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Landlord's liability for tenant's nuisance: UKSC clarifies the law in Lawrence v Fen Tigers (No. 2)

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The issue of when a landlord is liable for a nuisance caused by his tenant is a difficult one and has received scant judicial attention. The UK Supreme Court decision in *Lawrence v Fen Tigers (No.2)* provides some clarification; but doubts remain.

Landlord's Liability for Tenant's Nuisance: UKSC Clarifies the Law in Lawrence v Fen Tigers (No. 2)

Introduction

Where an occupier of premises creates or causes a nuisance and affects his neighbour's enjoyment of land, the neighbour may sue him under the tort of nuisance. Where the occupier is a tenant, the neighbour may also have recourse to the landlord. This area of law, however, has not been the subject of rigorous judicial analysis and appears to be still lacking in clarity, precision and sophistication.

The position prior to the UKSC decision in *Lawrence and another v Fen Tigers Ltd and others (No. 2)*,[1] (*"Lawrence"*) as discerned by the authors of *Markesinis & Deakin's Tort Law*[2] is that, generally, it is the tenant who is liable and that, as exceptions, the landlord is liable where, *inter alia*:[3]

1. he authorised the nuisance,

2. he let the premises knowing of the nuisance, and

3. he ought to have known of the nuisance before he let the premises.

According to the authors, scenario (2) includes the situation where the nuisance is the "ordinary and necessary consequence" or, even, the "foreseeable" consequence of the permitted act. The ambit of the landlord's liability for the tenant's nuisance, as advanced, is rather broad. After the UKSC decision in *Lawrence*, propositions (2) and (3) are very much in doubt.

Facts and Decision

This case is about a bungalow, which was near 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)[4] 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 on Mr Coventry and Motoland. Terence and James Waters played an active role in negotiating with the authority and in seeking support for the activities at the stadium to continue. The negotiations resulted in abatement works being done. The works, which reduced but did not eliminate the noise, satisfied[5] the authority but not the plaintiffs. The latter commenced proceedings.

In the first proceeding,[6] the High Court held Fen Tigers (the operators) liable for nuisance but dismissed the claim against the landlords as there was no evidence that the landlords had adopted the nuisance. Upon appeal, the Court of Appeal in *Coventry v Lawrence*[7] reversed the High Court's decision, holding that there was no nuisance;[8] consequently, it did not have to consider the landlord's liability. On further appeal, the Supreme Court in *Lawrence v Fen Tigers*[9] decided that there was nuisance on the part of the operators. Consequently, the question of the landlords' liability had to be reconsidered. In *Lawrence*, the Supreme Court dealt specifically with the liability of Terence and James Waters as landlords for the nuisance carried out on the premises.

The UK Supreme Court held[10] that a landlord can be held liable for a tenant's nuisance if there was either authorisation or participation on the part of the landlord; inaction was not sufficient to found liability. The Court was unanimous in deciding that, on the facts there was no authorisation. The majority of the Court (Lord Mance and Lord Carnwath dissenting) also thought there was no participation. Hence, the landlords were both held not liable for the tenant's nuisance.

Reasoning

Lord Neuberger PSC, whose rendition of the law had the endorsement of his brethren, thought the position as stated by Lord Millett in *Southwark London BC v Mills*[11] was correct:[12]

> … "it is not enough for [the landlords] to be aware of the nuisance and take no steps to prevent it". In order to be liable for authorising[13] a nuisance, the landlords "must either participate directly in the commission of the nuisance or … have authorised it by letting the property".

His lordship quoted approvingly the words of Pennyquick VC in *Smith v Scott*[14] that in order to find authorisation, there must be "virtual certainty" or a "very high degree of probability" that the letting will result in a nuisance. Lord Carnwarth preferred to apply the test of "necessary or highly probable" consequence and expressly rejected as "insufficiently rigorous" the yardsticks of "likely" and "foreseeable".

The UKSC was unanimous in its decision that, in the present case, the landlords could not be said to have authorised the nuisance as the proposed uses would not necessarily result in nuisance.

As regards participation, the Court was divided. Lord Neuberger, Lord Clarke and Lord Sumption were of the view that the conduct of the landlords did not amount to participation while the dissenting Judges, Lord Mance and Lord Carnwath, thought it did. The appellants relied on a number of factors to establish participation, including:[15]

1. the landlord's inaction or failure to prevent or reduce the noise;

2. the landlord's action in erecting a wall to keep down the noise as an indication of the landlord authorising the nuisance; and

3. the landlord's taking an active role, when noise abatement notices were issued under the Environmental Protection Act, in negotiating with the authority.

