SENDING NUISANCE NEIGHBOURS TO COVENTRY

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The recent Supreme Court decision in *Coventry v Lawrence* [2014] UKSC 13 raises interesting points relating to the tort of private nuisance and the remedies available to a successful Claimant, primarily in respect of nuisance arising from noise, but of wider importance on the issue of damages being granted in lieu of injunctive relief.

**BACKGROUND**

The appellants had moved into a peaceful little bungalow, called “Fenland”, with its own garden and surrounded by agricultural land. However, within very few months, they realised that their peaceful, semi-rural idyllic bliss was being rudely disturbed by a nearby stadium with an adjacent track used for motocross racing. The appellants issued proceedings alleging that the noise constituted a nuisance that ought to be restrained by injunction. There followed an 11 day trial before His Honour Judge Richard Seymour QC (sitting as a Deputy High Court Judge) who produced a 325 paragraph judgment running to over 110 pages. Somewhat ironically, such an expensive legal battle took place against a background of Fenland having been seriously damaged by fire in 2010 and being uninhabitable ever since; those bare facts, in themselves, should no doubt provide certain salutary lessons for those contemplating litigation.

However, in the judgment which Lord Neuberger described as “*difficult to follow*” in parts, the judge concluded that that the appellants had established their claim in nuisance and granted an injunction restraining the carrying on of activities emitting more than a specified level of noise.

The Court of Appeal reversed that decision, holding that the appellants had failed to establish that the activities at the stadium and track constituted a nuisance,
the judge had gone wrong in holding that actual use of the stadium and track over a number of years (with planning permission or a Certificate of Lawfulness of Existing Use or Development) could not be taken into account when considering the character of the locality for the purpose of deciding whether an activity constituted a nuisance. Given that error, the Court of Appeal did not need to consider any other issues.

The appellants appealed to the Supreme Court, which considered various points relating to the law of private nuisance.

**SOME BASIC PRINCIPLES**

Lord Carnworth took the opportunity to set out some basic principles relating to nuisance and the concept of “reasonable use”. Citing himself in *Barr v Biffa Waste Services Ltd* [2013] QB 455, where he adopted Weir’s approach in the basic text book (*An Introduction to Tort Law* 2nd edition), Lord Carnworth explained that reasonableness is not to be judged by reference to the sensitivities of the parties themselves but by “what objectively a normal person would find it reasonable to have to put up with”. He also helpfully reminds us that the reasonableness of a defendant’s activity is to be judged by reference to “the character of the locality” (see *Sturges v Bridgman* (1879) 11 Ch D 852).

In giving the lead judgment of the Supreme Court, Lord Neuberger dealt with a number of matters of principle that had been raised on the appeal.

First, it was explained that a defendant can acquire a right to do what would otherwise be a nuisance by causing noise, for example, such right arising from a binding agreement with the claimant to carry on the activity in respect of which complaint is made; alternatively, the facts might be such that the claimant is estopped from complaining about the activity. Of more interest was the question of whether the right to commit a nuisance by noise can be acquired by prescription. Despite the view to the contrary expressed in *Clerk and Lindsell on Torts* (20th edition at para 20-85) Lord Neuberger concluded that in “in the light
of the relevant principles, practical considerations and judicial dicta” it is possible to obtain by prescription, with at least 20 years uninterrupted enjoyment as of right, a prescriptive right to commit what would otherwise be a nuisance by noise.

Secondly, the Supreme Court reiterated that it is no defence for a defendant who is sued in nuisance to argue that the claimant “came to the nuisance”, that is, that the claimant took up occupation after the nuisance had started. This principle had been well established through authorities over very many years, despite a minor hiccup in a dissenting judgment from Lord Denning MR bowling a characteristic googlie in the 1970s concerning “the thoughtless and selfish act of an estate developer” in trying to build right up to the edge of a cricket ground where cricket had been played for 70 years and the club had devoted many years of “labour and love” in making their pitch.

