Trinity Term
[2014] UKSC 46
On appeal from: [2012] EWCA Civ 26

JUDGMENT

Coventry and others (Respondents) *v* Lawrence and another (Appellants) (No 2)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Carnwath

JUDGMENT GIVEN ON

23 July 2014

Heard on 12 May 2014

Appellant
Stephen Hockman QC
William Upton
(Instructed by Richard Buxton Environmental and Public Law)

1st Respondent
Robert McCracken QC
Sebastian Kokelaar
(Instructed by Pooley Bendall Watson)

2nd Respondent
Edward Denehan
Giselle McGowan
(Instructed by Hewitsons LLP)

LORD NEUBERGER (with whom Lord Clarke and Lord Sumption Agree)

Introductory

1. This judgment is concerned with a number of points which arise from this Court's decision in *Coventry v Lawrence* [2014] UKSC 13, [2014] 2 WLR 433. By that decision, we held that the occupiers of a Stadium, David Coventry trading as RDC Promotions, and a Track, Moto-Land UK Limited, were liable in nuisance to the appellants, Katherine Lawrence and Raymond Shields, who 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.

2. A summary of the factual and procedural history is set out in paras 7-27 of our earlier judgment. 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 our decision was to reverse the Court of Appeal and to restore the trial judge's order of 4 March 2011, which was based on his finding that the respondents were liable in nuisance but the Landlords were not so liable. By the time of the trial, Fenland was unoccupied owing to a fire, and it remains in its fire-damaged state to this day.

3. The order made by the Judge included (i) an injunction against the respondents limiting the levels of 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 made fit for occupation", (ii) permission to the parties "to apply to vary the terms of this injunction not earlier than 1 October 2011", (iii) awards of damages of some £10,350 against each of the two respondents, (iv) a provision dismissing the claims against the landlords, and (v) a direction that the respondents pay 60% of the appellants' costs, to be subject to detailed assessment.

4. Subject to further arguments, the effect of our earlier decision is to restore the orders for an injunction and for damages referred to in items (i) and (iii) above, and also the order for costs recorded in item (v). Four further or consequential issues now arise, and they are as follows. First, in relation to item (i), should the injunction be suspended until Fenland is rebuilt? The second issue, which arises out of item (ii), is when the parties should be able to apply to the judge. The third issue, which is raised by item (iv), is whether the Landlords are also liable to the appellants in nuisance. The fourth issue, which concerns item (v), is whether the order for costs against the respondents infringes article 6 of the European Convention on Human Rights ("the Convention"). 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.

The two minor issues

5. On the first minor issue, the respondents contend that the injunction should be suspended until Fenland is rebuilt and fit to be occupied again as a residence, whereas the appellants argue that, as the Judge decided, there should be a specific "long-stop" date, by which the injunction should take effect irrespective of the physical state of Fenland. On the face of it, at any rate, it seems to me that there is no reason why the injunction should start to bite so long as Fenland remains unoccupiable. The purpose of the injunction is to prevent activities at the Stadium and on the Track interfering with the ordinary residential use and enjoyment of Fenland. So long as such use and enjoyment is not possible, it is hard to see what justification there can be for maintaining the injunction: it would cause damage to the respondents with no concomitant benefit to the appellants.

6. There are arguments the other way, but they are unpersuasive. Thus, the Judge imposed a long-stop date, but (i) there is no apparent justification for it, and (ii) the date has long passed anyway, so this Court is free to exercise its own discretionary power. It is also said that there is reason to believe that the fire may have been started by one of the many people in the locality who support the continuation of the respondents' activities. That is no more than a suspicion, and the Judge was unable to decide whether the fire had occurred accidentally or had been started deliberately. He did find that an earlier attack on Fenland with a forklift truck had been "to exact revenge upon [the appellants] for the difficulties their complaints had caused to the activities at the Stadium or at the Track", although there was no proof as to who was responsible. In my view, unless it could be shown that the fact that injunction was still suspended in some way prevented Fenland being restored, I do not see why it should take effect before Fenland is restored.

7. It was also argued that the effect of this decision would be that the respondents "could postpone indefinitely the date when the injunction will take effect". However, it is not the respondents, but the appellants, who, by putting off the restoration of Fenland (as they are of course quite entitled to do) can indefinitely postpone the coming into force of the injunction. As the injunction is for the benefit of the residential use and occupation of Fenland, that is scarcely a surprising state of affairs.

8. Turning to the second minor issue, I do not consider that there should be a delay before the parties are able to apply to vary the injunction. The Judge thought that there should a delay, apparently to enable either party to argue that the terms of the injunction were not satisfactory in practice. The appellants contend that, given that this was a matter for the Judge, this Court should adopt the same approach. However, the Judge's approach was inhe**r**ently flawed as, under his order, the injunction would not have come into effect under item (i) above before either party could have made an application under item (ii).

9. Even more importantly, at least one reason which the respondents will very probably have in applying to the court is to argue that the court should discharge the

injunction on the ground that damages would be an adequate remedy. As explained in para 149-151 of our earlier judgment, in the light of the state of the authorities before we gave our judgment, this argument was understandably not regarded as having much prospect of success, and therefore was not run by the respondents below. However, it now has a prospect of success, and, as is stated in para 152 of the earlier judgment, it should be considered on its merits if it is indeed raised. There is therefore now a good reason, which did not exist when the Judge's order was being considered, for the respondents to be able to apply without having to wait.

The first main issue: the liability of the Landlords in nuisance

10. The first main issue concerns the extent to which the Landlords should be held liable for nuisance which is caused by their tenants, the respondents. At trial, the Landlords do not seem to have made much of the argument that they were in a different position from the respondents. It appears that it was the Judge who took the point that the terms of the leases under which the respondents occupied the Stadium and the Track ("the Leases") contained covenants against nuisance, and that the law as set out in *Clerk & Lindsell on Torts*, 20th edition, para 20-81, indicated that landlords are not liable for nuisance created by their tenants, unless the nuisance was close to inevitable as a result of the letting. On that basis, relying primarily on the terms of the Leases, he dismissed the claims against the Landlords. That decision was upheld by the Court of Appeal on the ground that there was no nuisance, and therefore no consideration was given to the question whether the Judge's reasons for rejecting the claims against the Landlords were justified. However, now that we have held that the respondents are liable in nuisance, the question which arises is whether the Judge was right in holding that their Landlords were nonetheless not liable. I should perhaps add that the appellants' cross-appeal on this issue to the Court of Appeal related simply to Terence Waters ("Mr Waters") and his son James, although claims had been made unsuccessfully against one other defendant under this head.

11. The law relating to the liability of a landlord for his tenant's nuisance is tolerably clear in terms of principle. Lord Millett explained in *Southwark London Borough Council v Mills* [2001] 1 AC 1, 22A, that, where activities constitute a nuisance, the general principle is that "the … persons directly responsible for the activities in question are liable; but so too is anyone who authorised them". As he then said, when it comes to the specific issue of landlords' liability for their tenant's nuisance, "[i]t is not enough for them to be aware of the nuisance and take no steps to prevent it". In order to be liable for authorising a nuisance, the landlords "must either participate directly in the commission of the nuisance, or they must be taken to have authorised it by letting the property".

12. In *Smith v Scott* [1973] Ch 314, referred to with approval by Lord Hoffmann in *Mills* at p 15D-E, Sir John Pennycuick V-C considered at p 321C-D the appropriate test to be applied in order to decide whether landlords had authorised a nuisance by letting a property from which the tenant caused the nuisance. He described "the authorities … [as] not altogether satisfactory", but decided that they suggested that it must be a "virtual

certainty", or there must be "a very high degree of probability", that a letting will result in a nuisance before the landlords can be held liable for the nuisance. As Pickford LJ put it in a case cited with approval by Lord Millett in *Mills* at p 22A, *Malzy v Eichholz* [1916] 2 KB 308, 319, "[a]uthority to conduct a business is not an authority to conduct it as to create a nuisance, unless the business cannot be conducted without a nuisance", a view shared by Lord Cozens-Hardy MR at pp 315-316.

