *Andrews*, in turn, takes the law further forward still and decides that the concept of ordinary user is applicable in determining whether other forms of pollution constitute a nuisance.

As far as the relevance of planning permission is concerned *Andrews* follows the Supreme Court case of *Coventry v Lawrence* [2014] UKSC 13 where the court held that whereas planning permission cannot sanction the creation of a nuisance, it may have some relevance. In that respect, the court held that the implementation of planning permission could give rise to a change in character of the locality, but not if it resulted in a nuisance.

Andrews also follows *Lawrence* by deciding that in determining whether K's conduct constituted a nuisance, the court could into account the relevant regulatory regime, including whether the regulator had taken any enforcement action against K, and whether K had taken steps to minimise the nuisance.

By way of conclusion, the extent to which regulatory law impacts on the development of the law of nuisance represents a grey area. Unfortunately,

Coventry did not clarify the law. However, the Scottish courts have not had to address this issue thus far. The author would suggest that planning law and other regulatory controls have no relevance in the development of the law of nuisance, in that the law of nuisance attempts to strike a reasonable balance between conflicting uses of land, whereas statutory regulatory controls exist to protect the general public and the wider environment, from the potential harmful effects of any development. Therefore, any attempt to allow the regulatory regime to shape the development of the law of nuisance only succeeds in complicating the law.

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