

## Lawrence v Fen Tigers: where now for nuisance?

The recent decision of the Supreme Court in *Lawrence v Fen Tigers*<sup>1</sup> is significant, not least for the fact that it is one of few recent decisions of the highest court in relation to the tort of nuisance. In addition to giving general guidance on the relationship between nuisance and planning and with regards to the appropriate remedy in nuisance cases, it discusses the potential for an easement to make noise.

In many respects the decision can be said to be helpful and welcome. The clarification of the role of planning permission within nuisance actions is extremely useful. There are some questions raised by the decision however, and the indication that the judges would be willing to see a greater role for damages within nuisance is both significant, and from a property law perspective at least, potentially problematic. What the decision does not tell us however, despite the clear acknowledgment from the judiciary that the appeal raised the issue, is what the role of nuisance is and ought to be in an era of heavy regulatory control on the use of land.

### Facts

The claimant's house, in a rural location in Suffolk, was within approximately half a mile of a stadium at which there were regular motor races. The levels of noise emitted during the races were high - and the claimants brought an action in nuisance against the defendants. The defendants argued that the planning permission which they had been granted permitting such racing prevented a successful nuisance claim, as well as arguing that the longevity of their actions prevented C from bringing a claim at this point (either due to the acquisition of an easement by prescription, or because long user meant that the race track now formed part of the character of the locality).

### Decision

The decision of the court can be divided into three key sections, albeit that not all members of the court agree on all issues. Firstly, the court was required to decide whether the claimants had acquired an easement to make noise. Secondly, the court was then required to assess whether, if no such easement had been acquired, the actions of the defendants constituted a nuisance to which they had no relevant defence. In order to answer this question the court needed to assess whether it could be argued that either the claimants having "come to" the nuisance, or the existence of planning permission in favour of the speedway track, could prevent a successful action in nuisance. Finally, if the court concluded both that there was no easement, and that there was a good claim in nuisance, they had to decide the appropriate remedy to grant.

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<sup>1</sup> [2014] UKSC 13, [2014] 2 WLR 433.

On the first question the court concluded, albeit *obiter*, that it was possible to have an easement to make noise.<sup>2</sup> Lord Neuberger conceptualised the easement of noise as an easement to transmit sound waves across another's land. He acknowledged that an easement of noise is unusual, not least because of the high number of potential servient tenements.<sup>3</sup> His Lordship also acknowledged that this easement had the potential to be extremely vague.<sup>4</sup> Nevertheless, these issues were not seen to be a barrier to the right being capable of being an easement in theory. It is no surprise therefore that the court also concluded that it could be acquired by prescription.<sup>5</sup> On the easement point therefore, although the reasoning of the court is *obiter* since they concluded on the facts that no such easement had in fact been acquired,<sup>6</sup> the possibility was accepted.<sup>7</sup>

The court also concluded that the action constituted a nuisance, and that there was no valid defence upon which the defendant could rely. The first step in reaching this conclusion was to confirm that, as per Lords Neuberger and Carnwath, the test in nuisance is one of reasonable use, where "reasonable" is judged objectively, in the context of the character of the particular locality concerned.<sup>8</sup> The court then went on to discuss the question of the claimant's coming to a nuisance, confirming the long-standing line of lower authority case-law holding that there is no defence in the claimant "coming to" a nuisance.<sup>9</sup> Per Lord Neuberger, "where the claimant in nuisance uses her property for essentially the same purpose as that for which it has been used by her predecessors since before the alleged nuisance started... defence of coming to the nuisance must fail".<sup>10</sup> The reasoning behind this conclusion is convincing. It makes little sense to conceive of nuisance as the property tort, but restrict action on a nuisance to the "first" owner to experience the problem.<sup>11</sup> "The right to allege a nuisance should, as it were, run with the land".<sup>12</sup> Thus far the conclusions reached by the court are uncontroversial.

