Coventry (t/a RDC Promotions) v Lawrence [2014] UKSC 13

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Noise, nuisance and injunctive relief

On 26 February 2014 the Supreme Court delivered judgment in an important case addressing when a right can arise to emit noise otherwise amounting to a private nuisance. More importantly, the Court also took the opportunity to consider the principles governing the granting of damages in lieu of injunctive relief. This latter aspect of the judgment is likely to be of particular interest to practitioners because it will impact upon the granting of injunctive relief in many areas beyond the realm of private nuisance.

Part I of this note provides an overview. Part II deals with the issues relating to nuisance. Part III deals with the principles relating to the granting of damages in lieu of injunctive relief.

Part I - Overview

Key issues

- whether a right to emit noise can exist as an easement arising by prescription;
- whether an action can be defended on the basis that the claimant "came to the nuisance";
- whether the defendant's use of the land affects the "character of the locality";
- the relevance of planning permission in defending an action for nuisance;
- when the court should grant injunctive relief or damages in lieu.

The Supreme Court's answers

Lord Neuberger JSC gave the leading judgment and held as follows:

1. the right to emit noise is capable of being an easement acquired by prescription;
2. it is not a defence to a claim in nuisance that the claimant has "come to the nuisance" but where the claimant's own activity (such as building or changing the use of his

land) causes the defendant's conduct to become a nuisance, the defendant may have a defence;

3. the defendant's use of the land is to be taken into account when assessing the character of the locality, but only insofar as it is not a nuisance;
4. planning permission to carry out the activity which causes the nuisance is normally of no assistance to the defendant;
5. the court has an unfettered discretion to grant damages in lieu of injunctive relief and should adopt a more flexible approach. The principles of Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287 should not be applied mechanistically.

Facts

The claimants complained about noise from speedway and stock car racing at a stadium and track on agricultural land near Mildenhall in Suffolk. The stadium had been constructed pursuant to a 1975 grant of planning permission in respect of speedway racing; in 1997 the planning authority issued a Certificate of Lawfulness of Existing Use or Development, confirming that stock car racing had taken place at the stadium for the previous ten years. The track was used for motorcross events pursuant to a series of temporary permissions from 1992 and then pursuant to a permanent grant of planning permission in 2002; each of the grants imposed conditions limiting the frequency of events on the track and the amount of sound which could be emitted.

A bungalow called "Fenland", built in the 1950s, stood 560 metres from the stadium and 86- metres from the track. In 2006 the claimants purchased and moved into Fenland. In 2008 the claimants issued High Court proceedings against the owners and operators of the stadium and track, contending that the activities at the stadium and track constituted a nuisance, and seeking an injunction to restrain them.

The claimants succeeded in the High Court, lost in the Court of Appeal but won in the Supreme Court, which reinstated the injunction awarded by the trial judge.

Part II - noise and nuisance

Is a right to emit noise capable of being an easement arising by prescription?

Yes. Lord Neuberger[1] was satisfied that a right to emit noise could arise by prescription [32] and is capable of constituting an easement [33]. He identified three difficulties which a litigant seeking to establish such a right might encounter:

1. the 20 year prescription period can only run once the noise amounts to a nuisance[2];
2. identifying the extent of the easement could be difficult because the volume of noise emitted over that period may fluctuate;
3. it could be difficult to decide how much, if any, more noise could be emitted pursuant to the right than had been emitted during the 20 year period.

[1] With whom their Lordships all agreed on this issue.

[2] Although the 20 years' use need not be continuous, per Lord Neuberger at [37]. In the event, the stadium owners fell at this hurdle in the Supreme Court because they could not show that the activity has been a nuisance for 20 years (as opposed to merely creating a noise for 20 years): see [143].

His Lordship described these problems as evidential ones which might make the claimant's task a difficult one, but which did not prevent the right from being capable of arising as a matter of law. As to the third problem, he doubted whether the dominant owner of an easement to emit noise could be accorded the degree of latitude available to someone with a right of way or drainage obtained by prescription. Accordingly the prescriptive easement to emit noise is likely to be a closely defined right in terms of decibels and duration, with little (if any) leeway.