13. When it comes to landlords being liable for their tenant's nuisance by participating in the nuisance, as a result of acts or omissions subsequent to the grant of the lease, the law was considered authoritatively in *Malzy*. Lord Cozens-Hardy at p 316 had no hesitation in rejecting as "an extraordinary proposition" the contention that landlords could be rendered liable by accepting rent and refraining from taking any proceedings against their tenant, once they knew that their tenant was creating a nuisance. As he put it at p 315, by reference to an earlier, unreported case, "there must be such circumstances as to found an inference that the landlord actively participated in the [relevant] use of the [property]", and he referred a little later to the need for "actual participation by [the landlord] or his agents".

14. It was suggested that two decisions of the Court of Appeal, *Sampson v Hodson-Pressinger* [1981] 3 All ER 710 and *Chartered Trust Plc v Davies* [1997] 2 EGLR 83, demonstrated that the law has developed since *Malzy*, so that it is now less easy for landlords to escape liability for their tenant's nuisance than it was 100 years ago. We were not referred to any social, economic, technological or moral developments over the past century in order to justify a change in the law on this topic; indeed, as already mentioned, *Smith* (where Sir John Pennycuick relied on 19th century cases) and *Malzy* (which was decided a century ago) were both cited with approval in the House of Lords less than 15 years ago. *Sampson* was discussed in *Mills* at p 16B-D by Lord Hoffmann, whose implied doubts about the decision I share. If, which I would leave open, the defendant landlords in *Sampson* were rightly held liable for nuisance in that case to the plaintiff tenant, it could only have been on the basis that the ordinary residential user of the neighbouring flat which they had let would inevitably have involved a nuisance as a result of the use of that flat's balcony. In *Chartered*, although the nuisance resulted from the tenant's use of the property, the actual nuisance was caused by people assembling in the common parts, impeding access to the plaintiff's property. Since the landlords were in possession and control of the common parts, where the nuisance was occurring, the decision may well have been justified on orthodox grounds, although, again, I would not want to be taken as approving (or indeed disapproving) the decision that there was a valid claim against the landlords in nuisance in that case.

15. In the present case, there can be no question of the Landlords being liable to the appellants for the nuisance on the ground that it was an inevitable, or nearly certain, consequence of the letting to respondent tenants of their respective demised premises, the Stadium and the Track. The intended uses of those properties were well 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 from what the Judge said in his judgment and from the terms of the injunction he granted that those uses could be, and could have been, carried on without causing a

nuisance to the appellants. It also appears that, in the past, the use of the Stadium and the Track may well not have given rise to any nuisance. Accordingly, the Landlords cannot be liable in nuisance as a result of having let the Stadium and Track to the respondents.

16. In reaching the same conclusion, the Judge was primarily impressed by the inclusion of covenants against nuisance in the Leases. Unfortunately, as is common ground, he misinterpreted the relevant clause in the Motoland lease. Even if the landlords would have been assisted by a clause prohibiting nuisance, this was not such a clause. On the contrary the prohibition was "subject to" the tenant being allowed to use the premises for the permitted motor-cycle use. This might be taken, if anything, as an indication that the landlords had accepted the risk that the permitted use might cause a nuisance, and deprived themselves of power through the lease to do anything about it.

17. I doubt in any event that such covenants could take matters further either way. If, at the time that the Leases were granted, it was inevitable, or close to inevitable, that the proposed or permitted uses would result in nuisance, then I do not think that the Landlords could have escaped liability by simply taking, or having taken, a covenant against nuisance (even assuming that the covenant, properly construed, would have served to prevent nuisance from the proposed or permitted uses in such circumstances). If, as was held in *Malzy*, landlords do not become liable for their tenant's nuisance simply by failing to enforce a covenant which would put an end to the nuisance, it must follow that, if landlords would otherwise be liable for their tenant's nuisance, they should not escape liability simply by including such a covenant in the lease. Conversely, in a case such as the present where the proposed uses would not necessarily result in nuisance, I do not consider that the Landlords' position would have been weaker if the Leases had contained no covenant against nuisance. As Lord Cozens-Hardy MR put it in *Malzy* at p 319 it is wrong to "render [the landlord] a sort of trustee of [such a] covenant for the benefit of [a neighbour]".

18. Accordingly, if the claim in nuisance against the Landlords is to succeed, it must be based on their "active" or "direct" participation to use the adjectives employed by Lord Cozens-Hardy in *Malzy* and by Lord Millett in *Mills.* The judge appears to have ignored this alternative. Although he referred to the allegations of "orchestration" by Terence Waters, he regarded them as potentially relevant only to a separate claim of harassment, which had not been pleaded. Accordingly he made no, or limited, findings on this issue. That failure is attributable to the fact that the Landlords did not raise at trial the argument that they should not be liable for nuisance if the respondents were so liable, and, as mentioned above, it was the Judge who raised the point, and he went on to decide it on the misconceived basis described in para 16 above. In this Court, the appellants expressly disclaimed the right to contend that it was not open to the Landlords to rely on the argument that they had not authorised or participated in the nuisance despite not having taken the point properly at first instance. While I appreciate the concern shared by Lord Mance and Lord Carnwath in finding for the Landlords in these circumstances, I consider that we have to do our best to arrive at the right result in the light of the evidence and the findings which the Judge made.

19. This creates a difficulty for this court. 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. The difficulty is compounded by the lack of pleadings on the point, attributable no doubt to the late stage at which it emerged. In other circumstances it might be appropriate to remit the matter for further findings on this issue. However, this was not sought by any of the parties, for understandable reasons, given the exorbitant expenditure of time and money already incurred. Accordingly we must do our best on the available material to decide whether the Landlords directly participated in the respondents' nuisance-creating activities.

20. It is clear in my view that 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. In this case, Lord Carnwath considers that it is significant that (i) Mr Waters (and his son James) had been using the Stadium before the grant of the lease of it in 2005 and had tried to revive its commercial use in 2008, and (ii) Mr Waters initially developed the Track and used it from 1992 until the grant of the lease. I consider that information is of very marginal relevance to the question whether they directly or actively participated in the nuisance while the Stadium was let. At the most it may fairly be said to render it a little more probable that they participated, but in my view that is as far as it is likely to go in this case.

21. In this case, the appellants rely on a number of factors to establish their case that Mr Waters participated in the nuisance. In particular, they rely on the fact that Mr Waters (i) did nothing as landlord to try to persuade his tenant to reduce the noise, (ii) erected a hay-bale wall around Fenland to discourage complaints and to keep down the noise, (iii) co-ordinated all dealings with the local authority on noise issues, leading for the respondents in discussions, (iv) appealed against the noise abatement notice served by the local authority in respect of the noise emanating from the Stadium and the Track, and (v) co-ordinated the response to the appellants' complaints about the noise, and often responded himself. I shall concentrate on the case against Mr Waters, as, if it fails, the case against his son James must fail, as the grounds for holding him liable are weaker.

22. As to point (i), the fact that a landlord does nothing to stop or discourage a tenant from causing a nuisance cannot amount to "participating" in the nuisance (to use the expression employed by Lord Millett and Lord Cozens-Hardy). As a matter of principle, even if a person has the power to prevent the nuisance, inaction or failure to act cannot, on its own, amount to authorising the nuisance. As already discussed, that is strongly supported by the reasoning in *Malzy*.