As regards factor (1), Lord Neuberger thought it was clear from *Malzy v Eicholz*[16] that even if the landlord has the power to prevent the nuisance, his inaction or failure does not, on its own, amount to authorisation or participation.

The contention in (2), his lordship thought, was a strange (his lordship used the term "ironic") one to make – that the landlord's attempt to reduce the nuisance supports the argument that he was participating in it.

Factor (3), his lordship acknowledged, had greater force. But Lord Neuberger thought it was natural for a landlord to be involved in such proceedings in order to ensure that his reversionary interest is not adversely affected. His lordship thought the various factors whether taken alone or cumulatively did not point to direct or active participation in the nuisance by the landlord.

In contrast, Lord Mance and Lord Carnwath were certain that there was participation by the landlords. To quote Lord Carnwath, "the involvement of [the landlords] has gone far beyond the ordinary role of a landlord protecting and enforcing his interests under a lease. It has involved active encouragement of the tenants' use and direct participation in the measures and negotiations to enable it to be continued".

Analysis and Comment

Ex facie, the UK Supreme Court has provided neat and ostensibly straightforward concepts and principles of liability. A landlord is liable for his tenant's nuisance if he either authorised the nuisance or participated in the tenant's activity. The landlord's knowledge of the nuisance coupled with his inaction (in not abating the nuisance) are insufficient to

found liability.

For authorisation, there must be inevitability or a high probability of nuisance being a consequence; it is not sufficient that the nuisance was a likely or foreseeable consequence. To be liable for participation, there must be, on the part of the landlord, “active”, “direct”[17] or “close”[18] participation or “involvement”[19] in the activity of the tenant.

Upon closer scrutiny, the writer finds the framework of principles emanating from *Lawrence* regrettably inadequate and lacking the precision and sophistication needed for dealing with the challenges. We will consider the matter under the issues/headings of authorisation, participation and inaction.

Authorisation

The usual meanings of the term “to authorise” are “to give authority” (which is of course circuitous), “to approve” and “to give permission”. It should be noted that, in *Lawrence*, the lawlords were concerned with whether the landlord can be said to have authorised the nuisance and not just the activity.

The problem is that usually, at the time of entering into the tenancy, the landlord does not contemplate (still less approve of) the tenant engaging in activities which may lead to complaints of nuisance. On the contrary, the landlord does not wish his tenant to engage in such activity. Hence, the landlord typically has, among the covenants in the tenancy agreement an undertaking by the tenant not to create or cause any nuisance. This covenant is bolstered by a clause entitling the landlord to terminate the tenancy for a breach of any covenant. It would therefore be very rare to find instances where the landlord has given authority, approval or permission for the commission of a nuisance.

But the UKSC attaches a somewhat different meaning to “authorise”. According to the Court, when a landlord lets out premises in circumstances where nuisance is a consequence which is inevitable, nearly certain or highly probable, he is said to have authorised the nuisance.

A comparison with *American Restatement of the Law of Torts*,[20] which Lord Carnwath referred to in his judgment, is instructive as it reveals the complexity which the exercise of determining the landlord’s liability could or should entail. According to s 837:

> A lessor … is subject to liability … if … (a) at the time of the lease the lessor consents to the activity or knows or has reason to know that it will be carried on, and (b) he then knows or should know that it will necessarily involve or is already causing the nuisance.

The provision is more studied in its analysis of the components or elements of the scheme of liability. It looks at the landlord’s culpability and state of mind as regards the activity and then as regards the nuisance. For the activity, the culpability lies in the landlord’s consent (rather than authorisation) or knowledge (“knows or has reason to know”). As regards the nuisance, the landlord is faulted if he knows or “should know” that the activity will “necessarily involve” or is “already causing” nuisance. (In short, landlord knows of activity and knows it causes or amounts to nuisance.)

The *Lawrence* schematic does not address the landlord’s state of mind. It looks, instead, objectively (it would appear) at the likelihood of resulting nuisance, pegging the threshold at the very high level, using terms such as “inevitability”, “virtual/near certainty”, “necessary consequence” and “high probability”.
A more nuanced and calibrated approach, addressing the landlord’s state of mind as regards the activity and as regards the likelihood of nuisance respectively, is desirable for providing the sophistication necessary to discern cases in which liability should be imposed and those in which it should not. It would, of course, be necessary to consider carefully the appropriate threshold of knowledge that should be required.