"Coming to the nuisance"

As every law student knows, it is no defence to a nuisance claim that the claimant "came to the nuisance". Not surprisingly, Lord Neuberger did not overrule this principle of law, which has stood for over 180 years [47] - [51].

However, the position might be different where it is the claimant's use of his land which renders the defendant's conduct a nuisance. Lord Neuberger[3] stated at [56]:

> *"….where a claimant builds on, or changes the use of, her land, I would suggest that it may well be wrong to hold that a defendant's pre-existing activity gives rise to a nuisance provided that*
> *(i) it can only be said to be a nuisance because it affects the senses of those on the claimant's land;*
> *(ii) it was not a nuisance before the building or change of use of the claimant's land;*
> *(iii) it is and has been a reasonable and otherwise lawful use of the defendant's land;*
> *(iv) it is carried out in a reasonable way; and*
> *(v) it causes no greater nuisance than when the claimant first carried out the building or changed the use."*

The distinction is summarised at [58]:

> *"Accordingly, it appears to me that it is no defence for a defendant who is sued in nuisance to contend that the claimant came to the nuisance, although it may well be a defence, at least in some circumstances, for a defendant to contend that, as it is only because the claimant has changed the use of, or built on, her land that the defendant's pre-existing activity is claimed to have become a nuisance, the claim should fail."*

Assessing the character of the locality

The trial judge held that he should disregard the defendant's activities when assessing the character of the locality. The Court of Appeal overturned him on that point. The Supreme Court charted a middle course between the two views, holding that the defendant's activities should be taken into account when assessing the character of the locality, but only insofar as they are not a nuisance to the claimant.

This involves some legalistic blinkers, best exemplified by Lord Neuberger's application of this test to the present facts at [65]:

[3] Again, with whom their Lordships all agreed on this issue.

> *"In my view, to the extent that [the defendant's] activities are a nuisance to the claimant, they should be left out of account when assessing the character of the locality, or, to put it another way, they should be notionally stripped out of the locality when assessing its character. Thus, in the present case, where the judge concluded that the activities at the Stadium and the Track were actually carried out in such a way as to constitute a nuisance, although they could be carried on so as not to cause a nuisance, the character of the locality should be assessed on the basis that (i) it includes the Stadium and the Track, and (ii) they could be used for speedway, stockcar and banger racing and for motocross respectively, but (iii) only to an extent which would not cause a nuisance."*

The logic is that if the defendant's conduct is unlawful, they should not be able to rely upon it in order to justify their continuing to commit that very activity. It follows that if the defendant's conduct has become lawful (for example, pursuant to 20 years user or the sanction of the court[4]), it would become relevant in assessing the character of the locality.

There is obvious circularity in this approach. In answering the question whether the defendant's conduct is a nuisance, one has to disregard the conduct of the defendant which amounts to a nuisance. Lord Neuberger was alive to this, but ultimately took the view that this course was (despite its circularity) better than the alternatives.[5] He opined that in some cases the court will have to go through an iterative process when considering what noise levels are appropriate[6], but regrettably offers no guidance as to how the court is to undertake that iterative process without tying itself up in knots.

By contrast, Lord Carnwath doubted whether such an iterative approach was necessary, preferring instead to accept that an existing activity can be taken into account if it is "part of the established pattern of use".[7] His Lordship makes no mention of whether the activity amounts to a nuisance or is otherwise unlawful.

Planning permission

A defendant to an action in nuisance may seek to resist that claim on the basis that he has planning permission which permits the activity said to give rise to the nuisance. The question is the extent to which such planning permission is relevant. The decided cases gave a mixed and confusing answer.[8] Lord Neuberger[9] took the opportunity to review the case law and share his own view.

The starting point is that the existence of planning permission is normally of no assistance to the defendant.[10] However, detailed planning permission which specifies that a particular noisy activity is permissible after a certain time, or at a certain decibel level, might be of some value [96]. Accordingly:

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[4] See [67] - [69].

[5] At [71] and [73].

[6] At [72].

[7] See [187] and [190].