23. I also consider point (ii) to be of very limited force. Absent very unusual circumstances, the fact that a landlord takes steps to mitigate a nuisance can scarcely give rise to the inference that he has authorised it. It is somewhat ironic that the appellants argue that Mr Waters should be liable for the nuisance because he did not take steps to prevent it, and then argue that the fact that he took steps to reduce the

nuisance supports the contention that he is liable for it. Constructing the wall on land adjacent to Fenland could, it is fair to say, be regarded as a somewhat aggressive act. Indeed, the Judge said that he "should have been inclined to regard [it] as an aggravating feature to be reflected in an award of damages, had [Mr Waters] been found to be liable in nuisance", but, as he immediately went on to observe, "that does not mean that Mr Waters thereby participated in the nuisance".

24. Points (iii), (iv) and (v), which are all based on Mr Waters' leading part in fighting off the risk of nuisance abatement by the local authority and claims in common law, have somewhat more force, but, even taken together, they do not persuade me that Mr Waters participated in the nuisance. Any landlord, whose premises were being lawfully used for motor car and motorbike racing, would naturally wish to avoid, or else to minimise, any restriction on the emission of noise from the premises, whether by the local authority or by the court. Any such restriction would be very likely adversely to affect the value of his reversionary interest, as it would risk curtailing the racing activities on the premises, and therefore the commercial attraction of the premises, which in turn could be expected to depreciate the capital and rental values of the premises. On that ground alone, I find it hard to accept that, by trying to fight off allegations of nuisance against his tenants, a landlord can be said to be participating or authorising the nuisance.

25. So far as point (iii) is concerned, a noise abatement notice was served by the local authority in December 2007, and it included a requirement for certain attenuation works, which were eventually carried out in January 2009. It is clear that, particularly during 2007, Mr Waters spoke against the service of an abatement notice and any further steps to curtail the activities at the Stadium and Track, at a number of meetings between the owners and operators of the Stadium and the Track and representatives of the local authority, and that in 2008 he made further representations about the need for any noise attenuation works. However, it has to be borne in mind that he was a local councillor and therefore had a legitimate interest in that capacity so far as the activities at the Stadium and the Track were concerned. Those activities commanded quite a lot of local support, as well as local opposition, and the fact that he spoke in support of them at such meetings is of less assistance to the appellants' case than if he had not been a councillor.

26. Nonetheless, while Mr Waters' position as a councillor can fairly justify much of his involvement, I find it hard to accept that it can explain everything that he said at such meetings in support of the local authority taking no steps to curtail the activities at the Stadium or Track. In my view, however, the fact that a landlord seeks to persuade a local authority not to take action in relation to alleged noise or other nuisance emanating from his tenant's activities does not involve his authorising or participating in the nuisance caused by those activities. It is worth recalling that the notion of authorising or participating in a nuisance is not limited to landlords: as Lord Millett pointed out in *Mills*, the notion of authorising and participating in a nuisance is a general principle of tortious liability Any person with an interest in the activities continuing, such as a local inhabitant, a participant, a spectator, or a person with an economic interest (eg someone employed at the Stadium or Track, with a car or bike manufacturing or repair business, or with a betting operation), might seek to persuade the local authority against taking

action aimed at curtailing the activities. Such a person would not thereby be authorising or participating in the nuisance, so as to become liable for it. It would therefore be illogical if a landlord could be held liable because he takes such a course because of his economic interests. The fact that he joins with his tenant, even taking the lead, in making representations to the local authority cannot of itself undermine this analysis. The most it can do is to reinforce other factors which support the contention that he has authorised or participated in the nuisance.

27. The fact that Mr Waters was a party to the appeal against the abatement notice when it was served in December 2007, point (iv), is not a powerful point. If he had been served with the notice, he was perfectly entitled to appeal against it. Even if he was not bound to appeal against it, indeed even if he was not served with it, a landlord may well wish to ensure that his reversionary interest in the property concerned is not damaged by such a notice.

28. Point (v), that Mr Waters was primarily responsible for replying to the complaints made by the appellants' solicitors in 2007 and 2009, is again explicable by reference to his interest as landlord in not having the use of the premises impeded. Further, given that he had much of the relevant information available to him as a councillor, and as a result of his discussions with the local authority, it is unsurprising that the detailed responses came from him. In any event, it appears that he was unaware that, as landlord, he was unlikely to be held liable for common law nuisance in any event, a point I return to in para 31 below.

29. On behalf of the Landlords, Mr Denehan and Ms McGowan (neither of whom appeared at first instance) said that, during the time that nuisance is alleged by the appellants, the Landlords had no involvement in the activities carried on at the Stadium and the Track, they were not in possession of the Stadium or the Track, they enjoyed no share of the profits made from the activities at the Stadium and the Track, and their actions cannot be said to have been causative of the nuisance in any way. Those points are well founded, save that by playing a substantial part in seeking to fight off the local authority's noise concerns, Mr Waters may well have indirectly caused a degree of nuisance, as he may have delayed service of the noise abatement notice, and he may have caused the noise levels to have been at a higher level than they would otherwise have been. But that is quite insufficient to amount to authorising or participating in the nuisance.

30. For the reasons which I have given, none of the five points relied on by the appellants make good the contention that Mr Waters authorised or participated in the nuisance. While I agree with Lord Carnwath that they show that Mr Waters went further than most landlords would have done, I do not consider that, as a matter of ordinary language, any of the grounds relied on can be said to involve Mr Waters actively or directly participating in the respondents' nuisance. I acknowledge that it is, at least in principle, possible that five points which, when taken separately cannot justify a certain conclusion, could, when taken together, justify that conclusion. Nonetheless, in relation to the five points relied on in this case, the reasons why each is not strong enough to

enable the appellants to fix liability on Mr Waters are such that I do not see how they could fix such liability between them.

31. Before turning to the final issue, it is right to say that, although I would uphold the dismissal of the appellants' claim against the Landlords, my current view is that there should be no order for costs as between the appellants and the Landlords. The legal basis on which the Landlords have succeeded in this Court is not merely different from that on which they succeeded before the Judge: it is a basis which was not pleaded or developed in argument before the Judge. While the appellants expressly disclaimed any objection to the Landlords resting their case on this basis in this Court, it seems to me, at least at the moment, that the right course to take on costs as between the appellants and the Landlords is to let them lie where they fall. At one extreme, the Landlords could say that they should have their costs because they have fought off the appellants' claim against them. At the other extreme, the appellants could say that they should have all their costs until the Landlords formally raised the point on which they have succeeded. Further, this could be said to be one of those unusual cases where the successful party brought the proceedings on himself (in the form of unusually confrontational behaviour – for instance as mentioned in para 19 above).

The second main issue: the level of costs

32. The final issue arises out of the Judge's order for costs, namely that the respondents should pay 60% of the appellants' costs. The appellants' costs at first instance consisted of three components, as permitted by the Courts and Legal Services Act 1990 as amended by sections 27-31 in Part II of the Access to Justice Act 1999. The first was the "base costs", ie what their lawyers charged on the traditional basis, which was, in crude terms, calculated on an hourly rate and the costs of disbursements. The second component was the success fee (or uplift) to which the lawyers were entitled, because they were providing their services on a conditional fee (or no win no fee) basis. The third component was the so-called ATE premium, a sum which is 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 amounted to £398,000; the success fee, which (we will assume) was at the maximum permitted level of 100%, amounted to £319,000-odd (as the uplift does not apply to every item of costs), and the ATE premium was apparently about £350,000.

33. Accordingly, if the respondents had been liable for the whole of the appellants' costs up to the date the Judge made the order, they would have had to pay the appellants around £1,067,000. As it is they are liable for over £640,000.

34. These figures are very disturbing.

35. They give rise to grave concern even if one ignores the success fee and ATE premium. The fact that it can cost two citizens £400,000 in legal fees and disbursements to establish and enforce their right to live in peace in their home is on any view highly

regrettable. The point is reinforced when one takes into account the value of their home, which is less than £300,000 (coupled with the effect of the nuisance on that value, £74,000 at the most) and the fact that there will have been very significant further "base costs" incurred as a result of four-day appeals in the Court of Appeal and this Court. The point can equally forcefully be made from the point of view of the respondents. As relatively small business operators, they are not only having to fund their own costs, which presumably would be of the same order, but in addition they are going to have to pay some £240,000 towards the appellants' costs. It is true that the respondents lost, but they were seeking to defend their businesses and they plainly had a reasonable case, as is evidenced by the fact that they won in the Court of Appeal.