It may be wondered if the s 837 requirements are more difficult to satisfy than the *Lawrence* “authorisation” requirements. The answer is both yes and no. It is more difficult as there is a dual requirement – knowledge of activity and knowledge that the activity would cause nuisance. It is easier in that the threshold of knowledge is low – it includes “has reason to know” and “should know” respectively.

Participation

As regards liability on the basis of participation, s 834 of the Restatement says:

… [o]ne is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on.

The difference is that the section explains that participation must be to a “substantial extent” whilst the law lords in *Lawrence* chose to speak of “direct”, “active” and “close” participation.

What is significant is that, so far as participation is concerned, both approaches do not discuss the landlord’s state of mind. The reason seems to be that where the landlord is himself the actor or one of the actors, he is liable for causing a nuisance even if he does not have the requisite knowledge; nuisance is, after all, a “strict liability” tort.

As we consider the actual decision in *Lawrence*, we come to a very difficult question – was there participation by the landlords or not? Are the majority or the minority correct? This is a very controversial matter, and the fact that this is a 3-2 decision warns us as much.[21]

The majority viewed the landlords’ conduct as no more than protecting their interests. The involvement in responding to abatement notices is driven by the landlord’s legitimate concern to establish or affect the establishment of what activities are permitted and what are not permitted on land (of which he has the reversionary interest). Put another way, such proceedings aim at drawing the line between nuisance and reasonable interference which has to be tolerated. The landlord supports the activity and, understandably, is concerned to see that the line is fairly and reasonably (from his perspective, that is) drawn. From this angle, it should not be said that this involvement amounts to a participation in the nuisance.

But the minority view is equally compelling. In siding with the tenant when there have been complaints of a nuisance, it does appear that there is a high degree of participation and, perhaps even, authoriasation.[22] [And the minority Judges were very certain that the landlords had crossed the line. Lord Carnwath’s words bear repeating here:

… the involvement of Terence and James Walters has gone **far beyond** the ordinary role of a landlord protecting and enforcing his interests under a lease. It has involved active encouragement of the tenant’s use and direct participation in the measures and negotiations to enable it to be continued (emphasis added).

On balance, the writer is inclined to agree with the minority that, on the facts, the landlords should be liable.[23] But enunciating or articulating the precise reason or justification for such a view is far from easy. Perhaps the answer lies in the negligence framework which we now consider.

Inaction as Negligence?

Lord Neuberger thought the law relating to a landlord’s liability for his tenant’s nuisance was “tolerably clear” and that, apart from authorisation and participation, the landlord bore no liability. There was no liability on account of the landlord’s awareness of the nuisance and his failure to abate and, to this end he cited with approval *Southwark London BC v Mills*,[24] *Smith v Scott*[25] and *Maltzy v Eichholz*[26].

It may puzzle the reader why the landlord could not be held liable under the tort of negligence. In this regard, *Smith v Scott* is particularly instructive as Pennyquick VC explained why, notwithstanding developments in the tort of negligence, it should still be the law that the landlord should not be liable for his inaction. It may be recalled that in *Dorset Yacht v Home Office*,[27] Lord Reid famously remarked that: “… the time has come when we can and should say that [the Donoghue principle] ought to apply unless there is some justification or valid explanation for its exclusion”. In the lines that followed, Lord Reid gave examples for exclusion and these included where “there is a long chapter of the law determining in what circumstances owners of land can and in what circumstances they may not use their proprietary rights so as to injure their neighbours”. In view of what Lord Reid had said, Pennyquick VC was of the view[28] that “the law cannot … now be reshaped by a reference to the duty of care”. To do so, he warned, would have “far reaching implications” for business and for society.

To the suggestion that the law has developed since *Malzy*, Lord Neuberger responded that the Court was not referred to any “social, economic, technological or moral developments” in the past century to justify a change in law. Of course the Court, if it were so minded, could have made its own observations as to the relevant developments.

Time for Tort of Negligent Failure to Abate?

