11-2015

Lawrence v Fen Tigers: Controversies and clarifications in the law of nuisance

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DOI: https://doi.org/10.2139/ssrn.2695304

Legal Studies Research Paper

2015

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Working Paper Series

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Singapore Management University School of Law Research Paper No. 56/2015

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Introduction

The line between what an owner or occupier is permitted to do in the enjoyment of his land and what his neighbour has to tolerate is a difficult one to draw. The continuing development and urbanization of modern society increases the tensions and challenges as the law seeks to strike a balance between competing interests.

In *Lawrence v Fen Tigers*,[1] the UKSC was confronted with no less than five issues:

- prescription as a defence;
- 'coming to the nuisance' as a defence;
- relevance of the defendant's activity in ascertaining the character of the locality;
- relevance of planning permission in ascertaining the character of the locality; and
- principles in determining if injunction or damages is the appropriate remedy.

The fact that the High Court's decision that there was nuisance was unanimously reversed by the Court of Appeal and finally restored by the Supreme Court itself serves to warn the reader that difficult and controversial issues are involved.

Facts, parties, issues

This case concerns a bungalow near[2] a motorsports stadium and its adjoining motorcross track. The suit, for nuisance, was brought by Ms Lawrence (and her husband) against Mr Coventry (stadium owner from 2008, second defendant), Fen Tigers (the company which operated the motorcross track, first defendant), Motoland (lessee of the motorcross track, third defendant), Terence Waters (joint owner of the motorcross track, fourth defendant)[3] and James Waters (son of Terence Waters and previous owner of stadium, sixth defendant).

In 2008, following complaints from the plaintiffs, the local authority served abatement notices under the Environmental Protection Act 1990[4] on Mr Coventry and Motoland. Protracted negotiations resulted in abatement works being carried out. The works, which reduced but did not eliminate the noise,

[1] [2014] UKSC 13; [2014] 2 WLR 433.

[2] Less than a kilometre away.

[3] The other joint owner, Anthony Morley, was fifth defendant.

[4] In Singapore, the Environmental Protection and Management Act, cap 94A, 2002 Rev Ed.

satisfied[5] the authority but not the plaintiffs. The latter commenced proceedings.

In the first proceeding,[6] the High Court held that there was nuisance for which various defendants (but not the landlords) were responsible and awarded damages and injunctive relief. Mr Coventry and Motoland appealed. The Court of Appeal in *Coventry v Lawrence*[7] reversed the High Court's decision, holding that there was no nuisance.[8] The plaintiffs appealed to the Supreme Court, which had to deal with the five issues mentioned above.

The Supreme Court allowed the appeal. In a nutshell, the court expounded on the law on each of the issues and decided that:

- the defences of prescription[9] and coming to the nuisance[10] did not avail as the elements were not satisfied on the facts;
- the defendant's activity is relevant in determining the character of the locality and so is the presence of planning permission (though to a much lesser degree) and, on the facts, there was nuisance; and
- the trial judge's order of injunction should be restored though the respondents were free to seek damages in lieu.

Prescription

The first issue was whether a defendant landowner could acquire a common law[11] prescription right to carry on an activity which amounts to a nuisance to his neighbour.

The trial judge, Judge Seymour, had held that as a matter of law there was no prescriptive right to emit noise if to do so would otherwise amount to actionable nuisance. He held, further, that in any case the use had to be continuous. In the Court of Appeal, Lewison LJ[12] was of the view that it is possible to obtain such a prescriptive right.

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[5] The council official's view was that, after the attenuation works, the activities do not produce noise which is a nuisance under the Act but might still amount to a private nuisance: at [129], [207].

[6] *Lawrence v Fen Tigers* [2011] EWHC 360, QB, [2011] 4 All ER 1314.

[7] [2012] 1 WLR 2127.

[8] The reason was that where planning permission had the effect of the changing the character of the locality, then whether an activity constituted a nuisance is to be decided against the background of the changed character.

[9] On the facts, the defence did not avail as the respondents failed to establish that their activities created a nuisance over the 20 year period.

[10] On the facts, the appellants used the property for the same purposes as their predecessors, so the defence did not avail.

[11] A prescription right can also be granted by statute, as is common as regards noise caused by air navigation, such as, in Singapore, the Air Navigation Act, cap 6, 1985 Rev Ed.

