23 July 2014

PRESS SUMMARY

Coventry and others (Respondents) v Lawrence and another (Appellants) (No 2) [2014] UKSC 46
On appeal from: [2012] EWCA Civ 26

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption, Lord Carnwath

BACKGROUND TO THE APPEALS

This judgment is concerned with a number of points which arise from the Supreme Court's decision in *Coventry v Lawrence* [2014] UKSC 13. That decision held the occupiers of a Stadium, David Coventry trading as RDC Promotions, and a Track, Moto-Land UK Limited, liable in nuisance to the appellants, Katherine Lawrence and Raymond Shields. The appellants were the owners and occupiers of a residential bungalow, Fenland, some 850 yards away. The nuisance arose from the use of the Stadium for speedway racing and other motorcar racing, and the use of the Track for motorcycle racing and similar activities.

The appellants brought their proceedings not only against Mr Coventry and Moto-Land ("the respondents"), but also against their respective landlords, Terence Waters and Anthony Morley and a predecessor landlord ("the landlords"). The effect of the Supreme Court's decision was to reverse the Court of Appeal and restore the trial judge's order, which was based on his finding that the respondents, but not the landlords, were liable in nuisance. By the time of the trial, Fenland was unoccupied due to a fire, and is still fire-damaged today.

The order made by the judge included:

(i) An injunction against the respondents limiting the noise which could be emitted from the Stadium and the Track to take effect on 1 January 2012 or, if earlier, when Fenland is again fit for occupation;
(ii) Permission to the parties to apply to vary the terms of this injunction not earlier than 1 October 2011;
(iii) A provision dismissing the claims against the landlords; and
(iv) A direction that the respondents pay 60% of the appellants' costs.

The effect of the Supreme Court's earlier decision is to restore the orders for an injunction and for damages, as well as the order for costs. Four further issues now arise:

(1) Should the injunction be suspended until Fenland is rebuilt?
(2) When should the parties be able to apply to the judge to vary the terms of the injunction?
(3) Are the landlords also liable to the appellants in nuisance?; and
(4) Does the order for costs against the respondents infringe article 6 of the European Convention on Human Rights ("the Convention"), which protects the right to a fair hearing?

JUDGMENT

Lord Neuberger, with whom Lord Clarke and Lord Sumption agree, gives the main judgment. The injunction imposed by the judge against the respondents should be suspended until Fenland is fit to be occupied, subject to any party having liberty to apply at any time to vary or discharge the injunction. The respondents' claim in nuisance against the landlords is dismissed as the landlords neither authorised nor participated in the nuisance. Lord Carnwath, with whom Lord Mance agrees, would have held that the landlords participated in, and were consequently liable for, the nuisance. Consideration of the respondents' contention that the judge's order for costs infringes the respondents' rights under article 6 of the Convention is adjourned for a further hearing after notice is given to the Attorney-General and the Secretary of State for Justice.

REASONS FOR THE JUDGMENT

The first two issues are of no general application, the third issue is of some significance, and the fourth issue concerns a matter which is important **[4]**.

The two minor issues

On the first issue, the injunction should not take effect before Fenland is restored, unless it could be shown that the fact that the injunction is still suspended in some way prevented Fenland being restored **[6]-[7].**

On the second issue, there should not be a delay before the parties are able to apply to vary the injunction **[8]**.

The third issue: the liability of the Landlords in nuisance

The law relating to the liability of a landlord for his tenant's nuisance is tolerably clear in terms of principle. In order to be liable a nuisance, the landlords either must have authorised it by letting the property or they must participate directly in the commission of the nuisance **[11].**

In the present case, there can be no question of the landlords having authorised the nuisance on the ground that it was an inevitable, or nearly certain, consequence of the letting the Stadium and the Track to the respondent tenants. The intended uses of the Stadium and the Track were known to the landlords at the time of the lettings and those uses have in fact resulted in nuisance, but that is not enough to render the landlords liable in nuisance as a result of the letting. It is clear that those uses could be, and could have been, carried on without causing a nuisance to the appellants **[15].**