From this point the reasoning of the court becomes more interesting. Leaving to one side for the moment the *obiter* comments relating to the possibility of a defence based on the claimant's change of the use of their land,<sup>13</sup> the next question related to the relevance of both the defendant's on-going activity,

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<sup>2</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [33].

<sup>3</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [33].

<sup>4</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [33].

<sup>5</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [37].

<sup>6</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [143] and [145].

<sup>7</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [41].

<sup>8</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [3], [5] and [179].

<sup>9</sup> *Sturges v Bridgman* 11 Ch D 852, *Miller v Jackson* [1977] QB 966.

<sup>10</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [51].

<sup>11</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [52].

<sup>12</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [52].

<sup>13</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [53] – [58].

and any planning permission, to the character of the locality. On the first point it was held that the defendant cannot rely on the very activity which it is alleged constitutes the nuisance as a defining feature of the character of the locality.<sup>14</sup> To do so would mean that virtually no action could ever constitute a nuisance.<sup>15</sup> On the second, the court held that planning permission for the act constitutive of the nuisance is not a defence to a nuisance action.<sup>16</sup> Similarly, the fact of the planning permission for that action cannot change the character of the locality so that the action becomes acceptable.<sup>17</sup> This, the court concluded, will be the case even where the planning permission constitutes a major or strategic development in an area.<sup>18</sup> This point reverses some earlier case-law which had suggested that a major or strategic plan in an area would change the character of that locality so that any nuisance which arose as part of that change would not be actionable.<sup>19</sup>

Finally, the court moved onto the question of remedies and held that although *prima facie* the remedy for nuisance is an injunction,<sup>20</sup> there may be circumstances where damages are more appropriate.<sup>21</sup> Their lordships indicated, essentially, that lower courts should not be afraid to give damages in lieu of an injunction, although, as their lordships acknowledge, they did not agree completely on what the right approach should be.<sup>22</sup> The considerations that they indicated might be taken into account included public interest in the activity carried on by the defendant, both in terms of the viability of that business, and in terms of the public enjoyment of the activity, as well as the interests of people affected by the nuisance other than the claimant.<sup>23</sup> Discretion as to remedy is however, as the court highlighted, unfettered.<sup>24</sup>

## Comment

There is much to be welcomed in this decision. The conclusion that it is possible to have an easement to make noise and the confirmation that planning permission cannot be a defence in relation to nuisance are, in this

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<sup>14</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [65].

<sup>15</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [73].

<sup>16</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [89] – [90], [94] and [156].

<sup>17</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [82].

<sup>18</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [91]. Lord Carnwath disagrees on this point, [223].

<sup>19</sup> *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343, *Wheeler v JJ Saunders Ltd* [1996] Ch 19, *Watson v Croft Promosport Ltd* [2009] 3 All ER 249.

<sup>20</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [121] although see the comments of Lord Sumption at [159] – [160] and Lord Clarke at [170].

<sup>21</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [126], [157], [167], [171], [239] although note the comments of Lord Mance at [168].

<sup>22</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [132], [161], [168], [169] – [171] and [245].

<sup>23</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [124].

<sup>24</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [120] – [121], [152] and [170].

author's view, both correct. There are however some comments which require further exploration. Firstly, and briefly, the reasoning of Lord Neuberger relating to the potential right to "make a noise" requires a small amount of unpacking, and he leaves open some interesting questions in his discussion of this issue. Secondly, the possibility of using a change in the claimant's use of their land as a defence to nuisance is a potentially significant development. Thirdly, there is still some ambiguity in the relationship between planning permission and nuisance even if it is now clear that planning permission itself will not prevent liability in nuisance, even in relation to so-called 'strategic' development. Fourthly, and perhaps most importantly, the shift from injunction to damages is highly significant for what we consider to be the nature of the tort of nuisance, and the relationship that it marshals between the holders of rights in land.