[12] [2012] 1 WLR 2127 at [88] – [91].

The Supreme Court held that the right to commit what would otherwise be a nuisance by noise is capable of being a prescriptive right. Lord Neuberger, with whom the other law lords agreed,[13] had little difficulty in concluding that on both principle and policy,[14] the right to carry on an activity which results in noise is capable of being an easement.[15] To establish a common law prescription right, a person has to show at least 20 years enjoyment as of right, that is '*nec vi, nec clam, nec precario'*, meaning not by force, nor stealth nor with the licence of the owner.[16]

His lordship acknowledged the three problems suggested in Clerk and Lindsell[17]:

- that the 20 years can only run when the noise amounts to a nuisance;
- the right acquired, that is the level of noise tolerated during the 20 years; and
- how much (if any) more noise should be tolerated.

His lordship's answer to the first two problems is that these were practical problems which the defendant faces as he seeks to present his case; but that is not reason enough to deny the possibility of a prescription right. His answer to the third problem appears to be that the dominant owner cannot emit 'a greater amount'[18] of noise than during the 20 years, although it is not clear how that is to be measured.

Lord Neuberger was also of the view that the 20 years use does not have to be continuous.[19]

'Coming to the nuisance'
Lord Neuberger, with whom the other judges agreed on this point, affirmed the long-established position in clear terms:[20]

> '… where the claimant in nuisance uses her property for essentially the same purposes as that for which it has been used by her predecessors since before the alleged nuisance started…, the defence of coming to the nuisance must fail.'

[13] None of the other judges added anything on this point.
[14] At [34].
[15] See especially [28] and [41].
[16] Per Lord Walker in *R (Lewis) v Redcar and Cleveland Borough Council* [2012] 2 AC 70 at para 20, cited with approval by Lord Neuberger in the instant case at [31].
[17] Clerk & Lindsell on Torts 20th ed (2010) at para 20-85.
[18] At [39].
[19] At [37], noting the view expressed in *Carr v Foster* (1842) 3 QB 581 at 586-588 that an interruption of 7 years might not destroy the claim of prescription.
[20] At [51].

Nuisance, after all, is a property-based tort, and so the right to allege a nuisance should 'run with the land'.[21] His lordship noted, obiter, that it 'may well be' a defence that the claimant came to the nuisance where the claimant changed the use of her land or built on her land.[22]

Lord Neuberger made the interesting comment[23] that perhaps the matter could and should be resolved by treating the defendant's pre-existing activity as part of the character of the neighbourhood.

Relevance of defendants' activities
The Court of Appeal had overturned the High Court's decision on the ground that the judge had wrongly failed to take into account the defendant's activities when considering the character of the locality. On this matter, Lord Neuberger's view was that one starts with the proposition that the defendant's activities are to be taken into account. This position, however, is to be qualified in that:[24]

> '… to the extent that those activities are a nuisance to the claimant, they should be left out of the account when assessing the character of the locality or… notionally stripped out of the locality….'

Thus, to the extent that the defendant's activities cause no nuisance,[25] they should be regarded in the assessment and it would be 'unrealistic, and indeed unfair' to disregard them.[26]

His lordship acknowledged that there may be an appearance of circularity in such an iterative process but felt that such circularity was more apparent than real. It is unclear to the reader how one can escape the circularity of the process.

Further, he argued,[27] even if there were circularity, such an approach was preferable to the two other approaches, namely, ignoring the activity altogether or to take into account the activity without modification. The first approach could be unfair to the defendant whilst the second approach would mean that

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[21] At [52]. He added: 'It would also seem odd if a defendant was no longer liable for a nuisance owing to the fact that the identity of his neighbour had changed, even though the use of his neighbour's property remained unchanged.'
[22] At [58].
[23] At [55].
[24] At [65].
[25] An alternative formulation could be that the defendant's activity, to the extent that it is *indisputably not a nuisance*, should be taken into account in ascertaining the character of the locality.
[26] At [66].
[27] At [73].

the nuisance claim would rarely be successful (and would be unfair to the claimant).