36. One of the main, and laudable, aims of the proposals made by Lord Woolf in his report *Access to Justice* (1996), which led to the enactment of the Civil Procedure Act 1997, and the introduction of the Civil Procedure Rules the following year, was to try and achieve a better relationship between the costs and benefits of litigation. As the figures in this case show, and as is reflected in many other cases, that target has not merely proved elusive, but it is often missed by a very wide margin indeed. It is, of course, easy to criticise, and, having been Master of the Rolls until 2013, I am as aware as anyone how hard it is to ensure that a case, particularly one that does not involve a very large sum of money but is potentially complex in terms of fact, law and expertise, such as the present case, is both properly and proportionately litigated. It is also right to acknowledge that the reforms proposed by Sir Rupert Jackson in 2010, which do not apply to this case, have been largely introduced and are being absorbed. Nonetheless, even without the effect of Part II of the 1999 Act, to which I must shortly turn, it would be wrong for this Court not to express its grave concern about the base costs in this case, and express the hope that those responsible for civil justice in England and Wales are considering what further steps can be taken to ensure better access to justice. It is only fair to emphasise that this concern relates to the current system and that it is not intended to imply any criticism of the lawyers in this case.

37. The amount of the base costs in this case is however dwarfed by the total potentially recoverable costs, which are nearly three times as much. The figures illustrate the malign influence of the amendments made to the 1990 Act by Part II of the 1999 Act, and as implemented through CPR rule 44 and CPR44 PD – now fortunately repealed and replaced by the provisions of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, following Sir Rupert Jackson's *Review of Civil Litigation Costs* (2010), referred to above. As Sir Rupert pointed out in his *Review*, and as is explained in *Zuckerman on Civil Procedure Principles and Practice* (3rd ed 2013), the system introduced in 1999 had a number of unique and regrettable features, four of which are worth mentioning for present purposes. First, claimants had no interest whatever in the level of base costs, success fee or ATE premium which they agreed with their lawyers, as, if they lost they had to pay nothing, and if they won the costs would all be paid by the defendants, who, on the other hand, had no say about the costs (other than retrospectively on an assessment). Secondly, in many cases, unsuccessful defendants found themselves paying, in addition to the whole of their own costs, three times the claimants' "real" costs. Thirdly, while proportionality had a part to play when assessing the recoverability of base costs (albeit a limited part – see *Home Office v Lownds* [2002] 1 WLR 2450), it was excluded from consideration

in relation to the recovery of success fee or ATE premium (which were simply required to be reasonable) – see CPR44 PD, paras 11.7-11.10. Fourthly, the stronger the defendants' case, the greater their liability for costs would be if they lost, as the size of the success fee and the ATE premium should have reflected the claimants' prospects of success.

38. Even accepting that they have no complaint about their liability for 60% of the appellants' base costs, the respondents are understandably aggrieved by the consequences of the Judge's order that they pay 60% of the appellants' costs, because it means that they have to pay (i) 60% of the 100% success fee, and (ii) 60% of the ATE premium. Mr McCracken QC contends on their behalf that this is a grievance which can be accorded legal recognition through article 6 of the European Convention on Human Rights and/or article 1 of the First Protocol to the Convention ("A1P1"). His argument is that, by virtue of section 6 of the Human Rights Act 1998 the court, as a public body, must exercise its discretion when awarding costs in accordance with the Convention, save where otherwise required by primary legislation (such as the 1990 and 1999 Acts), and that secondary legislation (such as the CPR and Practice Directions) must be disapplied where it requires otherwise. Relying on the judgments of the Strasbourg Court in *MGN Limited v United Kingdom* (2011) 53 EHRR 5 and *Dombo Beheer BV v Netherlands* (1994) 18 EHRR 213, he contends that article 6 would be infringed if the court required the respondents to pay 60% of the success fee and the ATE premium. As to A1P1, he relies on the reasoning of the Strasbourg court in *James v United Kingdom* (1986) 8 EHRR 123.

39. In *MGN v UK* at para 217, the Strasbourg Court said that "the depth and nature of the flaws in the system" introduced by the 1999 Act and the provisions of the CPR referred to above were "such that the Court can conclude that [it] exceeded even the broad margin of appreciation to be accorded to the State in respect of general measures pursuing social and economic interests". That provides some support for the respondents' case. However, the observation and the decision itself were made in connection with an alleged infringement of article 10, where the claimant was rich enough not to need to take advantage of a conditional fee agreement. In the present case, by contrast, article 10 does not apply and it is apparent that the appellants needed the protection of a conditional fee agreement and recoverable ATE premium in order to be able to bring their claim. *Dombo Beheer* was a case concerned with article 6, and the Strasbourg court said that it was "clear that the requirement of 'equality of arms', in the sense of a 'fair balance' between the parties applies in principle" to "cases concerning civil rights and obligations". However, it is by no means clear that that general observation would necessarily support the respondents' argument. In *James v UK* at para 50, the Strasbourg court said that, when someone is deprived of property, there must be "a reasonable relationship of proportionality between the means employed and the aim sought to be realised", and that "a 'fair balance' …. must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". I am unconvinced that this takes matters any further than the argument based on article 6.

40. In *Callery v Gray* [2002] 1 WLR 2000, the House of Lords effectively confirmed that, subject to reasonableness, success fees and ATE premiums were recoverable, and in *Campbell v MGN Ltd (No 2)* [2005] 1 WLR 3394, the House of Lords held that the 1999 Act costs recovery regime did not infringe article 10. However, as I have mentioned, the Strasbourg court took a different view in the latter case. In those circumstances, it must, in my view, follow that the issue of whether the 1999 Act costs regime, and in particular a claimant's right to recover any success fee and ATE premium from an unsuccessful defendant, infringes the Convention, is one which it is open to this Court to reconsider.

41. In the light of the facts of this case and the Strasbourg court judgments relied on by Mr McCracken, it may be that the respondents are right in their contention that their liability for costs under the 1990 Act, as amended by Part II of the 1999 Act, and in accordance with the CPR, would be inconsistent with their Convention rights. However, it would be wrong for this Court to decide the point without the Government having had the opportunity to address the Court on the issue.

42. This concern is based on the proposition that a declaration of incompatibility ought not be made by a court without the Government having the opportunity of addressing the court. It appears to me that there is a substantial argument to the effect that it is not merely secondary legislation, namely CPR 44 and CPR44 PD, but also Part II of the 1999 Act, which had the effect of requiring defendants who have been ordered to pay a claimant's costs to pay the uplift and ATE premium in full, subject to the uplift and premium having been reasonable, but irrespective of proportionality. Section 58A(6) of the 1990 Act (added by section 27 of the 1999 Act) provides that an order for costs "may, subject … to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee", and section 29 of the 1999 Act has a similar provision in relation to an ATE premium. It is true that these provisions are not on their face mandatory, but it seems to me to be arguable that the costs charging and recovery system introduced by Part II of the 1999 Act simply would not work unless a claimant's success fee and ATE premium were recoverable in full, irrespective of proportionality, from a defendant who had been ordered to pay the claimant's costs.