### Easement of noise.

The first issue tackled by the court is that of the possibility of an easement of noise. The problems that Lord Neuberger identified in relation to an easement of noise, i.e. that the right is potentially vague and that many neighbours would be able to hear the noise (thereby resulting in multiple servient tenements),<sup>25</sup> can be relatively easily overcome in theory. As Lord Neuberger highlights, the easement can be treated simply as the passing of sound waves over the servient land.<sup>26</sup> If imposing constraints on such a right proves difficult in practice (due to uncertainty over permitted levels or time of use), the courts are likely to develop an approach which can impose uncertainty onto what could potentially be a vague right.<sup>27</sup>

The most significant aspect of his Lordship's reasoning in relation to easements of noise is the suggestion that if this were not an easement, but some other kind of right, it might nevertheless be capable of being granted by deed.<sup>28</sup> He states that: "I do not think that it strictly matters whether the right to make a noise which would otherwise be a nuisance can be an easement or not".<sup>29</sup> He does conclude however that it is capable of being an easement. He then proceeds:

Subject to questions of notice and registration the benefit and burden of an easement run with the land, and, therefore if a right to emit noise which would otherwise be a nuisance is an easement, it would bind successors of the grantor, whereas it is a little hard to see how that would be so if the right were not an easement.<sup>30</sup>

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<sup>25</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [33].

<sup>26</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [33].

<sup>27</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [33].

<sup>28</sup> He bases this conclusion on *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634.

<sup>29</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [32].

<sup>30</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [34].

These comments are, to say the least, a little opaque. If this right were not to be an easement, what could it be? The only options are for a licence to have been implied due to the long-running course of conduct, or perhaps an equity arising through estoppel. Given the conceptual and practical differences between these different rights, it is difficult to see that the distinction does not matter. Nevertheless, in principle, it does seem correct to conclude that this right is capable of being an easement.<sup>31</sup> The reasoning of the court that the passage of sound waves, akin to the passage of water or air through a channel, or light in relation to easements of light, a crossing of defined servient land to a definable extent, is convincing. It makes sense that if something as intangible as air can be an easement, so too can noise waves.

### Change of use by the claimant

In discussing the 'defence' based on the claimant's coming to the nuisance, Lord Neuberger suggests that it might be possible to rely on the claimant's change of their own use of land as a defence to nuisance.<sup>32</sup> Thus, an action which was not a nuisance, but which became so following the claimant's action, might not attract liability.<sup>33</sup> Partly this can be seen simply as a question of locality – if the defendant's activities were lawful then they can be considered to be part of the character of the locality such that they are reasonable in that area.<sup>34</sup> Partly also, such a defence can be seen as part of the process of "give and take" that their Lordships refer to.<sup>35</sup> Neither the claimant nor the defendant can be allowed, through their actions, to ossify the use to which land can be put. Similarly, neither party should be able to demand a change in their neighbour's existing use simply because they have a new scheme that they themselves would like to put into place. Just as the defendant cannot unilaterally "force" the claimant to change his use of land by, for example, increasing the levels of noise he emits, nor too can the claimant force the defendant to change his use of land by becoming unusually sensitive to noise through altering the activities he carries out on his own land.

In practical terms however this defence (although strictly speaking 'defence' may be the wrong way to conceptualise the role that change of use might play here, being more a negation of liability than a defence as such) may be complex to administer. Small changes in the defendant's use of their land may combine with small changes in the claimant's use to result in an intolerable situation. Which of the two should win out in these circumstances may be difficult to determine. Similarly, just as a defendant's change of use may have gone through the planning process, so too the claimant's. This will raise the

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<sup>31</sup> See also M Dixon, 'The sound of silence' [2014] Conv 83.

<sup>32</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [53].

<sup>33</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [53].

<sup>34</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [55].

