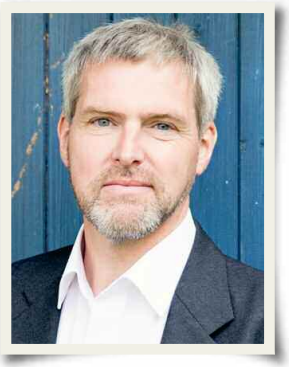
Student article

Coventry v Lawrence: What is the appropriate remedy for nuisance?



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At a glance

- This article examines the extent to which the grant of planning permission should impact the remedies in nuisance, and in particular looks at the arguments considered by Lords Nueberger, Mance, Sumption and Carnwath in *Coventry v Lawrence* [2014] AC 822.
- 19th century authorities are considered for the insight they provide on the origins and purpose of remedies in nuisance.
- It is argued that although the *Shelfer* principles should be applied less rigidly in light of *Coventry v Lawrence,* an injunction *prima facie* remains the most appropriate remedy.

In the decision of the Supreme Court in *Coventry v Lawrence* [2014] AC 822 there was significant discussion about whether damages in lieu of an injunction is an appropriate remedy in nuisance claims, particularly where planning permission has been granted in respect of the nuisance.

This article will examine the proposition put forward by Lord Sumption that the grant of planning permission in respect of the activity complained of may have a significant impact on remedies in nuisance as it raises 'a broader issue of legal policy…namely how is one to reconcile public and private law in the domain of land use where they occupy much the same space' (at [155]).

Lord Sumption suggested that the whole jurisprudence on remedies in nuisance needs to be updated. He noted that there is far less space for undisturbed private land use than there once was. Furthermore prior to the Town and Country Planning Act 1947, the idea of a public interest in the use of land was not codified. Now that it is, there is a potential conflict between the tort of nuisance and planning law. He expressed the view that "a use which is in the interest of very many other people who derive enjoyment or economic benefits from it of precisely the kind with which the planning system is concerned." He considered that "An injunction prohibiting the activity entirely will operate in practice in exactly the same way as a refusal of planning permission, but without regard to the factors which a planning authority would be bound to take into account. The obvious solution to this problem is to allow the activity to continue but to compensate the claimant financially for the loss of amenity and the diminished value of his property." (at [161]).

Planning permission and choice of remedy

There are arguably two reasons why the grant of planning permission may be an important factor in deciding whether to grant an injunction or damages in respect of a continuing nuisance. First, if damages are awarded in lieu, the successful claimant is not left without a remedy and, according to Lord Neuberger, the basis of assessment of damages could be generous and may recognise 'the benefit to the defendant of not suffering an injunction' (at [128]). Second, property may, on occasions, be an investment. One might well suspect that an injunction, if granted, could serve as a bargaining chip to extract money from a defendant to enable longstanding activities to continue, thereby producing a potentially unjustified windfall for the claimant. However, this is unlikely to be the case for the overwhelming majority of claimants who are simply seeking peace, quiet and some respite from nuisance activities. It is likely, for instance, that residents experiencing foul odours from a waste site just want to be able to open their windows or sit out in the garden without smells. They are unlikely to be interested in seeking financial gain from their unfortunate circumstances.

Lord Sumption's points forcefully made should then be compared with the equally cogent argument of Lord Mance, who suggested that: 'the right to enjoy one's home without disturbance is one … which people value for reasons largely if not entirely independent of money' (at [168]). In support of this statement it may be argued that a presumption of damages in lieu of an injunction where planning permission has been granted creates the possibility that a defendant could buy his way out of a nuisance claim, in effect forcing a claimant to sell the right to quiet enjoyment of his land. Moreover, it raises one of the key concerns in *Coventry* that also arises in many other nuisance cases where activities simply become lawful by the failure of public bodies to take effective enforcement action: see e.g. *Watson v Croft Promo-sport Ltd* [2009] 3 ALL ER 249, *Thornhill v NMR Ltd* [2011] Env LR 33 and *Barr v Biffa Waste Services Ltd* [2013] QB 455. The same issue arises where there has never been effective environmental impact assessment of the likely effects of a proposed activity. This is not a state of affairs that the law should endorse. It is however a debate of particular interest as it reflects the need to balance the right of the individual to quiet enjoyment of land with the continuance of an activity which may be in the public interest, as pointed out by Lord Neuberger at [120].

Shelfer and the l9th Century authorities

Private nuisance is one of the few remaining ways that residents can protect the quiet enjoyment of their homes, especially when set against the backdrop of an increasingly crowded island and an increasingly complex legislative framework surrounding the use of land. There has long been recognition of this as one of the purposes of nuisance and it is for this reason that *Shelfer* and 19th century authorities may still be relevant. For example in *Bliss v Hall* (1838) 132 E.R 758 Chief Justice Tindal held that a 'plaintiff [comes] to the house he occupies with all the rights which the common law affords', meaning that notwithstanding countervailing considerations such as prescription in that case, or planning permission in *Coventry,* the remedy should be to stop the nuisance if liability is shown.