Accordingly, if the claim in nuisance against the landlords is to succeed, it must be based on their 'active' or 'direct' participation **[18].** Although there is little authority on the issue, the question whether a landlord has directly participated in a nuisance must be largely one of fact for the trial judge, rather than law **[19].** The issue whether a landlord directly participated in his tenant's nuisance must turn principally on what happened subsequent to the grant of the leases, although that may take colour from the nature and circumstances of the grant and what preceded it **[20].** None of the factors upon which the appellants rely establish that the landlords authorised or participated in the nuisance **[21]-[30].**

Lord Carnwath, with whom Lord Mance agrees, would have held that the landlords actively encouraged the tenants' nuisance, and are therefore liable for that nuisance **[66, 69].**

The fourth issue: the level of costs

The appellants' costs at first instance consisted of three components in the light of the Court and Legal Services Act 1990, as amended by Part II of the Access to Justice Act 1999, and in accordance with the Civil Procedure Rules:

(1) Base costs: what their lawyers charged on the traditional basis;
(2) Success fee: the lawyers were entitled to this because they were providing their services on a conditional fee ('no win, no fee') basis; and
(3) ATE premium: a sum payable to an insurer who agreed to underwrite the appellants' potential liability to the respondents for their costs if the respondents had won.

The appellants' base costs were £398,000, the success fee was approximately £319,000, and the ATE premium was around £350,000. As a result of the judge's order, therefore, the respondents are liable for over £640,000 of a total of around £1,067,000. Even if one ignores the success fee and ATE premium, the fact that it can cost two citizens £400,000 in legal fees to establish and enforce their right to live in peace in their home is on any view highly regrettable **[32]-[36].**

The consequences of the judge's order that the respondents pay 60% of the appellants' costs means that they have to pay 60% of the 100% success fee as well as 60% of the ATE premium. The respondents contend that, if the court required them to pay 60% of the success fee and of the ATE premium, their rights under article 6 would be infringed **[38].** In the light of the facts of this case and the European Court of Human Rights' jurisprudence, it may be that the respondents are right in their contention that their liability for costs would be inconsistent with their Convention rights **[41].**

However, it is unclear whether such infringement of the respondents' human rights, if established, should be recognised by a declaration of incompatibility or by other relief, and a declaration of incompatibility ought not to be made without the Government having the opportunity of addressing the court **[42].** Accordingly, if the respondents wish to maintain their contention that article 6 is infringed by the order for costs in this case, the present appeal should be re-listed for hearing before the Supreme Court, after appropriate notice has been given to the Attorney-General and the Secretary of State for Justice **[44].**

References in square brackets are to paragraphs in the judgment

26 February 2014

PRESS SUMMARY

Coventry and others (Respondents) v Lawrence and another (Appellants) [2014] UKSC 13
On appeal from [2012] EWCA Civ 26

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption and Lord Carnwath

BACKGROUND TO THE APPEALS

This appeal raises a number of points in connection with the law of private nuisance, a common law tort. A nuisance is an act (or a failure to act) on the part of a defendant, which is not otherwise authorised and which causes an interference with the claimant's reasonable enjoyment of her land.

In February 1975 planning permission was granted for the construction of a stadium ("the Stadium") in the Suffolk countryside. The planning permission permitted the Stadium to be used for "speedway racing and associated facilities" for a period of 10 years, and it was subsequently renewed on a permanent basis in 1985. Stock car and banger racing started at the Stadium in 1984, and after ten years of such use Mr Waters successfully applied for a Certificate of Lawfulness of Existing Use or Development. To the rear of the Stadium is a motocross track ("the Track"), which was used pursuant to a temporary personal planning permission, which was subsequently renewed on a permanent basis.

In January 2006, Katherine Lawrence and Raymond Shields ("the appellants") moved into Fenland, a residential property close to the Stadium and Track. In 2008 they issued proceedings against the operators of the Stadium and the Track ("the respondents") for an injunction prohibiting their activities, on the ground that they gave rise to a nuisance by noise. At first instance the appellants were successful in that the judge made an order limiting the level of noise emitted by those activities, but he stayed the order until the appellants' house had been rebuilt as it had been severely damaged by fire, and granted the parties the right to apply to him. The Court of Appeal allowed the respondents' appeal, holding that the appellants had failed to establish that the activities constituted a nuisance. Jackson LJ, who gave the main judgment, held that the judge was wrong to hold that the actual use of the Stadium and the 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.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Neuberger, with whom the rest of the court substantially agrees, gives the main judgment. The respondents' activities at the Stadium and the Track constitute a nuisance and, as the respondents fail to establish a prescriptive right to carry out these activities, the injunction granted by the judge is restored, although it remains stayed because the appellants' house has not yet been rebuilt.