<sup>35</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [5], [55] and [179] relying on Lord Goff in *Cambridge Water* [1994] 2 AC 264, 299.

question as to whether the fact of C's planning permission, which will have taken into account D's interest in free use of his land, amongst many other considerations, will impact upon the role that C's change of use plays in a nuisance action. This is not to say that this defence cannot be sensibly and usefully integrated into the boundaries of the tort, but simply that this process may prove practically problematic.

Furthermore, if such a defence is developed, there will need to be some consideration as to precisely what role it is to play. As suggested above, it is not clear that this is indeed a defence. Rather, if there is no breach of the reasonable user principle due to adverse affects coming about through a change in C's, rather than D's actions, then there is no nuisance at all. The language of describing this as a defence, rather than a negation of liability in that it means the '*actus reus*' of nuisance is never committed, is to this extent misleading. If the potential for a change of use of the claimant's land is seized upon by a later court, a precise understanding as to how this operates in theoretical terms would also be required.

### The relationship between planning and nuisance

Linked to questions of change of use therefore, is the relationship, fractious and contradictory as it can appear, between planning and nuisance.<sup>36</sup> The court highlights three features of the relationship between planning and nuisance. Firstly, it discusses the precise relevance of a planning permission to a nuisance action in terms of the defendant using his own planning permission as a defence to a nuisance action. Unsurprisingly, they conclude that he cannot do so.<sup>37</sup> A public regulatory decision of this nature cannot simply rob a neighbouring land owner of his property rights – per Lord Sumption: “planning powers do not exist to enforce or override private rights in respect of land use”.<sup>38</sup> Secondly, they discuss the relevance of planning permission to the character of the locality in general and acknowledge as such that a planning decision can fundamentally alter the nature of a place.<sup>39</sup> However, although the planning decision as a whole can be taken into account, those parts of the permission that constitute the permission to commit a nuisance must be ignored.<sup>40</sup> Thirdly, planning permission is seen as relevant to the question of the appropriate remedy, in that the courts may be more likely to grant damages in lieu of an injunction where the defendant has planning permission for his activities.<sup>41</sup>

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<sup>36</sup> M Lee, 'Tort law and regulation: planning and nuisance' [2011] JPL 986.

<sup>37</sup> In other contexts it is clear that planning permission cannot in itself override private rights. In relation to freehold covenants, it is clear that planning permission does not affect the validity of the covenant unless the developer is able to discharge the covenant through the powers of section 84 LPA 1925.

<sup>38</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [156].

<sup>39</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [82].

<sup>40</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [89] – [94].

<sup>41</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [125].

All of these aspects of the decision make good sense, and indeed show a willingness to be pragmatic about the impact that public interest decisions have on private rights. Planning permission may also be tangentially relevant also as evidence as to what constitutes reasonable behaviour. According to Lord Sumption, a planning decision may “provide some evidence of the reasonableness of the particular use of the land in question”.<sup>42</sup> What is less clear from the approach of the court however is exactly what they perceive to be the conceptual relationship between the two. This is discussed further below, but it seems clear that the courts have reached a sensible, practical solution to a difficult problem of legal policy, but ultimately without grasping the nature of that problem fully, they leave open the door for future problems in the interaction between private and regulatory law.

### The appropriate remedy

In indicating that in future cases lower courts should be willing to grant an award of damages in lieu of an injunction, the Supreme Court is setting in place a course of action which might fundamentally change how we conceive of nuisance and its relationship with property rights. Admittedly, the court still highlights that the injunction should *prima facie* be the primary remedy,<sup>43</sup> but it is clear from the tone and extended discussion of the court that damages should always be considered as an option.<sup>44</sup> This would require that Smith LJ’s “four-stage test” from *Shelfer*<sup>45</sup> now be considered as out of date, and relevant only, if at all, as a general guide to assist in the application of an unfettered discretion. The strong presumption in favour of injunctions that *Shelfer* introduces should no longer be considered good law, even if in formal terms the decision is not overruled.