It will be noted that the legal framework of a landlord's liability for his tenant's nuisance has to deal with two scenarios or time frames: (i) liability of landlord in granting the tenancy; and (ii) liability of the landlord in permitting the tenancy to continue after learning of an alleged nuisance. The law appears to focus on (i) and brush aside (ii) by saying that as long as the landlord did not authorise or participate, he is not liable even after he knows of the complaint.

There is a feeling of illogicality and unreality here. Letting out with high probability of nuisance amounts to authorisation and makes the landlord liable; yet continuing to let out after having actual knowledge of an alleged nuisance attracts no liability.

The issue is not a simple one and leads to a more basic and fundamental question: what is the proper and acceptable response of a landlord when he learns that the neighbour has complained of a nuisance by the tenant? Is he required to investigate the matter? And, if having investigated, what (else) should he do? Can he, without impunity, leave matters as they are or must he take steps to abate the alleged nuisance?

Is the reply, which *Lawrence* appears to afford, that so long as he does not participate in the activity, his inaction does not damn or implicate him the correct one? Or is it time to refine the law by applying the tort of negligence?

Let us consider the factual matrix. The premises are the landlord's and so is the tenant. As mentioned above, the tenancy agreement usually contains a covenant by the tenant not to cause nuisance to others and gives the right to terminate the tenancy if there is a breach of this covenant. When informed by the neighbour, the landlord has actual knowledge of the activity and the allegation of nuisance. Against such factual dynamics, can it be that the landlord absolutely has no obligation, responsibility or liability to take steps to abate the nuisance?

In support of the position of no liability for inaction, it may be argued that the activity and its attendant liability belong to the tenant and that provides sufficient recourse to the complainant. It may further be argued that so far as the landlord is concerned, there is an omission rather than an act. It may also be thought that in the scale of harm, interference of enjoyment of land does not rank high when compared to injury to person or damage to property.

As a retort, it may be argued that while the first recourse may be against the tenant, it is desirable to provide an alternative and additional recourse. As for seriousness of harm, nuisance can cause substantial disturbance and distress and some legal protection is necessary.

Further, since the landlord has, by virtue of the tenancy agreement, a right against and a power over the tenant, does not that right and power carry some responsibility?[29] Should not a landlord who has rented out his premises have a duty to act responsibly and reasonably vis-à-vis his neighbours? The position of the landlord having no liability at all does not accord with expectations and realities of societal interaction.

Of course what is appropriate and reasonable as a landlord's response would depend on the circumstances. Nuisance is the unreasonable interference with the neighbour's enjoyment of his land. When a complaint is made, there is a range of possibilities (adopting three for simplicity sake) that there was:

1. clearly a nuisance;

2. borderline nuisance; and

3. clearly no nuisance.

Taking a commonsensical approach, if the tenant's activity is obviously a nuisance, one would expect the landlord to take steps to abate the nuisance or procure his tenant to do so. In extreme cases, as where the tenant refuses to co-operate, one might even expect the landlord to terminate the tenancy.

Conversely, where the activity clearly does not amount to a nuisance, then the landlord would be justified in aligning with the tenant and not take any abatement measures; perhaps he might even assure the tenant that his activity is within the bounds of reasonable use of land.

Where the complaint borders on nuisance, what the acceptable response is more debatable. An instinctive answer is that the landlord can “sit on the fence”, so to speak. But it is possible, depending on the further facts of the case, that it may be reasonable for the landlord to take some steps in abatement or, conversely, to side with the tenant.

The appropriate response is determined by considering what is reasonable to impose on the landlord and what is fair and necessary for the protection of the complainant’s interests. This involves a balancing act, which, after all, is what the law of nuisance seeks to do.

One reason for the Courts’ reluctance to impose liability on the landlord is the fear of “far reaching implications”. This fear is overstated as the tort of negligence is a well-developed and robust framework and is fully able to discern when a landlord should be liable and when he should not. For one thing, the duty of care analysis has all its refinements of foreseeability, proximity and policy[30] which enable a Court, if it is so inclined, to find that there is no duty. For another, in terms of standard of care or scope of duty, the framework is sophisticated and can calibrate the appropriate response according to the factual matrix.

So if we apply the negligence framework, the landlord is liable if he owes the neighbour a duty of care and, in his conduct or response, fails to take reasonable steps towards abating the nuisance. If the landlord does not owe a duty or if he does what is reasonable in the circumstances, he is not liable for his tenant’s nuisance.