This early principle was expanded in *Sturges v Bridgman* (1879) 11 Ch. D. 852 when at first instance Lord Jessel M.R. gave an analogy (with what now appears a wonderful vision of contemporary life some 150 years on) of a blacksmith running his business in a barren moor with no surrounding properties. He held, and the Court of Appeal endorsed his approach, that if one was to come to live on the moor one would not be deprived of one's rights as a resident simply because the blacksmith was there first. A resident's right to quiet enjoyment comes with him and must be balanced against the rights of another to use his land.

The need recognised in *Sturges* to protect neighbours and the concept of balancing neighbouring uses is analogous to today's land use planning system. This was recognised by Lord Carnwath in *Coventry* (at [176]) when he stated that "since the middle of the 19th century common law nuisance has played an important complementary role to regulatory controls, on the one hand stimulating industry to find better technical solutions to environmental problems, and, on the other, stimulating the legislature to fill gaps in the regulatory system." If the grant of planning permission is allowed to 'trump' private rights in nuisance, so that the harmful acts may continue, it is difficult to see how this complementary role will continue. It is relevant to note that Lord Carnwath sought to make a distinction between environmental regulation and land use planning. However, this is somewhat artificial. Indeed, land use planning is simply one form of environmental regulation; arguably the most important form of environmental regulation. And while planning practitioners may try to decouple the environment from land use planning by, for instance, dis-applying the EIA Directive 2011/92/EU such an approach is likely to despoil our crowded land further.

In light of the principles arising from 19th century authority and judgments in *Coventry* the interests of developers should be considered against those directly affected by development. In his discussion as to the relevance of the grant of planning permission Lord Neuberger comments at [89] that:

"… the grant of planning permission for a particular development does not mean that that development is lawful. All it means is that a bar to the use imposed by planning law, in the public interest, has been removed. Logically, it might be argued the grant of planning permission for a particular activity in 1985 or 2002 should have no more bearing on a claim that that activity causes a nuisance than the fact that the same activity could have occurred in the 19th century without any permission would have had on a nuisance claim in those days."

This finding draws in the recurrent discussion about rights of appeal under the Town and Country Planning Act 1990 and that a developer is entitled to appeal a refusal of permission to the Secretary of State but that there is no third party right of appeal for those affected by any decision. Thus, the only remedy that a neighbour may have in challenging a nuisance causing development is through a claim in private nuisance. And, although this is far from ideal, this option should not be further limited by a presumption against an effective remedy.

It may be suggested that a resident could challenge by judicial or statutory review a planning permission that caused a nuisance. This is unsatisfactory for a myriad of reasons including, for example, that a nuisance-causing development would only be quashed if the decision-maker had erred in law and also, by the time it was known that the nuisance was arising the six week time limit for challenging any decision would have long since expired. Also, proper grounds for judicial review would often not stretch to address the underlying problem of the nuisance. It is possible for a decision to give rise to a nuisance but yet not be susceptible to judicial review because the proper procedure and approach was followed by the decision maker, and the nuisance was not foreseeable by the decision maker at the time of the grant of permission.

Injunctions as the *prima facie* remedy

It could well be that the *Shelfer* principles can be applied more flexibly in the light of *Coventry.* Nevertheless, it is clear that an injunction should *prima facie* follow a finding of nuisance (Lord Neuberger at [101]). The danger in doing otherwise would be to reduce our lives to mere monetary considerations and to render our homes and the peaceful enjoyment of our homes a financial product to be bought or sold whenever the opportunity arises. Indeed, the need to avoid this type of undesirable situation prompted the enactment of the Trusts of Land and Appointment of Trustees Act 1996 which abolished the concept of trust for sale in relation to home ownership. There is also the likelihood that the nuisance affects individuals apart from the claimant, such as neighbours or future homeowners in an area affected by the nuisance. There are many reasons why others affected by nuisance may not come forward to join a claim. Relying only on damages paid to the claimant does not remedy the situation for others.

It is entirely reasonable that if an activity or development has been found to cause a nuisance, it should be stopped. That is not to say the operational activities must stop, but that the nuisance should stop being caused to others e.g. by limiting the occasions of noisy activities, by stricter operational limits on the types of waste introduced to waste sites in order to limit odours, or by compliance with more stringent air pollution controls. The courts should be very slow to invoke a crude form of the polluter pays principle and say: 'Yes, you can cause a nuisance providing you pay for the privilege'. The erosion of robust remedies to prevent nuisance would reduce society to little more than a price tag and it cannot really be the case that we have reduced our lives to this – yet.

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