By moving from injunction to damages, the court is recasting the role that nuisance plays in managing the relationship between those with rights in neighbouring land. It is both tempting and trite to argue that bad neighbours will now be able to buy their way out of breaching property rights.<sup>46</sup> Undoubtedly, in a few cases, this would be the case and would also be the way that the defendant thought about their actions. A more nuanced view

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<sup>42</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [156].

<sup>43</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [121] although see the comments of Lord Sumption at [159] - [160] and Lord Clarke at [170].

<sup>44</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [126], [157], [167], [171], [239] although note the comments of Lord Mance at [168].

<sup>45</sup> “(1) If the injury to the plaintiff’s legal rights is small, (2) And is one which is capable of being estimated in money, (3) And is one which can be adequately compensated by a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction: then damages in substitution for an H injunction may be given.” per AL Smith LJ, *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, p. 322-333.

<sup>46</sup> See the concerns expressed by Lord Mance, *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [168].

however acknowledges the changing role of nuisance that the shift from injunction to damages reflects. Control of land use has, in recent years, shifted from the private to the public sphere.<sup>47</sup> This does not mean however that private law does not have a critical role to play,<sup>48</sup> not least because of the resources and interest of a private landowner in pursuing relatively minor breaches when compared with a state regulator who, under time and financial constraints, is likely to tackle the worst, first.<sup>49</sup>

More than this however, nuisance is also what polices the interaction between property rights.<sup>50</sup> For example, freehold rights in land are, theoretically, unlimited in terms of use, abuse and destruction of features on that land. Of course in practice this is limited by environmental and planning controls, but in private law terms (if such a separation is possible), the right can be considered unlimited. But, critically, it can only be unlimited in so far as it comes up against the right of a neighbour who too has unlimited use of his land. Nuisance stands on the boundary between the two estates in land and regulates the extent to which – through the idea of give and take<sup>51</sup> – one person can inconvenience another.

The move to damages as opposed to injunction alters this, and it does so in two key ways. Firstly, it alters the ability of a person with rights in land to fix in stone their ability to use their land in a particular way. Thus if a claimant has been using their land for many years for a particular purpose, and a defendant's actions makes that intolerable or impossible, then, when an injunction is issued preventing D's actions, C can carry on as before. If damages are seen as the appropriate remedy, C cannot do so. The balance of "give and take" has been permanently altered in D's favour. The payment of money does not necessarily redress the new imbalance that has arisen. Secondly, as recognised by Lord Neuberger, damages rather than an injunction mean that, in effect, the court has "sanctioned" D's use of his land (even if they do not render it lawful).<sup>52</sup> This sanctioning has a permanent effect on the rights that D has in his land – giving him more rights, in effect, than his neighbour. This is particularly the case if his nuisance action is then considered to form part of the locality of the neighbourhood.<sup>53</sup>

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<sup>47</sup> P Bishop and V Jenkins, 'Planning and nuisance: revisiting the balance of public and private interests in land-use development' (2011) 23 JEL 285, 286.

<sup>48</sup> M Dixon, 'The sound of silence' [2014] Conv 83 and M Lee, 'Nuisance and regulation in the Court of Appeal' [2013] JPL 277, 283.

<sup>49</sup> J Steele, 'Private law and the environment: nuisance in context' (1995) 15 Legal Studies 236, 241.

<sup>50</sup> E Lees, *forthcoming* Environmental Offences: Remediating Interpretive Uncertainty (Hart Publishing). See also J Penner, "Nuisance, the Morality of Neighbourliness, and Environmental Protection" in J Lowry and R Edmunds, *Environmental Protection and the Common Law* (Hart, Oxford 2000).

<sup>51</sup> *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299, *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [5] and [179].

<sup>52</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [69].

<sup>53</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [69].