[8] Even the Court of Appeal in Coventry seemed to draw an unruly distinction between planning permission over "large" and "small" plots of land: [2012] 1 WLR 2117, [57] *et seq*. Lord Neuberger strongly disagreed with this approach.

[9] With whom the remainder of the Court agreed.

[10] See Lord Neuberger at [94] and Lord Sumption at [156].

"...the existence and terms of the permission are not irrelevant as a matter of law, but in many cases they will be of little, or even no, evidential value, and in other cases rather more." [11]

The Court gave little by way of guidance as to when planning permission would carry evidential value and when it would not. However, it is clear that the Court of Appeal's distinction based on "small" and "large" plots of land was firmly disapproved of. Instead the court will look to the detail of the planning permission as to (in this context) duration, decibels and the like.

Part III - injunctive relief

In the Supreme Court the appellants contended, for the first time, that even if this were a nuisance, the judge should have awarded damages in lieu of an injunction. Lord Neuberger took the opportunity to analyse the authorities on the court's jurisdiction to grant damages in lieu of an injunction, from A L Smith LJ's famous working rule in Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287 to date. Lords Sumption and Carnwath also added some shorter remarks of their own.

Shelfer's test

In Shelfer A L Smith LJ spoke of a "good working rule" that damages in substitution for an injunction may be awarded where four conditions are satisfied:

(1) the injury to the claimant's legal rights is small;
(2) the injury is capable of being estimated in money;
(3) the injury can be adequately compensated by a small money payment;
(4) it would be oppressive to the defendant to grant an injunction.

The decided cases since Shelfer reveal a divergence in the courts' approach to applying those principles. Some decision have treated the four conditions as prescriptive and render the granting of damages in lieu of an injunction truly exceptional. Other cases have taken a less restrictive view and demonstrated greater willingness to substitute damages for injunctive relief.

Lord Neuberger's view

Lord Neuberger[12] favoured the more flexible approach and counseled against a mechanistic application of the Shelfer principles. He said that *"(i) an almost mechanical application of A L Smith LJS's four tests, and (ii) an approach which involves damages being awarded in only 'very exceptional circumstances', are each simply wrong in principle, and give rise to a serious risk of going wrong in practice."* [119].

His Lordship emphasised the discretionary nature of the power to award damages in lieu and warned that the discretion should not become fettered, but offered the following guidance:

[11] per Lord Neuberger at [96].

[12] With whom Lords Mance and Clarke agreed, save that they both adopted the qualifications made by Lord Carnwath at [246] - [247] to the effect that the grant of planning permission should not give rise to any presumption against granting an injunction. Lord Clarke also reserved his position as to who should bear the burden of showing that an injunction or damages in lieu were appropriate [at 170].

1. the prima facie position is that an injunction should be granted;
2. the legal burden is on the defendant to show why an injunction should not be granted;
3. in the absence of relevant circumstances pointing the other way, it would normally be right to refuse an injunction if Shelfer's four tests were satisfied;
4. but the fact that those tests are not all satisfied does not mean that an injunction should be granted.

Lord Neuberger also took the opportunity to discuss the relevance of "public interest" in deciding whether to grant an injunction or damages in lieu. He observed:

> *"I find it hard to see how there could be any circumstances in which [public interest] arose and could not, as a matter of law, be a relevant factor."* [13]

His Lordship revisited the question of planning permission in this context and opined that the existence of planning permission which authorises carrying on an activity in a way which causes nuisance may be a factor in favour of refusing an injunction and compensating the claimant in damages instead [125]. Lord Sumption went further and suggested that such planning permission provided *"particularly strong reasons"* for awardinh damages in lieu of an injunction.[14] Lord Carnwath (with whom Lord Mance agreed[15]) was more restrained and suggested that the grant of planning permission should not give rise to any presumption against granting an injunction.

Lord Sumption's view

Lord Sumption went further than Lord Neuberger in his attempts to rein in the mechanistic effects of the Shelfer tests. In a fascinating passage, sure to be revisited by appellate courts in years to come, his Lordship opined:

> *"In my view, the decision in Shelfer is out of date, and it is unfortunate that it has been followed so recently and so slavishly. It was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control. The whole jurisprudence in this area will one day need to be reviewed in this court. There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not normally be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission."* [16]

The historian among their Lordships certainly gives a strong wind to any litigant with the requisite facts and funds to mount a challenge to the orthodoxy of injunctive relief in cases of nuisance, but for

[13] At [124].