Thirdly, it is for the judge trying the case to assess the character of the locality as a matter of fact in order to decide whether an activity constitutes a nuisance. Contrary to the view expressed by the Court of Appeal, Lord Neuberger’s opinion was that the extent to which a defendant’s activities are an alleged nuisance to the claimant should be left out of account when assessing the character of the locality. In so far as the track and stadium were operated without causing nuisance to the claimants, such activities were not to be disregarded when assessing the character of the neighbourhood. Although this might require the exercise of some intellectual gymnastics the Court was of the view that in most cases it would be fairly clear and present no problems. Thus, a defendant faced with an allegation of nuisance can rely on those activities as forming part of the character of the locality but only to the extent that the activities do not constitute a nuisance – but if the activities could not be carried out without creating a nuisance they would have to be entirely discounted when assessing the character of the neighbourhood. This might surely present more difficult conceptual and practical issues, giving rise to argument, than appeared to the Supreme Court!
Fourthly, what is the position as regards an activity that allegedly causes a
nuisance but which is covered by a grant of planning permission? Although the
implementation of a planning permission can be relevant as regards any change
to the character of a locality, such implementation is, essentially, no different
from any other construction work or change of use that does not require
planning permission. Accordingly, the mere fact that a defendant carrying on an
activity has the benefit of the grant of planning permission is of no assistance
when facing an allegation that the activity causes nuisance in the form of noise or
other loss of amenity.

**SHELFER REVISITED**

On the basis that the noisy motocross had disturbed the peaceful utopia of
Fenland, Lord Neuberger went on to consider the interesting question of
remedies and particularly the issue of damages in lieu of an injunction. Such
power to award damages instead of injunctive relief dates back to the Victorian
era with Lord Cairns’ Act (the Chancery Amendment Act 1858) and is now
enshrined in section 50 of the Senior Courts Act 1981.

Where damages are awarded in lieu of an injunction, they have previously been
calculated by reference to the diminution in value of the claimant’s property by
reason of the nuisance. Discussion as to the interplay between damages and
injunctions usually derives from the well known judgment of A L Smith LJ (and
note that somewhat peculiarly, his initials always seem to be included) in **Shelfer v City of London Electric Lighting Co.** [1895] 1 Ch 287. In **Shelfer** it was stated to
be “a good working rule” that damages can be awarded in substitution for an
injunction if:

i) the injury to the (claimant’s) legal right is small;

ii) the injury is capable of being estimated in money;

iii) the injury can be adequately compensated by a small money
    payment; and

iv) it would be oppressive to the defendant to grant an injunction.
Shelfer has stood the test of time, but not without difficulty, with subsequent cases being more fully reviewed by Mummery LJ in *Regan v Paul Properties DPF No. 1 Ltd* [2007] Ch 135 (at paragraphs 35-59). In *Watson* [2009] 3 All ER 249, the Court of Appeal commented that Shelfer represented the appropriate test and that damages in lieu of an injunction should only be awarded in very exceptional circumstances.

Against that background, Lord Neuberger highlighted difficulties arising as to the proper approach to be adopted by the courts. First, should it require an exceptional case before damages should be awarded in lieu of an injunction, or should the court adopt a more flexible approach, taking into account the conduct of the parties? Secondly, to what extent should the public interest be taken into account on the issue? Is it relevant or not? The view, expressed in *Watson*, that the public interest was relevant where damages were minimal (but not otherwise) was quite properly regarded as being more than a little strange.

As to the first point, the view was that the court should have flexibility and not be restricted by seeking rigidly to apply the four Shelfer tests. The court's power to award damages in lieu of injunctive relief represented a classic exercise of discretion that should not be fettered. Every case is likely to be fact-sensitive and the application of rigid guidelines was “likely to do more harm than good”. This would not prevent the courts from laying down rules as to what factors can, and cannot, be taken into account when exercising the discretion but where, on the face of it, an injunction should be granted, then it is up to the losing defendant to persuade the court as to why it should not grant an injunction based on all the evidence and arguments. There were no special rules to be applied to cases involving rights to light as opposed to other forms of nuisance (although Lord Mance was not persuaded that cases concerning light involved all the same considerations as those relating to the noise nuisance arising in the *Coventry* case under consideration).