If D carries on a very noisy activity on his land, which is acknowledged to be a nuisance, and remedied by an injunction, if D were to carry on with this, another neighbour could also claim in nuisance if they were affected by his actions. If however the court sanctions D's actions and his act now becomes part of the character of the locality – or as Lord Neuberger expresses it, the “pattern of uses” within the locality<sup>54</sup> then a subsequent claimant would not be able to complain. Thus one claimant's failure to obtain an injunction in a nuisance action would fundamentally impact upon a subsequent, different claimant's ability to bring a successful nuisance action at all.<sup>55</sup> The bad defendant, in these cases, can then not only buy his way out of breaching one claimant's property rights through the payment of damages, but can in fact buy his way out of breaching all of his neighbour's rights. And he achieves this by paying only one of them. This is certainly an outcome which, at the very least, should not be stumbled into by focussing on remedial flexibility. Indeed, in circumstances where it is difficult for the court to assess the impact of neighbours (e.g. where such information has not been provided to the court), the court should, in this author's view, guard against erring towards damages as a remedy since they are ill-equipped to judge the ‘public interest concerns’ that are intended to form part of their discretion. In cases of potential multiple claimants therefore, extra caution should be taken to prevent remedial discretion resulting in the total erosion of the property right of an individual not party to the instant dispute.

On the other hand, there is a certain inescapable logic in the conclusion that when a landowner has been given planning permission for a particular activity, and where that planning process has taken account of the interests of neighbouring owners, even if it has not prioritised those interests, it seems odd that those neighbours who have “already had their say” can then override the decision of the planning authority. Perhaps, as Lee has convincingly argued, the relationship is too complex here to conceptualise with a simple planning is or is not relevant response.<sup>56</sup> Planning, as is discussed below, is best equipped to deal with problems where adequate public involvement and consultation is involved and where participation helps to predict problems before they arise. In practical terms however, some response does have to be given, and in this case the courts have concluded that planning permission does not impact upon whether or not an action that might be a nuisance is a nuisance. What the court does not do, however, in coming to this conclusion, is really grasp the nettle as to the deeper question

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<sup>54</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [60].

<sup>55</sup> They would not of course be bound by the earlier decision as such, not being parties to it, but if the now-sanctioned nuisance subsequently forms part of the character of the locality, it would be difficult to argue that such a user was unreasonable in that locality. For more on the importance of the definition of locality, see M Lee, ‘Nuisance and regulation in the Court of Appeal’ [2013] JPL 277, 280 and P Bishop and V Jenkins, ‘Planning and nuisance: revisiting the balance of public and private interests in land-use development’ (2011) 23 JEL 285.

<sup>56</sup> M Lee, ‘Nuisance and regulation in the Court of Appeal’ [2013] JPL 277.

of how we reconcile public and private regulation of land. Deferral to remedial flexibility may be practically useful, but it is not a satisfactory conclusion to the more theoretical debate.<sup>57</sup> Furthermore, relying on remedies erodes property rights by the back door. As Dixon argues, “this is hard to swallow: the whole point of proprietary rights, be they of ownership or more limited, is that they are about land use, not land value”.<sup>58</sup> If we do want to give property rights a more limited scope vis-à-vis a neighbour, this should be done explicitly, and not by allowing remedial choice to weaken the right. Indeed, the uncertainty generated by such a move would in itself have the potential to cause practical problems. The answer must be to clarify the role of nuisance and grant injunctions to prevent such nuisances. The solution must lie in a comprehensive understanding of how the public and private sit together.

### What is the role of nuisance?

Where this takes us then is to the deeper issue as to what role exactly we see nuisance as playing. Per Lord Sumption, this case raises “a broader issue of legal policy of some importance, namely how is one to reconcile public and private law in the domain of land use where they occupy much the same space?”<sup>59</sup>, or as Lord Carnwath put it: “the present appeal as an important opportunity for the Supreme Court to review the proper role of this part of the law of nuisance in the modern world”.<sup>60</sup> Is nuisance a private law mechanism to prevent change in or escalation in use where the planning system does not intervene, or is it a means of balancing the property rights of neighbours?<sup>61</sup> In terms of structuring the requirements and defences to the tort, arguably, it cannot be both.<sup>62</sup> Unfortunately, the court in *Lawrence v Fen Tigers* never really gives us a conclusion on this broader issue.