REASONS FOR THE JUDGMENT

The issues raised in relation to a claim for nuisance by noise are as follows [**6**]:

- The extent, if any, to which it is open to a defendant to contend that he has established a prescriptive right to commit what would otherwise be a nuisance by noise;
- The extent, if any, to which a defendant can rely on the fact that the claimant "came to the nuisance";
- The extent, if any, to which it is open to a defendant to invoke the actual use complained of by the claimant, when assessing the character of the locality;
- The extent, if any, to which the grant of planning permission for a particular use can affect the question whether (i) that use is a nuisance or (ii) any other use in the locality can be taken into account when considering the character of the locality;

- The approach to be adopted by a court when deciding whether to grant an injunction or whether to award damages instead, and the relevance of planning permission to that issue.

Acquiring a right to commit what would otherwise be a nuisance by noise
In light of the relevant principles, practical considerations and judicial dicta, it is possible to obtain by prescription (a form of deemed grant that arises as a result of long use) a right to commit what would otherwise be a nuisance by noise [**28**]-[**46**]. What has to be established is that the relevant activity has created a nuisance for over 20 years "without interruption" [**143**].

"Coming to the nuisance"
It is not a defence to a claim in nuisance to show that the claimant acquired or moved into her property after the nuisance had started. However it may be a defence, at least in some circumstances, that it is only because the claimant has changed the use of her land that the defendant's pre-existing activity is claimed to have become a nuisance [**47**]-[**58**].

Reliance on the defendant's own activities in defending a nuisance claim
A defendant, faced with a contention that her activities give rise to a nuisance, can rely on those activities as constituting part of the character of the locality, but only to the extent that those activities do not constitute a nuisance [**74**]. In many cases it is fairly clear once the facts are established whether a defendant's activities constitute a nuisance, albeit in some cases the court may have to go through an iterative process when considering what noise levels are acceptable when assessing i) the character of the locality and ii) what constitutes a nuisance [**71**]-[**72**]. The same principle applies to the defendant's ability to rely on other uses as forming part of the character of the locality [**75**].

The effect of planning permission on an allegation of nuisance
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 her with compensation [**90**]. A planning authority can be expected to balance competing interests as best it can in the overall public interest and some of those interests play no part in the assessment of whether a particular activity constitutes a nuisance [**95**]. Nevertheless, there will be occasions when the terms of a planning permission could be of some relevance in a nuisance case: the fact that the planning authority takes the view that noisy activity is acceptable after 8.30am in a particular locality may, for example, be a real value as a starting point in a case where the claimant contends that the activity gives rise to a nuisance if its starts before 9.30am [**96**].

The award of damages instead of an injunction
Where a claimant has established that the defendant's activities constitute a nuisance, *prima facie* the remedy to which she is entitled (in addition to damages for past nuisance) is an injunction to restrain the defendant from committing such nuisance in the future. The *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not [**121**]. The existence of a 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 refusing an injunction and compensating the claimant in damages [**125**]. In a number of recent cases judges have been too ready to grant injunctions without considering whether to award damages instead.

Lord Neuberger concludes that the respondents' activities at the Stadium and on the Track do constitute a nuisance and that, as the respondents had not established that their activities amounted to a nuisance during a period of at least 20 years, they fail to establish a prescriptive right to carry out these activities. Consequently, the appeal is allowed and the injunction granted by the judge restored [**133**]-[**153**]. However, when and if the matter goes back before the judge, he should be entitled to consider whether to discharge the injunction and award damages instead.

Lord Mance, Lord Clarke, Lord Sumption and Lord Carnwath all give judgments concurring with the outcome reached by Lord Neuberger.

References in square brackets are to paragraphs in the judgment