Lord Carnwath[28] analysed the issue differently. In his view, an existing activity can clearly be taken into account if it is 'part of the established pattern of use' and noted that in *Rushmer v Polsue & Alferi*[29] the defendants' activities 'at their previous level' were accepted as part of the established pattern. This distinction between a new activity and an intensified activity is useful – a new activity does not form part of the character of the locality whilst for an intensified activity, the activity at its previous level of intensity, does form part of the character.

It remains to be seen which of the two approaches will find favour with future courts. This writer finds the pragmatism of Lord Carnwath's approach appealing.

Relevance of planning permission

We come now to the subject of planning permission, which Lord Carnwath thought[30] was the most difficult problem raised in the appeal. Lord Neuberger, whose views on the subject were endorsed by Lords Sumption, Mance and Clarke said:[31]

> … it seems wrong in principle that, through the grant of a planning permission, a planning authority should be able to deprive a property-owner of a right to object to what would otherwise be a nuisance, without providing her with compensation…

Hence, the fact of planning permission is 'normally of no assistance'[32] though there will be some occasions where the terms of a planning permission may be of 'some relevance'[33]. In his view:[34]

> ... the existence and terms of the permission are not irrelevant… but in many cases they will be of little, or even no, evidential value….

In similar vein, Lord Sumption thought[35] that planning permission is of 'very limited relevance' and 'may, at best, provide some evidence of the reasonableness' of the use of the land.

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[28] See also Lord Mance's comments at [164] regarding new activities and intensified activities.
[29] [1906] 1 Ch 234.
[30] At [191].
[31] At [90].
[32] At [94].
[33] At [95].
[34] At [96]. He said further (at [89]) that the grant of planning permission removes a bar imposed by planning law but does not mean that the development is lawful.

Lord Carnwath was much more sanguine about planning permission. He began with a survey of the development of planning law and the law of nuisance, where he observed[36] that while planning law promotes the public interest, the law of nuisance protects the rights of individuals, and that they may pull in opposite directions. He then referred to the landmark cases in the field, in particular the *Gillingham Docks* case[37] where Buckley J famously said:

> … planning permission is not a licence to commit nuisance…. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood.

Lord Carnwath then noted that the *Gillingham* proposition was endorsed by Lord Cooke of Thorndon in *Hunter v Canary Wharf*[38] and by the Court of Appeal in *Watson v Croft Promosport*.[39]

After reviewing the authorities, Lord Carnwath concluded that planning permission may be relevant in two ways: it may be evidence of the relative importance of the permitted activity as part of the pattern of uses, and where planning permission includes a detailed framework of conditions governing the use, the framework may provide a 'useful starting point or benchmark' for the court's consideration. In other words, planning permission may indicate that the activity is within the character of the locality, and compliance with the authority's conditions may indicate that the intensity of the activity complained of did not go beyond the acceptable or tolerable level.

It is observed that there is a parallel between using compliance with the planning authority's conditions as a gauge for whether there is nuisance and using industry standard as an indicator of the standard of care in the tort of negligence. Such an approach makes good sense.

Regarding character of locality, his lordship remarked that 'in exceptional cases a planning permission may be the result of a considered policy decision… leading to a *fundamental change in the pattern of uses*, which cannot sensibly be ignored in assessing the character of the area' (emphasis added) and added that planning permission which involve a 'strategic planning decision affected by considerations of public interest'[40] or a 'major development altering the character of the neighbourhood with wide consequential effects'[41] may result in a change of the character of the locality.

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[35] At [156].
[36] At [193] and [194] respectively.
[37] *Gillingham Borough Council v Medway (Chatham) Dock* [1993] QB 343 at p 359.
[38] [1997] AC 655 at p 772E.
[39] [2009]3 All ER 249
[40] *Wheeler v Saunders* [1996] Ch 19 at p 30, per Staughton LJ.
[41] Ibid, at p 35, per Peter Gibson LJ.

Lord Neuberger, however, disliked the concepts of 'strategic planning decision' or 'major development' and thought they were a 'recipe for uncertainty'.[42]

For now, the view that planning permission[43] is of little value in ascertaining the character of the locality holds sway; but the issue is a controversial one. If a planning authority had considered a new activity (especially a large project) very carefully and closely, and after consultation with all the relevant stakeholders, it would be quixotic to ignore the authority's decision to approve the activity.

Perhaps one could merge both approaches into a single proposition that planning permission provides only little evidence of the character of the locality save where there is a strategic planning decision or a major development.