43. Accordingly, if the respondents' argument based on article 6 or A1P1 is correct, it may well be that the proper outcome would not be to disregard paras 11.7-11.10 of CPR44 PD, but to grant a declaration of incompatibility, although that would be questionable as the relevant provisions of the 1990 and 1999 Acts have been repealed and replaced by a far less unsatisfactory system in Part 2 of the 2012 Act. Nonetheless, the system enacted in the 1999 Act remains in force in relation to litigation brought pursuant to conditional fee agreements made before April 2013 (see *Simmonds v Castle (Practice Note)* [2013] 1 WLR 1239). Quite apart from that, a determination by a United Kingdom court that the provisions of the 1999 Act infringed article 6 could have very serious consequences for the Government. Although the Strasbourg court would not be bound by the determination, it would, I suspect, be likely to agree or accept that conclusion, so that those litigants who had been "victims" of those provisions could

well have a claim for compensation against the government for infringement of their article 6 rights.

44. However, it would be inappropriate to go further into the contention that article 6 or A1P1 is infringed by the order for costs made against the respondents in this case. It seems to me that, if the respondents wish to maintain that contention, as they are plainly entitled to do, the present appeal should be re-listed for hearing before us, after appropriate notice has been given to the Attorney-General and the Secretary of State for Justice. In relation to that hearing, it is only right to flag up the point that, as Lord Bingham and Lord Hoffmann emphasised in *Callery* at paras 8 and 17 respectively, it is the Court of Appeal which has the primary supervisory and judicial policy-making functions in connection with case-management, procedural and costs issues in the courts of England and Wales; and members of the Court of Appeal have far greater experience than the members of this Court on matters concerning costs. It may therefore be inappropriate for us to decide the point raised by the respondents without the benefit of the Court of Appeal's consideration of, and views on, the issue, particularly as there may be an argument that, although the outcome of the costs system produces an unattractive result in the present case, its compatibility has to be assessed by reference to the generality of cases, so that a few unfortunate results are inevitable. Further, as any claim based on the Convention is fact-sensitive, and because the issue here concerns first instance costs, it may be inappropriate for an appellate court to decide the issue without having the views of the trial Judge.

45. Accordingly, quite how far this Court should go at this subsequent hearing will have to be considered at the time. At one extreme, it may be right simply to decide that all the various points are arguable but should be remitted to the Court of Appeal or a first instance judge. At the other extreme, if we thought it appropriate to do so (particularly if all parties were agreed on that course) we could determine all the issues. And there are clearly a number of intermediate possibilities. Once the interveners are identified, it would be appropriate to consider how the matter is to proceed – either at a short hearing or by way of written submissions. I would expect all those involved (including the Attorney-General and the Secretary of State for Justice, and any other intervener sanctioned by the Court) to try and seek an agreed procedure, and then to contact the Court Registrar in writing explaining what had been agreed and what had not been agreed, so far as the identification of the issues and proposed procedure was concerned. We could then consider that written material, and give appropriate directions.

46. I have, somewhat unusually, dealt with questions of future procedure in this judgment, because I am very concerned indeed about the possibility of a further escalation in the already exorbitant costs in this case. If I was satisfied that there was any satisfactory way of proceeding without incurring the parties in further costs, I would eagerly grasp it, but, sadly, I cannot see any such course.

47. However, it is also right to record that it was suggested in argument that, even if the respondents' article 6 or A1P1 rights were infringed by the present costs order, we

could do nothing about it, as we would be interfering with the A1P1 rights of the appellants' solicitors and counsel. On the basis of the arguments we have heard so far, we are inclined to dismiss that argument, but it may have some prospect of success in so far as it is based on reliance by those solicitors and counsel on the House of Lords' decision in *Campbell v MGN*. Accordingly, it is an argument which the appellants are free to deploy if they are so advised.

48. It remains to deal with the respondents' argument that their liability for costs under the 1999 Act costs recovery regime would infringe article 9 of the Aarhus Convention. Articles 9.3 and 9.4 of that Convention require "members of the public" to enjoy appropriate "access to administrative or judicial procedures" and "adequate and effective remedies", which involves them not being "prohibitively expensive". However, those articles are concerned with those who wish to "challenge acts and omissions … which contravene provisions of [the] national law which relate to the environment". That may well apply to a claimant seeking to prevent a common law nuisance by noise, but I do not see how it can extend to a defendant who is being sued for causing a nuisance by noise.

Conclusion

49. Accordingly, I conclude that:

a) The injunction against nuisance by noise imposed by the Judge against the respondents should be suspended until Fenland is fit to be occupied residentially, subject to the next point;

b) The appellants and the respondents should each have liberty to apply at any time to vary or discharge the injunction, albeit on notice (save in case of urgency);

c) The respondents' claim in nuisance against the Landlords is dismissed, but, albeit that this is a preliminary view, the Landlords should recover no costs;

d) Consideration of the respondents' contention that the Judge's order that the respondents' liability for costs extends to the success fee and the ATE insurance premium infringes their rights under article 6 of the Convention is adjourned for further hearing after notice being given to the Attorney-General and the Secretary of State for Justice, following which the parties (including any authorised interveners) must seek to agree issues and proposed procedure, and the Court will then give directions.

LORD CARNWATH

50. This judgment is directed principally to the first main issue identified by Lord Neuberger: the liability of the "landlords" in nuisance. I shall comment briefly at the end on the costs issue. On all other matters covered by Lord Neuberger's judgment, I agree with him and have nothing to add.

The authorities

51. Like Lord Neuberger (para 11) I would start from Lord Millett's summary of the law in *Southwark London Borough Council v Mills* [2001] 1 AC 1, 22A, in particular that in order to be liable for authorising a nuisance, the landlords "must either *participate directly* in the commission of the nuisance, or they must be taken to have *authorised it by letting* the property" (emphasis added). In view of the limited discussion or findings of fact on this issue in the lower courts, this is not a suitable case for a detailed examination of the law. However, some brief comments on both alternatives may be helpful for future reference. It is convenient to deal first with the second.

Authorising by letting

52. I agree generally with Lord Neuberger's analysis of the authorities under this head, and the test which he extracts.

53. One additional authority which might have assisted the judge, because of its helpful review of the authorities in a similar factual context, is *Tetley v Chitty* [1986] 1 All ER 663. A local council had granted planning permission to a go-kart club to develop a go-kart track on land owned by the authority, and had granted the club a seven year lease to use it for that express purpose. The council were held liable in nuisance for noise arising from the use of the track. It was common ground that they would not be relieved of potential liability by clauses in the lease obliging the club not to commit a nuisance.

54. Having reviewed the authorities cited to him (which did not apparently include *Malzy v Eichholz*), the judge (McNeill J) accepted that it was not necessary to show that the nuisance was a "necessary consequence" of the use. He had mentioned among other authorities *Smith v Scott* [1973] Ch 314 (to which Lord Neuberger has referred), where the phrases "virtual certainty" or "a very high degree of probability" had been used. Possible alternative tests, on which he found it unnecessary to express a concluded view, were whether the use was "likely to cause a nuisance", or was "the foreseeable result" of the decision to permit the use for go-karting. It was enough that, on the facts of this case, the nuisance was "an ordinary and necessary consequence" or "a natural and necessary consequence" of the use (expressions used in two of the older cases), and that there was accordingly "express or implied consent to do that which on the facts here inevitably would amount to a nuisance" (pp 670-671).

55. Reference might also have been made to authorities from other common law jurisdictions which have adopted the same principles. A close parallel on the facts is the judgment of the Ontario Supreme Court in *Banfai v Formula Fun Centre Inc* [1984] OJ No 3444, 34 CCLT 171(HCJ). The court held that the owner, Hydro, was on the facts liable for nuisance caused by car race course run by its tenant because it arose from use in the way intended when the lease was granted. O'Leary J, adopting the approach of the English authorities as to the landlord exception (including *Smith v Scott*), said:

> "Hydro not only knew that Formula intended to use the land for an amusement ride, it knew and approved of the layout of the track. It knew the size, power and make of the cars to be raced thereon and the hours of the day the track would be in operation.
>
> … the nuisance resulted from Formula operating the track, that is to say, using the land exactly as Hydro knew it intended to use it. By entering into the lease, Hydro authorized Formula to use the land in the manner that caused a nuisance. It follows that the nuisance was 'the natural and necessary result of what the landlord authorized the tenant to do'…" (paras 44-48)

It is of interest that the landlord was held liable even though there seems to have been no finding that it knew or should have known that a nuisance was likely to result from the permitted activity. It was enough that he was aware of the relevant aspects of the intended activity, from which, as found by the court, nuisance had resulted.