This is not simply a question as to what the relationship between nuisance and planning law ought to be, nor indeed what remedy for breach of private nuisance is appropriate, it is about the role that we conceive private property

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<sup>57</sup> M Lee, ‘Nuisance and regulation in the Court of Appeal’ [2013] JPL 277, 282-284.

<sup>58</sup> M Dixon, ‘The sound of silence’ [2014] Conv 83, 84.

<sup>59</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [155].

<sup>60</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [176].

<sup>61</sup> Bishop and Jenkins discuss the role that nuisance can have as an indirect third party appeal to the grant of a planning permission. P Bishop and V Jenkins, ‘Planning and nuisance: revisiting the balance of public and private interests in land-use development’ (2011) 23 JEL 285, 305.

<sup>62</sup> Lee has previously highlighted that there are in fact three separate torts embedded within nuisance: a fault-based tort; a nuisance-style tort of strict liability; and amenity harm. The different focus of the three branches means that planning permission, and public interest more generally will have a different role to play in each. In attempting to conflate the roles of “private planning control” and property rights management, the boundaries of the three branches are unclear and the normative basis for the tort uncertain. M Lee, ‘What is private nuisance?’ (2003) 119 LQR 298.

rights as playing in questions of land use.<sup>63</sup> It is not possible to consider this issue in detail here – the question is much vexed<sup>64</sup> – but it is worth highlighting that decisions about the shape of nuisance have inevitable impacts upon this role. As Lee highlights, “[t]he core difficulty in working through a relationship between tort and regulation is in trying to find a defensible path between idealised visions of what tort and what regulation are each trying to achieve”.<sup>65</sup> Furthermore, we must also recognise that if we do not use nuisance as the means of balancing private property rights, we have few, if any, other options. The planning system and environmental regulation can deal adequately with “public interest” issues in land use, taking account of the nuances of the change of use threshold for the requirement for planning permission and having the procedural ability to take into account public interest factors in a more open way than a court, but they struggle with the more minor private grievances that a particular land owner suffers at the hands of another where the change of use threshold is not met. Furthermore, the planning permission system is dependent upon assessments of public interest as a whole, and is not well designed to zoom in upon practical impacts which emerge after a development is complete. This is particularly relevant where a development complies with the terms of its planning permission, but where minor impacts of that development were unforeseen by the planning authority and thus not accounted for in the planning decision.

What we ought to guard against therefore is these more minor issues slipping through the gaps, such that there is no public assessment of the general good in allowing a particular activity to take place, notwithstanding the impact on private property rights, but also in there being no remedy for C in relation to the infringement on those rights simply because another of their neighbours had failed to obtain an injunction at an earlier date. It will not be possible to craft such a role for the tort if the tensions between it and planning and environmental regulation are not acknowledged.

The Supreme Court has here acknowledged these tensions, and it is in Lord Carnwath’s judgment that we see the most nuanced treatment of this issue. Nevertheless, there is work to be done and this lies in the shaping of the tort of nuisance to correctly reflect its proper role in the light of changes to modern regulation. It is no longer appropriate to attempt to use nuisance as

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<sup>63</sup> J Steele, ‘Private law and the environment: nuisance in context’ (1995) 15 *Legal Studies* 236, 239.

<sup>64</sup> See, amongst others, F. H. Newark, ‘The Boundaries of Nuisance’ (1949) 65 *L.Q.R.* 480; C Gearty, ‘The Place of private nuisance in a modern law of torts’ (1989) 48 *CLJ* 214, 215; M Lee, ‘Tort law and regulation: planning and nuisance’ [2011] *JPL* 986; D Campbell, ‘Of Coase and Corn: A (sort of) defence of private nuisance’ (2000) 63 *Modern Law Review* 197; J Steele, ‘Private law and the environment: nuisance in context’ (1995) 15 *Legal Studies* 236, 239 and M Lee, ‘What is private nuisance?’ (2003) 119 *LQR* 298.