The appropriate remedy – injunction or damages

We come to a very controversial and unsettled area in the law of nuisance.[44] Assuming nuisance is established, should the court award an injunction (which is what most claimants desire) or should it award damages instead (which is what defendants pray for)?

The pre-*Lawrence* legal landscape appears to be as follows. The traditional approach is that, prima facie, an injunction would be granted. However, the court has the discretion to award damages instead of an injunction. For the exercise of this discretion, two different sets of tests have been applied.

In *Shelfer v City of London Electric Lighting*,[45] Smith LJ laid down the following four requirements for an award of damages:

- the injury to the plaintiff's legal rights is small,
- the injury is capable of being estimated in money,
- the injury can be adequately compensated by a small money payment, and
- it would be oppressive to the defendant to grant an injunction.

Clearly, it would not be easy to satisfy all four of the requirements.

In contrast, in *Colls v Home & Colonial Store*,[46] Lord MacNaghten thought *Shelfer* was unsatisfactory and expressed the view, obiter, that a court ought to incline to damages rather than injunction if:

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[42] At [91].

[43] Likewise, where a certificate of lawfulness of existing use or development (or CLEUD) is issued by the planning authority, as was in the instant case.

[44] Lord Clarke, at [171], regarded the remedies issue as the most important aspect of the case.

[45] [1895] 1 Ch 287.

[46] [1904] AC 179 at 193.

- the injury can fairly be compensated by money (even if the sum is substantial), and
- the defendant had acted fairly and 'not in an unneighbourly spirit'.[47]

It is noted that this view relaxes the requirements and even suggests that upon their satisfaction the presumption is that damages is the remedy to award.

Finally, it should be added that, as recently as 2009, the Court of Appeal in *Watson v Croft Promo-Sport*[48] took the position that the public benefit of the defendant's activity is not a sufficient reason for refusing an injunction.[49]

The subject was dealt with at great length by the UKSC, especially by Lord Neuberger in his leading judgment. The rest of the judges, whilst agreeing with Lord Neuberger generally, disagreed on some points and added qualifiers. Lord Carnwath, however, viewed this aspect of the law quite differently from Lord Neuberger. The legal picture which emerges is a maze comprising the following possible principles or propositions:

a) Prima facie, an injunction should be granted (Lord Neuberger[50]);

b) The defendant bears the burden of showing why an injunction should not be given (Lord Neuberger[51]; Lord Clarke[52] preferred to 'reserve the question'), but it is incorrect to say that damages may only be awarded in 'very exceptional circumstances' (Lord Neuberger[53]);

c) The power to award damages instead of an injunction involves a classic exercise of discretion and should be unfettered (Lords Neuberger[54], Clarke[55]);

d) In the exercise of this discretion, courts are guided by *Shelfer*,[56] *Colls* and also public interest, which includes the fact that planning

[47] In contrast, an injunction would be given if the defendant had acted in a 'high-handed' manner, tried to 'steal a march' upon the plaintiff or tried to evade the jurisdiction of the court.
[48] [2009] 3 All ER 249.
[49] However, he accepted, at [51], that public benefit can be taken into account where the damage to the plaintiff is minimal.
[50] At [101], [121].
[51] At [121].
[52] At [170].
[53] At [119].
[54] At [120].
[55] At [170].
[56] His lordship also remarked at [123] that even if not all four of the requirements are satisfied, it is still possible that an injunction may be granted.

permission had been given[57] (Lords Neuberger[58], Sumption[59] and Carnwath[60]);

e) However, the presence of planning permission does not raise a presumption against awarding an injunction (Lords Mance[61], Carnwath[62]);

f) In exercising its discretion, the court should keep an open mind; there should not be any inclination towards either injunction or damages, save that the burden is on the defendant (Lord Neuberger[63], *contra* Lords Sumption and Clarke in (g) below);

g) Damages are ordinarily an adequate remedy for nuisance (Lords Sumption[64] and Clarke[65]; Lord Mance disagreeing[66]; *contra* Lord Neuberger in (f) above);

h) Special importance should attach to the right to enjoy one's home without disturbance, independently of financial considerations (Lords Mance[67] and Carnwath[68]); and

i) The approaches in the measurement of damages include:
- the traditional approach of fall in value,
- loss of amenity (Lords Neuberger[69], Clarke[70]), and
- possibly a share in the defendant's benefits or profits (Lord Clarke[71]; Lords Neuberger and Carnwath expressing reluctance[72]).