56. I agree, however, with Lord Neuberger that, on the limited findings of fact made by the judge in this case, it is not possible to hold the landlords liable on the ground that nuisance was a "necessary" or "highly probable" consequence of the lettings. The less stringent tests suggested by the judge in *Tetley v Chitty* ("likely", "foreseeable") do not seem to be supported by earlier or later authority. I would reject them as insufficiently rigorous for a case where the sole basis for attributing responsibility to the landlord lies in the terms and circumstances of the grant of the lease.

Participation

57. I agree accordingly with Lord Neuberger that the case for the landlords' liability stands or falls on the issue of participation, in the sense used in *Malzy v Eichholz*. In *Malzy* itself, the landlord was held not liable for nuisance caused by the activities of his tenant, because the evidence showed no more than that, with knowledge of the offending use, he had continued to accept rent and had not taken any steps under the lease to bring it to an end. As Lord Cozens-Hardy MR explained (following Lord Collins MR in an unreported case):

> "There must be something much more than that. There must be something which can fairly amount to his doing the act complained of or allowing the act complained of, either by actual participation by himself or his agents or by what Lord Collins called active participation in that which was complained of." (p 315)

Unfortunately, very little help is to be gained from the English authorities as to the practical application of this test, in circumstances where the landlord's involvement in his tenant's activities goes beyond mere receipt of rent and failure to intervene, as in that case.

58. Again some help might have been gained from other common law jurisdictions. A similar concept is found, for example, in the American Restatement. In *Harms v. City of Sibley* 702 N.W.2d 91 (Iowa 2005) pp 104-5, the Supreme Court of Iowa held (applying the American Restatement (Second) of Torts (1979), sections 834, 837) that a lessor may be liable if at the time of the lease he consents to the activity and "he then knows or should know that it will necessarily involve or is already causing the nuisance" or if he "participates to a substantial extent in carrying it on.". On the facts of that case the landlord of a ready-mix plant site was held jointly liable with his tenant for a nuisance caused by the plant, where the evidence showed that the landlord had purchased the property with the intent of building a ready-mix plant, had obtained a building permit for that purposed, and was president of the ready-mix company which operated the plant. In reaching this conclusion, as I understand the judgment, that court did not draw a clear distinction between the two parts of the test, relying both on the landlord's state of knowledge at the time of the lease and his "personal involvement in the property" both before and after.

59. Even in the absence of direct authority, I see nothing in Lord Millett's formulation which requires a rigid division between the two parts of the test. The terms and circumstances of the lease, and the history, may be relevant in considering the significance of the landlord's conduct thereafter. "Participation" is not a term of art nor a precise definition. What is required in my view is a broad, common-sense judgment, based on the facts as a whole, as to whether there was such active involvement by the landlord in the offending activities as to make him jointly responsible in law for their consequences.

60. We are concerned directly with the period from April 2006, when the claimants began to complain of nuisance, having acquired their house in January of that year. However, in considering the position of the landlords it is unrealistic in my view to ignore the earlier history. As far as concerns the stadium, Terence Waters had been the owner of the stadium since it was constructed by him in 1975 until August 2005, when he sold to his son James. The 1985 planning permission for continuation of speedway racing, which is still operative, was and remains personal to him.

61. In September 2005, James granted a lease to a Mr Harris (not a party) which lasted until its surrender in January 2008. During that time the business at the Stadium

was operated under an arrangement with Mr Harris by David Coventry (2nd defendant, trading as RDC Promotions), whose own involvement with the stadium had started in 1993 (judgment para 16). We were told that the application to extend the stadium facilities in 2006 was in James' name. In January 2008 James, in the judge's words (para 28), "tried to revive the commercial activities at the stadium", before selling it to RDC Promotions in April 2008. They have owned and operated it ever since. However, James continued to take the lead in negotiations with the authorities, and it seems that the appeal against the abatement notice served in 2007 was in his name.

62. The moto-cross track was also developed initially by Terence Waters under a 1992 temporary permission personal to him (and a Mr Nunn). Permanent permission was granted in 2002, this time personal to Terence Waters and Moto-land UK Ltd (the 3rd defendant) to whom Mr Waters and his co-owners granted a 10 year lease in September 2003.

63. This history shows a close involvement by Mr Terence Waters, and later his son, in the activities of the stadium and the track dating back to their inception. Although the precise legal basis of their involvement has varied over the years, their central role in the enterprise has not. It is against that background in my view that the issue of "participation" in the relevant period must be judged.

64. Lord Neuberger (para 21) has summarised the factors on which the claimants rely in the present case. I do not understand there to be any material dispute about the factual allegations; the dispute is as to their significance in law. In my view they show clearly that the involvement of Terence and James Waters has gone far beyond the ordinary role of a landlord protecting and enforcing his interests under a lease. It has involved active encouragement of the tenants' use and direct participation in the measures and negotiations to enable it to be continued. That these measures were directed in part to mitigating the problem does not alter the fact of participation nor the consequences for the landlord when the measures proved ineffective. It may be, as Lord Neuberger suggests, that they were motivated at least in part by their concurrent interests as freeholders, or even, in Terence's case, as local councillor. But under the *Malzy* test, as I understand it, the issue is not *why* they participated, but *whether* they did so, and with what effect.

65. James's involvement is more recent than that of his father, and there is a lack of evidence about the precise extent of his involvement in the activities at the stadium before and since the period of his direct occupation in early 2008. However, it seems clear that he took a leading role in the negotiations with the authority to allow the use to continue at its existing level, and in the appeal against the abatement notice, though not served on him. On the material available to us, there is no reason to treat him as a less active participant than his father.

66. For these reasons, in respectful disagreement with Lord Neuberger, I would allow the appeal on this issue, and hold that Terence and James Waters are jointly liable for the nuisance.

Costs

67. I understand that the majority of this court supports Lord Neuberger's view that consideration of this aspect should be adjourned for further hearing, following notice to the Attorney-General and Secretary of State. In those circumstances I prefer to express no view at this stage on the substantive issues, save that I agree with him (para 48) that the Aarhus Convention is of no help to the respondents for the reasons he gives.

LORD MANCE

68. I agree with Lord Neuberger's judgment on all issues, save that concerning the liability of the Third and Fourth Respondents, Messrs Terence and James Waters, as "landlords" in nuisance, discussed by Lord Neuberger in his paras 10 to 31 and by Lord Carnwath in his paras 52 to 67.

69. On that issue, I find myself in sympathy with Lord Carnwath's reasoning and conclusion.

70. I am fortified in this by the course this litigation has taken with regard to the Third and Fourth Respondents' liability. Lord Neuberger says in para 10 that "At trial, the landlords do not seem to have made much of the argument that they were in a different position" from the other defendants at trial. That appears an understatement.

71. All the defendants were represented at trial by the same counsel (though not the same solicitor), and no suggestion at all was made in their opening or closing written submissions that, if there was a nuisance, the Third and Fourth Respondents were not liable for its commission in common with the other defendants held liable in nuisance.

72. The only point made was that, assuming there was a nuisance, any damages awarded should not in the case of the Third and Fourth Respondents include exemplary and aggravated damages (but should be confined to ordinary damages): see especially para 53 of their opening submissions and paras 111 to 166 of their closing submissions.

