The Supreme Court reconsiders nuisance and the power to award damages in lieu of an injunction

By Chloe Campbell

In the case of *Coventry and others (Respondents) v Lawrence and another (Appellants)* [2014] UKSC 13 the Supreme Court has addressed five key matters which will play an important role in informing future claims for nuisance.

The Appeal

1. This was a claim brought in private nuisance by the owners of a house purchased in 2006 positioned near a stadium and motocross track who sought to establish that the noise emitted from racing was a nuisance despite the stadium having been in use for this purpose with planning permission since 1975 (with the track as a later addition also with planning permission).

2. HHJ Seymour found at first instance that the noise constituted a nuisance and made an order limiting the level of noise to be emitted by the activities. The Court of Appeal overturned this decision finding that it had not been established that the activities constituted a nuisance. Jackson LJ who gave the leading judgment found that HHJ Seymour was wrong to hold that the actual use of the stadium and track with planning permission could not be taken into account when assessing the character of the locality for the purpose of determining whether the activities constituted a nuisance.

3. The Supreme Court unanimously allowed the appeal, reversing the Court of Appeal's decision. Lord Neuberger gave the leading judgment with which the rest of the court substantially agreed.

Key matters

4. In setting out its judgment the Supreme Court addressed five key matters in its decision which will be of great significance to the law of nuisance:

   - Whether one can obtain a right by prescription to commit what would otherwise be a nuisance by noise
   - The viability of the defence that the claimant "came to the nuisance"
   - Whether the activities that form part of the alleged nuisance can be taken into account when assessing the character of the neighbourhood
   - The effect of planning permission
   - The power to award damages instead of an injunction

Obtaining a right by prescription

5. The Supreme Court held that it is possible to obtain by prescription a right to commit what would otherwise be a nuisance by noise if one can show at least 20 years' uninterrupted enjoyment as of right.

6. The greater problem lies in how this can be assessed when the level of noise may vary in intensity and frequency throughout the period. Time does not run for the purposes of prescription unless the activities of the owner of the putative dominant land can be objected to by the owner of the putative servient land. So, during such time as the noise does not amount to a nuisance time will not run, because for as long as there is no nuisance there can be no question of the claimant being able to object to it. Similarly, the extent of the prescriptive right will be hard to establish where frequency and intensity has varied.

7. Nevertheless, the Supreme Court held that these problems should not stand in the way of the principle that it is possible to obtain by prescription a right to commit what would otherwise be a nuisance by noise. Periods of time where

there was no such use or where the noise does not amount to a nuisance will not be fatal to a claim. It has to be shown that the activity has created a nuisance over 20 years, but the 20 years use does not have to be continuous. If the nature and degree of activity of the putitive dominant owner over the period of 20 years taken as a whole should make a reasonable person in the position of the putative servient owner aware that a continuous right to enjoyment was being asserted then a prescriptive right can be established.

No defence that the claimant came to the nuisance

8. The Supreme Court confirmed the well-established position that it is no defence to a nuisance claim to argue that the claimant came to the nuisance, in that they acquired or occupied the property after the nuisance had started. This was found to be consistent with the fact that nuisance is a property based tort and the right to allege nuisance should, as it were, run with the land.

9. Nevetheless, the Supreme Court found that it is relevant to ask whether an alteration in the claimant's property after the activity in question has started can give rise to a claim in nuisance if the activity would not have been a nuisance had the alteration not occurred. It may be a defence for a defendant to contend that the claim should fail because it is only as a result of the claimant changing the use of the land that the defendant's pre-existing activity is claimed to have become a nuisance.

Nuisance not to form part of the character of the neighbourhood

10. In assessing the character of the neighbourhood, the locality should be notionally stripped of the nuisance activities. A defendant can only rely on the activities as constituting part of the character of the locality to the extent that the activities can be conducted lawfully without nuisance.

11. By way of example, when applying this reasoning to this case Lord Neuberger found that the character of the locality should be assessed on the basis that: (i) it included the stadium and the track; and (ii) they could be used for racing; but (iii) only to the extent which would not cause a nuisance. However, if the activities in question could not be carried out without creating a nuisance they would have to be entirely discounted when assessing the character of the neighbourhood.

12. This was justified by the reasoning that if the matters complained of by the claimant are part of the character of the locality, then it is hard to see how they would be unacceptable by a standard which is to be assessed by reference to that very character, and further because it would not be right for the defendant to be able to rely on his own wrong against the claimant.

Planning permission not a defence

13. The Supreme Court confirmed that the grant of planning permission to undertake the activity which creates the nuisance is normally of no assistance to the defendant.

14. The grant of planning permission does not mean a development is lawful, it simply means a bar to the use imposed by planning law, in the public interest, has been removed. It is wrong in principle that, through the grant of planning permission, a planning authority should be able to deprive a property owner of a right to object to what would otherwise be a nuisance without providing compensation. A planning authority must balance public interests but does not take on the role of deciding a neighbour's common law rights.

15. Nevertheless, the existence and terms of a planning permission could be of some relevance in a nuisance case. The fact that a planning authority takes the view that a noisy activity is acceptable if limited to a certain time or level may be of real

value, at least as a starting point, in assessing a nuisance claim. It may also be considered a reason in favour of awarding damages instead of an injunction.

Power to award damages instead of an injunction

16. Prima facie, the position is that where a nuisance is established an injunction should be granted, so the legal burden is on the defendant to show why it should not. Nevertheless, the Supreme Court stressed the importance of considering damages rather than automatically awarding an injunction, and set out some very interesting discussions on the circumstances in which damages may be found to be more appropriate. In particular, as set out in Lord Neuberger's speech, it confirmed that the existence of planning permission which expressly or inherently authorises carrying on an activity in such a way as to cause a nuisance can be a factor in favour of awarding damages in lieu of an injunction.

17. Lord Sumption set out the most extreme view on this matter, explicitly rejecting the leading authority which created a strong presumption in favour of an injunction Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287, describing it as *"out of date"* and *"devised for a time in which England was much less crowded"*. He stated that there is much to be said for the view that damages are ordinarily an adequate remedy for nuisance, and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests – such as those of employees of the defendant's business or members of the public using or enjoying the defendant's business, particularly when that use has planning permission.

18. Lord Mance, however, was not persuaded of this view, stating that it put the significance of planning permission and pubic benefit too high in the context of the remedy to be afforded for a private nuisance. He preferred Lord Neuerger's more nuanced approach.

19. There was also discusssion of the appropriate measure of damages, Lord Neuberger stating that they should not always be limited to the value of the consequent reduction in the value of the claimant's property, but might where appropriate also include the loss of the claimant's ability to enforce their rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction.

20. Lord Clarke reserved his position but said it is at least arguable that there is no reason in principle why a court considering whether or not to award damages in lieu of an injunction should not be able to award damages on a more generous basis than the diminution in value caused by the nuisance, including, for example, an award which represented a reasonable price for a licence to commit the nuisance.

21. Lord Carnwath was more cautious about extending gain-based damages into the field of nuisance, where the injury is less specific, and the appropriate price much harder to assess, particularly in a case where the nuisance affects a large number of people.

22. On this matter their Lordships held differing views as to emphasis and detail and Lord Neuberger was keen to stress that, having not heard argument on it, this appeal was not concerned with deciding the matter. He stressed that the Court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered. Whilst some guidance is important, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good. Nevertheless, the observations of their Lordships will inform future consideration of this matter and firmly point the way towards an increase in damages awards in nuisance cases in place of assuming an injunction is the appropriate remedy.

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