The law regarding the appropriate remedy for nuisance is far from settled and the array of views and variations of views canvassed is quite baffling.

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[57] Other factors include fact that defendant's business has to be closed, loss of jobs, resource implications and benefit to the public: [124] – [126].
[58] At [121]-[126].
[59] Obliquely at [158] – [159].
[60] At [245].
[61] At [167].
[62] At [246].
[63] At [122].
[64] At [161].
[65] At [171].
[66] At [168].
[67] At [168].
[68] At [247].
[69] At [128].
[70] At [172].
[71] At [173].
[72] At [131] and [248] respectively. Giving the plaintiff a share of the defendant's benefit is a highly controversial matter: see eg the comments of Lord Carnwath at [248].

Commenting how *Shelfer* is out of date and devised in a time when England was far less crowded and without a system of planning control, Lord Sumption remarked[73] that '[t]he whole jurisprudence in this area will need one day to be reviewed by this court'. Observe also the hesitancy of Lord Clarke,[74] who preferred to leave the law open on many of the sub-issues.

In view of the above complexities and apprehensions, perhaps all that can be said with some confidence about this area of law is:

1) English courts are now less reluctant than before to award damages instead of an injunction;

2) In exercising its discretion, the court applies the tests in *Shelfer* and in *Colls* and also considers the factor of public interest, including the fact that planning permission had been given; and

3) In deciding the measure of damages, the court considers the alternatives of fall in value, loss of amenity and, possibly, a share of the defendant's benefit.

The writer would add that it is surprising that there was no discussion in the UKSC judgment of the option of ordering the defendant to carry out attenuation or ameliorative works, as is common in the statutory nuisance regime.[75] For example, under s 29 of Singapore's Environmental Protection and Management Act,[76] the Director-General of Environmental Protection may, if satisfied that noise is being or is likely to be emitted from any work place, issue a noise control notice. Action required under such a notice include the installation of noise control equipment and the erection of noise barriers.

One would have thought that, in appropriate situations, courts would also make such an order since it facilitates the ideal solution of allowing the defendant to carry on his activity without disturbing the plaintiff's quiet enjoyment of land.[77]

Concluding remarks

[73] At [161].
[74] At [170] – [173].
[75] As is common in the UK Environmental Protection Act framework, which is discussed in some detail by the Court of Appeal in *Coventry v Lawrence* [2012] 1 WLR 2127.
[76] See also s 44 of the Environmental Public Health Act, cap 95, 2002 Rev Ed.
[77] The leading texts, such as *Markesinis & Deakin's Tort Law* (7th ed, 2013) at pp 447 – 452) and *Street on Torts*, ed Witting (14th ed, 2015) at pp 466 – 469, do not suggest that such an order is available.

It has been said that '[t]here is no more impenetrable jungle in the entire law than that which surrounds the word nuisance'.[78] The UKSC decision in *Lawrence v Fen Tigers* discusses several of the captious issues in the law of nuisance. Of particular difficulty and controversy are the relevance of planning permission[79] in deciding whether an activity amounts to a nuisance and whether damages should be awarded instead of an injunction.

With the heightened tensions and increasing competing interests in modern society, the endeavor to protect a home owner's right to quiet enjoyment while respecting his neighbour's right to carry on an activity (whether residential or commercial) which causes some disturbance but which confers benefit to the community has become extremely challenging. The difficulty is accentuated where planning permission had been granted.

England's apex court has yet to agree decisively how this delicate balance is to be achieved. It appears that the law is gravitating to a position where an owner or occupier of land is relegated to a lower level of enjoyment and that toleration of a greater degree of disturbance is but a vicissitude of modern living.

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* The research assistance of Damien Chng is gratefully acknowledged. The writer also benefitted from discussions with Leong Kwong Sin and Nicholas Liu.

[78] WL Prosser and WP Keeton on *Torts* (5th ed, 1984) at p 616.
[79] Where planning permission is involved, perhaps the aggrieved party should seek his remedy in administrative law rather than in the law of torts.