73. As explained in counsels' submissions before us, it appears to have been the judge who, effectively of his own motion, raised at a very late stage a possible distinction between the Third and Fourth Respondents and other defendants as regards liability for any nuisance. According to para 22 of his judgment, a point to this effect seems to have been explored with counsel in the Appellants final oral submissions, and, in paras 22 to 25 of his judgment, the judge then picked the point up, deciding that the Third and Fourth Respondents had no liability because of the terms of the leases. In doing this, he not only misread one of them, as Lord Neuberger points out in his para 16, but also overlooked the principle that a landlord who "participates" in a nuisance may be liable, irrespective of the terms of the lease.

74. The Court of Appeal judgment is of equally little assistance on the present issue, since the Court concluded that there was no nuisance at all and so did not need to consider any question about the Third and Fourth Respondents' liability.

75. The fact that the Third and Fourth Respondents were prepared to recognise their liability along with other defendants for any nuisance which existed, while denying that it extended to liability for exemplary or aggravated damages, appears to me not insignificant, when the question is whether they sufficiently participated in the nuisance for it to be appropriate to hold them liable for it. They and their counsel are likely to have had a much better feel for the reality of what was going on than we can have. But it also appears to me consistent with the facts and matters relied upon of which we are aware, and on which the Appellants place reliance in this connection.

Hilary Term
[2014] UKSC 13
On appeal from: [2012] EWCA Civ 26

JUDGMENT

Coventry and others (Respondents) *v* Lawrence and another (Appellants)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Carnwath

JUDGMENT GIVEN ON

26 February 2014

Heard on 12, 13 and 14 November 2013

Appellant
Stephen Hockman QC
William Upton
(Instructed by Richard Buxton Environmental and Public Law)

Respondent
Robert McCracken QC
Sebastian Kokelaar
(Instructed by Pooley Bendall Watson)

LORD NEUBERGER

The issues raised by this appeal

1. This appeal raises a number of points in connection with the law of private nuisance, a common law tort. While the law also recognises public nuisance, a common law offence, this appeal is only concerned with private nuisance, so all references hereafter to nuisance are to private nuisance. It should also be mentioned at the outset that the type of nuisance alleged in this case is nuisance in the sense of personal discomfort, in particular nuisance by noise, as opposed to actual injury to the claimant's property (such as discharge of noxious material or removal of support).

2. As Lord Goff of Chieveley explained in *Hunter v Canary Wharf Ltd* [1997] AC 655, 688, "[t]he term 'nuisance' is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land", quoting from Newark, *The Boundaries of Nuisance* (1949) 65 LQR 480. See also per Lord Hoffmann at pp 705-707, where he explained that this principle may serve to limit the extent to which a nuisance claim could be based on activities which offended the senses of occupiers of property as opposed to physically detrimental to the property.

3. A nuisance can be defined, albeit in general terms, as an action (or sometimes 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 his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, "a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society".

4. In *Sturges v Bridgman* (1879) 11 Ch D 852, 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out.

5. As Lord Goff said in *Cambridge Water Company v Eastern Counties Leather plc* [1994] 2 AC 264, 299, liability for nuisance is "kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land, under which '... those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action': see *Bamford v Turnley* (1862) 3 B & S 62, 83, *per* Bramwell B". I agree with Lord Carnwath in para 179 below that reasonableness in this context is to be assessed objectively.

6. The issues raised on this appeal are as follows:

- 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 means of noise;

- The extent, if any, to which a defendant to a nuisance claim 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 a nuisance claim to invoke the actual use of his premises, 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 of whether that use is a nuisance or 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 to restrain a nuisance being committed, or whether to award damages instead, and the relevance of planning permission to that issue.

A summary of the substantive facts

7. In February 1975, planning permission was granted to Terence Waters for the construction of a stadium ("the Stadium") some three miles west of Mildenhall Suffolk, on agricultural land which he owned. The planning permission permitted the Stadium to be used for "speedway racing and associated facilities" for a period of ten years. Speedway racing involves racing speedway motorcycles over several laps of a circuit.

8. The Stadium was constructed during the ensuing year, and thereafter it was used for the permitted purpose by a company called Fen Tigers Ltd, Terence Waters' licensee or lessee of the Stadium. The planning permission was renewed on a permanent basis in 1985, although it was made personal to Mr Waters. Stock car and banger racing started at the Stadium in 1984. Such uses were not permitted under the planning permission, but after ten years of such use, it was contended that they had become immune from planning control enforcement, pursuant to section 191 of the Town and Country Planning Act 1990, as substituted by section 10(1) of the Planning and Compensation Act 1991, and Mr Waters applied for a Certificate of Lawfulness of Existing Use or Development (a "CLEUD"), pursuant to section 191 in early 1995. In July 1997, a CLEUD was issued by the planning authority confirming that, for a period of ten years, there had been 20 stock car and banger racing events (at specified hours of the day) at the Stadium each year, so that such a use had become lawful in planning terms. In addition, greyhound racing has been going on at the Stadium since 1992.

9. To the rear of the stadium is a motocross track ("the Track"), an undulating track on which this particular type of motorbike racing and practice takes place. The Track was constructed and used pursuant to a personal planning permission for motocross events, which was granted in May 1992 for a year, and renewed from time to time thereafter, always subject to conditions which sought to control the frequency of events, and the amount of sound which was emitted during such events. Eventually, in 2002, a permanent personal planning permission was granted for this use, subject to similar conditions, including one which limited the use of the Track to a limited number of days within prescribed hours, and another which imposed a maximum noise level of LAeq 85 dB over any hour at the boundary of the Track.

10. In August 2005, the Stadium was acquired from Mr Waters by his son, James Walters, and he leased it a month later to Carl Harris, who entered into an arrangement whereby the business at the Stadium was operated by David Coventry. David Coventry and his brother later took on the lease and then acquired the Stadium in April 2008. They have owned and operated it since then. Fen Tigers Ltd itself continued to promote speedway racing at the Stadium until it went into liquidation in July 2010. Terence Waters is also one of the three joint owners of the Track, and, in September 2003, he and his co-owners granted a lease of the track for ten years to Moto-Land UK Ltd ("M-LUK"), who since then have operated the activities on the Track.

11. The trial judge, His Honour Judge Richard Seymour QC (sitting as a Deputy Judge of the High Court), found that, between 1975 and 2009, the Stadium had been used for speedway racing between 16 and 35 times per year, save that for six years (1990, 1991, 1993 1994, 1997 and 2000) it was not used at all for speedway. As for stock car racing, the judge found that it had occurred at the Stadium between 16 and 27 times a year between 1985 and 2009, save that there was no stock car racing in

1991 or 1992. The judge also found that the Track had been "used for motocross to the full extent permitted" by the relevant planning permission (para 76). As he also mentioned, in 1995, this activity had resulted in the service of noise abatement notices, under section 80 of the Environmental Protection Act 1990, which were then the subject of inconclusive proceedings.

12. Across open fields, about 560 metres from the Stadium and about 860 metres from the Track, is a bungalow called "Fenland", which was built in the 1950s. It stands in about 0.35 hectares of garden, and is otherwise surrounded by agricultural land. The nearest residential property to Fenland appears to be about half a mile away, and the small village of West Row is about 1.5 miles to the south-east of Fenland (and about one mile to the south east of the Stadium).

13. In January 2006, Katherine Lawrence and Raymond Shields ("the appellants") purchased and moved into Fenland; their vendors were a Mr and Mrs Relton, who had owned and lived in Fenland since 1984. By April 2006, the appellants had become concerned about the noise coming from the motocross events on the Track. They complained about this to the local council in and after April 2006, and they also wrote to Mr Coventry and M-LUK, and to Terence and James Waters, threatening proceedings. The complaints to the council eventually resulted in the service of further noise abatement notices, required the carrying out of works to mitigate the noise emanation ("the attenuation works"). These notices were served during December 2007 on Mr Coventry, his brother, M-LUK and Fen Tigers Ltd, and stated that the activities at the Stadium and on the Track each constituted a statutory nuisance. The attenuation works were carried out, albeit later than they should have been, by January 2009.