Did this leave the Shelfer tests completely shattered and shelved? Well, contrary to some views expressed elsewhere as to the *Coventry* decision, not completely
but substantially. At paragraph 123 of his judgment Lord Neuberger set out the following approach:

i) the application of the 4 Shelfer tests must not fetter the exercise of discretion by the court;

ii) in the absence of relevant matters pointing the other way, if the 4 Shelfer tests were satisfied, it would normally be right to refuse an injunction;

iii) but just because the 4 Shelfer tests are not satisfied does not mean that an injunction should be granted.

Dealing with the second point, as to the relevance of public interest, Lord Neuberger concluded that it was difficult to see how any point of public interest, if genuinely arising, could be simply disregarded on the basis that it was not a relevant factor for the court to consider when it was exercising its discretion. Whether any public interest point in fact had merit, so as to be persuasive upon a court, would be a quite different and fact-sensitive issue.

**SOME POINTS ON QUANTUM**

As to the quantum of damages, where damages are awarded in lieu of an injunction then in addition to the reduction in value of the successful claimant’s property (and where regarded as appropriate) the award might also include a further sum to compensate for loss of the ability of the claimant to enforce his or her rights. That further award might be assessed by reference to the benefit to the losing defendant in not suffering the making of an injunction by the court – a point that might well have considerable financial significance where property development is concerned. Although this additional element of damages was not confirmed, since it had not been raised on the appeal or argued, Lord Neuberger’s view was that it's pursuit would be arguable, thus introducing into the law of private nuisance the same approach to damages in lieu of injunctions found in claims concerning breach of restrictive covenant and well illustrated by cases such as *Jaggard v Sawyer* [1995] 1 WLR 269 (where damages in lieu
against a losing defendant in breach of a restrictive covenant were assessed by reference to the amount that could reasonably have been negotiated to secure the release of the covenant). Lord Clarke saw no reason why damages could not be awarded on this basis but preferred to leave open the question as to how damages should be assessed. However, the general view of Lord Neuberger will plainly be highly persuasive for the future.

The other members of the Supreme Court all agreed with Lord Neuberger's decision in allowing the appeal, Lord Sumption also commenting that the decision in Sheller was out of date and that it was “unfortunate that it has been followed so recently and so slavishly”. Rather crucially, Lord Sumption also expressed the view that in nuisance cases damages would ordinarily be an appropriate remedy rather than injunctive relief.

**STABILITY OR FALL-OUT**

For those advising parties involved in nuisance cases or disputes involving allegations that a development interferes with a party’s right to light, one must focus on the discretion emphasised by the Supreme Court as to whether a court should order an injunction (with possible disastrous effect on a development project) or damages in lieu. This discretion might bring into play a whole host of factors that are incapable of exhaustive categorisation. One will also need to form an assessment (probably requiring expert involvement) as to the likely sum required to negotiate an acceptance of the nuisance by the claimant (applying a similar approach to the notional negotiated figure in Jaggard).

Property developers, in particular, may well welcome the less rigid approach encouraged by Coventry. The rigid adherence to Sheller has previously caused considerable difficulties where courts have granted injunctive relief and refused to award damages in lieu - see, for example, Regan v Paul Properties DPF No. 1 Ltd [2007] Ch 135 and HKRUK II (CHC) Ltd v Heaney [2010] 3 EGLR 15 (where the Court refused to grant damages in lieu of an injunction where the defendant had committed an actionable interference with the access to light to the
claimant's building, in the centre of Leeds, by extending upwards by two floors; Judge Langan QC holding that it would be wholly wrong for the court effectively to sanction the wrong by compelling the claimant to take monetary compensation).

It was Robert Kennedy who made famous the phrase “we live in interesting times”, on another continent and in another century. In time, the ramifications of the Coventry decision will play out and make themselves felt both in courts dealing with tortfeasors facing claims for injunctive relief and in negotiations between those causing and effected by interference with the enjoyment of neighbouring properties. It will be fascinating to see the development of guidelines that incorporate flexibility and common sense, yet without imposing principles to be rigidly, and “slavishly” followed. Yes indeed, we do live in interesting times.

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