[14] At [157].

[15] At [167].

[16] Lord Clarke agreed with Lord Sumption's observation that Shelfer was out of date and should not be followed so slavishly, at [171].

the time being these remarks are likely to deter the mechanistic application of Shelfer in favour of the more flexible approach signaled by Lord Neuberger.[17]

Lord Carnwath's view

Lord Carnwath agreed with Lord Neuberger and with the rest of the Court *"that the opportunity should be taken to signal a move away from the strict criteria derived from Shelfer"*.[18] He briefly surveyed a number of other jurisdictions, some of which applied Shelfer rigidly (Australia, New Zealand and Ireland) and others which did not (Canada and New York). However, Lord Carnwath added three reservations to his concurrence with Lord Neuberger flexible approach:

1. the grant of planning permission for a particular use should not give rise to a presumption against the grant of an injunction;
2. in some cases it may be appropriate to combine a more limited injunction with an award of damages;
3. his Lordship was reluctant to open up the possibility of gains-based damages without fuller argument.

Measure of damages

Lord Neuberger accepted that the usual measure of damages awarded in lieu of an injunction was the diminution in value to the claimant's property caused by the continuation of the nuisance: [101]. However he later added that damages need not always be so limited. At [128] he said:

> *"While double counting must be avoided, the damages might well, at least where it was appropriate, also include the loss of the claimant's ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction."*

His Lordship recognised that in some circumstances damages should be calculated (at least in part) by reference to the defendant's gains rather than the claimant's losses.[19] The principle at play is essentially that which underlies the notion of "hypothetical release damages" invoked in Wrotham Park [20]. In the same way that a covenantor might be permitted to continue in breach of covenant upon payment of damages calculated in part by reference to the gains he enjoys by effectively being released from the covenant, so too the defendant to a nuisance action may be permitted to continue his conduct upon payment of damages calculated in part by reference to the gains he enjoys by effectively being spared an injunction.

Having recognised this possibility, Lord Neuberger observed that such gains-based awards should be rare in nuisance cases and (in the absence of argument on the issue) declined to express a view as to

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[17] Lord Mance concluded by refusing to accede to Lord Sumption's suggestion in this quoted passage, adding that *"the right to enjoy one's home without disturbance is one which I would believe that many, indeed most, people value for reasons largely if not entirely independent of money."* at [168]. Lord Carnwath later agreed with Lord Mance's observations, at [247].

[18] At [239].

[19] Though leaving the question open, Lord Clarke lent some support to Lord Neuberger's suggestion that gains-based damages may occasionally be appropriate, at [173].

[20] Wrotham Park Estate Co v Parkside Homes Limited [1974] 1 WLR 798.

the circumstances in which such an award would be appropriate. Lord Carnwath was more cautious altogether, declining to open up the possibility of gains-based damages without fuller argument. His Lordship indicated that whereas it might be possible to envisage a hypothetical negotiation for the release of certain proprietary rights, the same cannot readily be said in the context of nuisance.[21]

Concluding remarks

The Supreme Court have clarified a number of important matters relating to the right to emit noise and to restrain the same by an action in nuisance. However the true importance of this decision lies in the approach taken to the question of injunctive relief. All of their Lordships supported a departure from the rigid or mechanistic application of A L Smith LJ's famous four-fold test in Shelfer, in favour of a more flexible exercise of the court's discretion to award damages in lieu of an injunction.

Since damages in lieu were sought for the first time in the Supreme Court, their Lordships resolved to restore the injunction but to permit the stadium owners to seek damages in lieu pursuant to the liberty to apply provisions contained in the judge's original order. Therefore the Court's remarks on the approach to be taken when considering whether to award damages or an injunction may well be tested on these facts. As Lord Clarke observes, *"some of the questions raised by Lord Neuberger and the other judgments in this appeal may fall for decision in this very case."*

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[21] At [248].