Dennis v Head Start Nursery Ltd [2024] EWHC 1248

Background and decision

Dennis concerned an appeal, by way of case stated, against the decision of the District judge who had found the defendants not guilty of statutory nuisance, by creating a noise.

Since the early 1990s the defendants' premises had been used as a nursery for children between the ages of three months and five years. The prosecutors were Dennis and Andrei, who were the landlord and tenant respectively, of property which was situated next door to the nursery. They contended that the noise coming from the nursery amounted to a statutory nuisance.

Under s82 of the Environmental Protection Act 1990 ('EPA') a person aggrieved by a statutory nuisance can apply to a Magistrates Court for an abatement order. Under s79(1) of the EPA noise emitted from premises so as to be prejudicial to health or a nuisance, ranks as a statutory nuisance. In *National Coal Board v Neath BC* [1976] 2 All ER 478 (which was a case brought under the Public Health Act 1936) it was held that a statutory nuisance, coming within the meaning of that Act, must either be a private or public nuisance, as understood by the common law.

Turner J stated that the central question which fell to be determined by the District judge was, therefore, whether the noise from the nursery amounted to a private nuisance *vis a vis* the prosecutor's property, by the application of common law principles. Turner J stated that the law of private nuisance had recently been reviewed by the Supreme Court in *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1. In that case, Lord Leggatt stated that in order to rank as a nuisance, the interference with the claimant's property required to be substantial. The test was objective. What amounted to a material or substantial interference was not to be judged by what the claimant found annoying, but rather by the standards of an ordinary or average person, in the claimant's position. However, 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 the ordinary use of the defendant's own land. Such a rule was underpinned by the principle of 'give and take, live

and let live.' Turner J stated that the rule of 'give and take, live and let live' applied wherever a nuisance resulted from the ordinary use of land.

The judge went on to refer to the House of Lords case of *Southwark LBC v Tanner* [2001] 1 AC 1. In that case, adjoining flats had been built without adequate sound insulation, the result of which was that the tenants could hear literally everything their neighbours were doing. The noise from the neighbours activities had thus caused a substantial interference with the ordinary use and enjoyment of the claimants' flats. However, the House held that this interference was not an actionable nuisance because the neighbours were doing no more than making normal use of their own flats.

Turner J stated that these authorities supported the view that in circumstances where the court took the view that the noise complained of, in any nuisance case, did not amount to a sufficiently high level of interference with the ordinary use of property, then there was no need to go on to consider the common and ordinary use criterion. The assessment of the nature of the locality was pertinent, not to the threshold level of interference but, rather to the 'ordinary use' assessment. The judge added that what was a common and ordinary use of land was to be judged, having regard to the character of the locality.

Turner J then addressed the two substantive questions which the court was required to answer.

In relation to the first question the District Judge had correctly set out the 'threshold test' as an objective test. That was to say, that what amounted to material or substantial interference, was not to be judged by what the claimant found annoying or inconvenient, but by the standards of an ordinary or average person in the claimant's position. The objective nature of the test reflected that fact that the interest protected by the private law of nuisance was the utility of land, and not the bodily security and comfort of the particular individuals occupying it. The District Judge had properly applied that test in finding that the threshold had not been met. The consequence of this was that no further consideration was needed of any other matter in issue. There was, therefore, no need for the District Judge to go on to consider the common and ordinary use of the defendants' premises.

In relation to the second question. Turner J stated that the issue was whether the District Judge was right to find that the prosecutors had created an artificially low acoustically sensitive ambience which was not usual or average. Turner J concluded that the prosecutors were over-sensitive and that the noise in question would not have affected the average person.

Turner J concluded by rejecting the appeal.

Comment

Before an adverse state of affairs can be categorised as a nuisance it must be *plus quam tolerabile* (ie more than can reasonably be endured) in the eyes of the law: *Watt v Jamieson* 1954 SC 56 at 58 (per Lord Cooper). In *Dennis,* the noise in question did not reach a level which would have annoyed a reasonable person. In short, the prosecutors were oversensitive and, therefore, fell foul of the rule that the courts are unwilling to assist the oversensitive: *Heath v Brighton Corporation*:(1908) 24 TLR 414. *Dennis* also illustrates the principle that in order to rank as a statutory nuisance, the impact of the adverse state of affairs on the occupier of the premises affected, requires to be similar to that which ranks as a common law nuisance: *Robb v Dundee City Council* 2002 SC 301; *National Coal Board* (above).

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