Other Legal Angles

Apart from the legal concepts discussed above, there are two other approaches or ideas relevant to the analysis of the landlord’s liability. The first is joint liability – where two (or more) persons cause the same damage, they may be liable as joint tortfeasors. According to Markesinis & Deakin,[31] these situations include cases of “express authorisation or instigation” and principal and agent.

The other is “secondary civil liability”, which according to the same learned authors,[32] means liability as an “accessory” to the commission of a civil wrong, much like in criminal law. A landlord may be said to be an accessory to the tenant’s tort if he procured the commission of the tort or assisted in its commission.

Perhaps future Courts may consider these concepts as they seek to reshape the framework of the landlord’s liability.

Concluding Thoughts

At first glance, the *Lawrence* decision appears to provide the clarification much needed in this area of law. Close scrutiny, however, reveals the inadequacies of the legal jurisprudence confirmed by the decision. The meaning and ambit of authorisation are strained and oversimplified and compare unfavourably with the formulation and articulation of the law in the Restatement.

As regards participation, there is serious doubt as to whether a landlord’s involvement in challenging abatement proceedings amounts to such participation. Perhaps the idea of accessory liability would be helpful here.

The critical question is whether it is time to revisit the position taken by English courts – that a landlord who is aware of nuisance being committed by his tenant but does nothing to abate it is not liable for the nuisance. The writer suggests that this blanket stance is simplistic and untenable, and does not accord with the expectations and the realities of tenancies.

It is not an undue imposition to require a landlord to act responsibly and reasonably vis-à-vis his tenant’s activities. Nor should one fear the “far reaching implications” of such a move as the robust and well-developed tort of negligence framework is more than able to deal with the challenges at hand.

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* In writing this case comment, I benefitted from discussions with Leong Kwong Sin, Nicholas Liu and Sum Yee Loong respectively.

Notes

1 [2014] UHSC 46, [2014] 3 WLR 555.

2 Deakin, Johnston & Markesinis (7th ed, OUP, 2013), p 443.

3 The other situations are where he is under a duty to repair and where he has an express or implied right to enter and inspect the premises.

4 The other joint owner, Anthony Morley, was fifth defendant.

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 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 [2013] UKSC 13; [2014] UKSC 13, [2014] AC 822. This decision is important as the Court dealt extensively with many pertinent issues in nuisance law, namely: (i) defence of prescription; (ii) defence of coming to the nuisance; (iii) relevance of defendant's activity in establishing character of locality; (iv) relevance of planning permission to a claim in nuisance; and (v) availability of damages rather than an injunction.

10 Subsequent to this, the UKSC in *Lawrence v Fen Tigers* (No. 3) [2015] UKSC 50, [2015] 1 WLR 3485 dealt with the issue of costs.

11 [2001] 1 AC 1.

12 At [11].

13 Ideally, his lordship should have said "in order to be liable for a nuisance" instead of "in order to be liable for authorising a nuisance".

14 [1973] Ch 314.

15 The landlords also supported, publicised and promoted the racing activities.

16 [1916] 2 KB 308.

17 At [18], per Lord Neuberger.

18 At [63], per Lord Carnwath.

19 At [59], [63], per Lord Carnwath.

20 *American Law Institute, Restatement of the Law, Torts*, 2d (1979).

21 The writer detects some hesitancy in Lord Neuberger's judgment, esp at [30]: "I acknowledge that it is, at least in principle, possible that the five points … could, when taken together, justify that conclusion [of participation]".

22 The concept of ratification comes to mind here.

23 Note also that Terence Waters, the fourth defendant, was involved in carrying out the abatement works.

24 [2001] 1 AC 1.

25 [1973] Ch 314.

26 [1916] 2 KB 308, CA. Lord Cozens-Hardy MR remarked, at p 316, that it would be "an extraordinary position" if the landlord could be rendered liable by his inaction.

27 [1970] AC 1004 at 1026.

28 He began by saying: 'If this were virgin territory it might be argued that a landowner owes his a duty of care to his neighbours when selecting the person to whom he will let as a tenant …"

29 It is observed that Lord Neuberger, at [16]-[17], doubted the legal significance, especially on the facts of the case, of the presence or absence of a covenant not to cause nuisance. In this writer's view, the matter requires further consideration.

30 The English Courts also use the alternative concept or expression "fair, just and reasonable": see eg *Caparo v Dickman* [1990] 2 AC 605 at 617-618, per Lord Bridge.

31 At p 880.

32 At pp 887-888.