Environmental Law Monthly

ENVIRONMENTAL JUSTICE

Coventry and Others -v- Lawrence and another [2014] UKSC 13

Facts

From 2006 the Appellants (L) occupied a residential property close to a speedway stadium ("the stadium") operated by the Respondents (C). The planning history of the stadium was that permission for its construction was granted in 1975 to C's predecessors. It permitted the stadium to be used for "speedway racing and associated facilities" for a period of ten years and from 1985 on a permanent basis. In 1984 stock car and banger racing started at the stadium. After ten years a Certificate of Lawful use was granted for those additional activities. Behind the stadium a motorcross track was established. It too was granted a temporary permission which was subsequently made permanent. In 2008 L issued proceedings against C claiming that the activities at the stadium constituted a noise nuisance.

Proceedings

At first instance the High Court granted an injunction limiting the amount of noise at the stadium. The injunction was stayed pending the rebuilding of L's property which had been badly damaged by fire. C had not contended that, if their activities were a nuisance, damages were a suitable alternative remedy. The Court of Appeal reversed that decision. They held that the activities did not constitute a nuisance. The primary ground was that the Judge below had been wrong not to take account of the actual use of the stadium and planning permissions when assessing the character of the neighbourhood. C appealed to the Supreme Court. The Supreme Court allowed the appeal to the extent that the activities constituted a nuisance on the facts of the case but remitted the case to the High Court to consider remedy which L raised for the first time.

Summary of Decision

Acquiring the Right to Commit a Nuisance

Although it would be an unusual right, the right to commit what would otherwise be a nuisance by noise could be obtained by prescription. The right would have to be obtained by the emission of sound that constituted a nuisance without interruption (not necessarily continuously) for 20 years That right would be better described as the right to transmit sound waves over neighbouring land. Cases would be fact sensitive (Per Lord Neuberger).

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Coming to a Nuisance

It is no defence to allege that the complainant "came to the nuisance". However, where a Claimant changes the use of the relevant land after the activity complained of has been established it is arguable that no claim in nuisance will lie. That would probably be limited to cases where (1) it is the senses that are affected by the activity, (2) the activity was not a nuisance before the Claimant changed the use of his land, (3) the activity is a reasonable and lawful use of the land (4) which is carried out in a reasonable way and (5) it causes no greater nuisance than when the Claimant first changed the use if his land (Per Lord Neuberger).

Reliance on the Defendant's Own Activities

A Defendant to a claim in nuisance can only rely on his own activities in relation to the land as being part of the local character to the extent that they are, themselves, not a nuisance. That may result in a degree of circularity in that a Court would have to consider to what extent an activity is a nuisance before disregarding it (Per Lord Neuberger).

The Effect of Planning Permission

It remains the case that the grant of planning permission does not override the private law rights of parties relating to nuisance. However, the fact of planning permission could be of some relevance in nuisance cases, such as where the permission restricted the times during which activities could be undertaken (Per Lord Neuberger).

Remedy

There should be no restriction on the Court's discretion as to the award of damages instead of an injunction; the test in *Shelfer -v- City of London Electric Lighting Co* [1895] 1 Ch 287 ("Shelfer") should not be slavishly followed. Further, the grant of planning permission may be of relevance when considering whether the activity is of public benefit and should be met with an award of damages rather than prevented by injunction. Other factors such as loss of jobs or the number of Claimants affected will require consideration It is arguable that damages should not be limited to the reduction in value of the land and could be related to the benefit to the Defendant (Per Lord Neuberger). An award of General Damages might be appropriate (Per Lord Clarke).

Shelfer is out of date and there is much to be said for saying that ordinarily damages should be awarded for nuisance and as a matter of principle in cases where there is planning permission for the activity complained of (Lord Sumption). Planning permission may well be relevant on the question remedy. Caution should be taken in making too direct a comparison with rights to light cases which generally provide drastic alternatives (Lord Carnwath).

Commentary

The majority of the principles set out in the judgment do not make dramatic reading in terms of changes in the law. Rather they represent welcome clarification. Although the possibility of acquiring a "right to transmit sound waves" is acquirable by prescription there will be practical difficulties in doing so. For example, establishing the level of noise for the required period without interruption will be a significant challenge. Lord Neuberger's suggested tests for reliance on activities by a Defendant to which the Claimant has come represent a workable and common sense approach.

Although there may be circular arguments involved, the affirmation that a Defendant cannot rely on his own nuisance when considering the characteristics of the neighbourhood is welcome. The Court of Appeal had suggested that activities which were in breach of planning permission could not be relied on as being unlawful; however, it is difficult to see why activities which were unlawful by way of being a nuisance should be any different. The Supreme Court has restored common sense. Indeed, as Lord Neuberger stated,

if activities which formed the very nuisance complained of were taken into account in the character of the neighbourhood it is difficult to see how a claim could ever be made out. The Supreme Court has stopped short of altering the law to state that the fact of planning permission (a public law matter) should affect private law rights in nuisance, at least in terms of liability. It is in relation to remedy that a significant change in the law has taken place. Prior to *Lawrence* the principles in *Shelfer* provided that damages would rarely be awarded in lieu of an injunction which was seen as the natural remedy to protect property rights. For some time *Shelfer* has been under attack, largely because of what were seen as disproportionate results in right of light cases; see e.g *HKRUKII Ltd -v- Marcus Alexander Heaney* [2010] EWHC 2245 (Ch).

Even though Lord Neuberger (see also Lord Mance and his comments as regards the value of one's home being other than purely money) restated that *prima facie* an injunction should be granted it is clear that the presumption will be much easier to displace. Developers will be keen to establish that, for example, jobs or green energy will provide a wide ranging benefit and that they have their planning permission to prove it. Claims may well develop into "beauty parades" by Defendants who will seek to argue that Claimants are standing in the way of progress or development. If damages are a realistic proposition they will also make early Part 36 Offers to put the Claimant under huge costs pressure. Lawyers will find it very difficult to give any firm advice as to whether an injunction is a likely remedy or not.

The decision as to remedy is certainly not limited to nuisance cases; by referring to *Regan -v- Paul Properties* [2006] EWCA Civ 1319 the court ensured that the comments related to interference with legal rights in property. There may well be a substantial inequality in bargaining positions and resources; the Jackson reforms limit what a party may *recover* in costs; not what he may *spend*. Developers may be happy to invest considerable sums in lawyers and experts if it is rewarded by an award of damages instead of an injunction. Defendants will no doubt argue that damages should be limited to the loss of value in the land. By making benefit-based damages an uncertain prospect the Supreme Court has created a significant battle ground. The wind farm operator that derives large profits from his activities will be unwilling to share them without a fight. Lord Neuberger recognised that a degree of uncertainty would be introduced by the decision. He stated that the law would develop on a case by case basis. That assumes that Claimants will be willing to take the litigation risks rather than the pay offs which will be offered. Deep pockets and a strong nerve will be required.

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FLOODING

Somerset's King Canute and a timely reminder on the 'common enemy' rule

With large parts of the UK still mopping up after the January and February floods, and property owners turning their minds to the task of protecting their land from what appears to be a future of more extreme flood events as climate change proceeds, it is worth examining where liabilities may lie when private