<sup>65</sup> M Lee, ‘Tort law and regulation: planning and nuisance’ [2011] *JPL* 986, 986.

the private equivalent of planning control,<sup>66</sup> nor ought it to be seen simply as a way to ensure compensation to those robbed of their property rights as a result of a planning permission.<sup>67</sup> Instead, we should strive to ensure that it has its own defined role to play as “policer” of interaction between private rights, a role that to date has been obscured by the infiltration of negligence-based considerations into the shape of the tort. As Gearty argues: “This strategic surrender will enable nuisance to turn its undivided attention to what it does best, protecting occupiers against non-physical interference with the enjoyment of their land”.<sup>68</sup> Private rights are, and always have been, constrained by public regulation and public interest. Nuisance does not need to take on this role as well. Instead, it should be seen as a coordination tort – how can we ensure one landowner can live next to others? This would require a fundamental recasting of nuisance, not simply a tinkering to allow it to fit within a framework largely governed by regulatory intervention, and such a recasting cannot take place if we simply place our reliance on remedial discretion.<sup>69</sup>

There has been much written about what to do with nuisance, and what its role can be in the modern world, but there is little consensus over this role, and more importantly, recognition that the current role is blurry has not led to any concerted efforts on the part of the courts to define that role.<sup>70</sup> As their Lordships recognised, this case provided the opportunity to provide some clarity. It is to be regretted that the opportunity was not fully seized. Yes, we now have a clearer picture of how planning permission and nuisance fit together, but beyond that, the picture may be different, but it is not necessarily more comprehensive than before.

## Conclusion

Clarification of the role of nuisance therefore, and in particular focusing the tort onto the interaction between competing property rights, rather than on public interest, will not only allow it to sit more comfortably with modern regulation, it will also ensure that it has an on-going and thriving role, and that this role is one which is appropriate to harnessing the resources and interests of private landowners.<sup>71</sup> In order to clarify this role however we do

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<sup>66</sup> P Bishop and V Jenkins, ‘Planning and nuisance: revisiting the balance of public and private interests in land-use development’ (2011) 23 JEL 285.

<sup>67</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [90].

<sup>68</sup> C Gearty, ‘The Place of private nuisance in a modern law of torts’ (1989) 48 CLJ 214, 218.

<sup>69</sup> For the need for a fundamental revision of nuisance, albeit along different lines, see D Campbell, ‘Of Coase and Corn: A (sort of) defence of private nuisance’ (2000) 63 Modern Law Review 197.

<sup>70</sup> For discussion of the difficulty of defining the role of nuisance, see F. H. Newark, ‘The Boundaries of Nuisance’ (1949) 65 L.Q.R. 480 and C Gearty, ‘The Place of private nuisance in a modern law of torts’ (1989) 48 CLJ 214, 215.

<sup>71</sup> J Steele, ‘Private law and the environment: nuisance in context’ (1995) 15 Legal Studies 236, 242.

not simply need to resolve the relationship between planning, environmental regulation, and nuisance, but we will also need to look at precisely the sort of issues that nuisance tackles. Such exploration of the harms tackled by nuisance will require a re-evaluation of the reasonable user test and of an understanding of the various different types of harm that nuisance regulates. Lord Sumption acknowledges in this case that the entire jurisprudence on nuisance will need to be revisited to explain its future role.<sup>72</sup> It is a pity perhaps that the Supreme Court felt unable to begin this process here. A shift to remedial discretion may be able to paper over our lack of commitment to one understanding of the role of nuisance in the short term, but it cannot get to the heart of the problem; the problem of the place of private law rights in a sphere of such regulatory complexity.

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<sup>72</sup> *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433, [161].