14. Meanwhile, the appellants had also been pursuing their contention that both the Stadium and the Track were being used in such a way as to constitute a nuisance. As discussions did not produce what they considered to be an acceptable outcome, the appellants issued proceedings against Mr Coventry, M-LUK and Terence and James Waters ("the respondents") in the High Court for an injunction to restrain the nuisance in early 2008. In those proceedings, the appellants contended that the activities at the Stadium and on the Track constituted a nuisance individually, or in the alternative cumulatively. They maintained this contention following the completion of the attenuation works. The respondents filed a joint Defence in December 2009 denying nuisance.

15. In April 2010, Fenland suffered a serious fire, which caused extensive damage and rendered it uninhabitable. Since then, no-one has lived there, as it has yet to be rebuilt. Meanwhile, the proceedings came on before Judge Seymour on 26 January, and he heard them over 11 days.

The judgments below

16. The judge gave his decision on 4 March 2011, and his judgment runs to 325 paragraphs and over 110 pages - [2011] EWHC 360 (QB) (reported in part [2011] 4 All ER 1314). It is unnecessary to attempt to explain it in any detail for the purposes of this appeal. There are some parts which are difficult to follow, and there are one or two findings which he should have made, but did not make (in particular whether the appellants knew of the planning permissions when they purchased Fenland).

17. Particularly where there has been a relatively long and expensive hearing, it is important that the judge (i) clearly identifies for his own benefit as well as that of the parties, all the issues of fact and expert opinion that are in issue, and (ii) resolves in clear terms all such issues which are relevant on his view of the law, and, at least often, those issues which would be relevant if his view of the law turns out to be wrong. Otherwise, there is a real risk of a complete or partial rehearing being ordered, which would be very unfair on the parties, and would bring the administration of law into disrepute.

18. Reverting to Judge Seymour's judgment, he began by summarising the relatively uncontroversial history, and then turned to the "nature of the locality". He described the immediate locality which was generally rural, but included some houses and a small village, West End, and also a US Air Force base at RAF Mildenhall, which, at its nearest point, is about a mile to the east of the Stadium, the Track and Fenland, and is also about a mile to the north of West Row. The judge described the terms of the various planning permissions, and then turned to the question whether the planning permissions for the uses of the Stadium and the Track should have any bearing on the issue of whether those uses constituted a nuisance. He concluded in para 66 that they should not, because of the personal nature of the permissions, and the fact that they limited the permitted uses to a maximum number of days a year and to specified hours of the day.

19. Judge Seymour next discussed the extent to which the Stadium and the Track had been used over the years. He then set out (at paras 96-206) the oral and documentary evidence which he had read and heard in relation to the level of noise emanating from the Stadium and the Track. This evidence consisted of (i) letters, mostly of support, sent to the planning authorities in connection with the applications for, and renewals of, the planning permissions for the use of the Stadium and the Track for the activities described above, (ii) the advices given in connection with those applications and permissions by planning officers to planning committees, (iii) the planning permissions themselves, (iv) letters sent to the local authority between 1992 and 2010, complaining of the noise, (v) records kept, and letters sent, by the local Environmental Health Officers, (vi) the oral evidence of the appellants, four other residents in the locality on behalf of the appellants, and Mrs

Relton and at least five other residents for the respondents, (vii) one expert acoustic witness for each side, (viii) reports on noise levels from various public bodies including the World Health Organisation, the Department of the Environment, the National Physical Laboratory, and the Institute of Sound and Vibration Research.

20. When considering the expert evidence, the judge (at para 158) raised the question "whether it was appropriate, in assessing whether the noise generated by the activities [of the defendant] was capable of causing a … nuisance, to take into account as one of the noise characteristics of the locality the noise generated by those very activities". As Jackson LJ said in the Court of Appeal [2012] 1 WLR 2127, para 72, the judge does not appear to have answered that question expressly, but he appears to have held that the answer was no.

21. The judge said that, when the Stadium was being used for speedway, stock car, and banger racing from 1984, and also when the Track was being used for motocross from 1992, the noise was "sometimes … sufficiently intrusive to generate complaints, and sometimes not". Accordingly, he concluded that "it was possible so to organise activities at the Stadium or at the Track as not to produce intrusive noise affecting those residing nearby" - para 95.

22. The judge also concluded at para 207 that "the operation of activities at the Stadium both before and after the [attenuation] works constituted a nuisance, by reason of the noise generated, to [the appellants]", and he immediately went on to make the same finding about "the activities at the Track".

23. The judge then considered and rejected the respondents' contention that they had acquired a right to create what would otherwise have been a nuisance by noise, as a result of the use of the Stadium for speedway, stock car, and banger racing for more than 20 years. First, he held that no such right could be acquired as a matter of law; secondly, he held that, even if that was wrong, the interruption in use, especially in respect of stock car and banger racing in 1991 and 1992, would have been fatal to a prescriptive claim.

24. Finally, having concluded that the appellants had established a claim in nuisance, the judge turned to the question of remedies. He stated at paras 243-245 that he was minded to grant an injunction to restrain the respondents from carrying on activities at the Stadium or at the Track which emitted more than a specified level of noise, which he had in mind to fix at specific levels which he identified. He explained at para 243 that he had arrived at those levels by reference to the quantum of noise emitted from various motor racing circuits across the United Kingdom, a topic on which he had heard evidence from one of the expert witnesses, and also stated that there should be a lower level of noise permitted during the evening and

at night. He recorded at para 244 that the respondents did not challenge the notion that he should grant an injunction if he concluded that their activities had caused "continuing nuisance". At para 245, he provisionally indicated the decibel limits he had in mind, and added that, as Fenland was unoccupied, it may be appropriate to suspend any injunction. The judge then dealt with damages for past nuisance.

25. After he had handed down his judgment, a further hearing took place before the judge, pursuant to which he made an order which was a little more generous to the respondents than he had provisionally suggested, in that the injunction he granted permitted them to emit somewhat higher noise levels on up to 12 weekends each year. He gave the respondents time to reorganise their affairs by providing that the injunction would only take effect on 1 January 2012, or (if later) when Fenland was ready for residential occupation (which has not yet happened). The terms of the order also gave either party permission to apply to vary the terms of the injunction, but not earlier than 1 October 2011.

26. The respondents appealed against the decision. The Court of Appeal reversed Judge Seymour's decision, holding that the appellants had failed to establish that the respondents' activities at the stadium and the Track constituted a nuisance: [2012] 1 WLR 2127. Jackson LJ, who gave the main judgment, with which Mummery and Lewison LJJ agreed, held that the judge had gone wrong in holding that the actual use of the Stadium and the Track over a number of years, with planning permission, or a CLEUD, could not be taken into account when the assessing the character of the locality for the purpose of determining whether an activity is a nuisance – paras 74 and 76. In those circumstances, it was unnecessary for the Court of Appeal to consider any other issue, although Lewison LJ expressed a provisional view that, contrary to the judge's conclusion, it is possible to obtain by prescription a right to commit what would otherwise be a nuisance: paras 88-91.

27. The appellants now appeal to the Supreme Court. As indicated at the start of this judgment, the appeal raises a number of points relating to the law of nuisance, and it is convenient to consider them in principle before applying them to the facts and arguments in this appeal.

Acquiring a right to commit what would otherwise be a nuisance by noise

28. There is no doubt that a defendant can have a right to carry on an activity which would otherwise be a nuisance. For instance, in common law, a claimant may have bindingly agreed to the activity being carried on and to the consequent nuisance, or a claimant may somehow be estopped from objecting to the activity on the ground that it constitutes a nuisance; and, under a statute, certain activities in

certain circumstances may be accorded immunity from a claim in nuisance – see eg section 76 of the Civil Aviation Act 1982 and section 158 of the Planning Act 2008.

29. It is well established that an easement (that is, a right in favour of the so-called "dominant" land over the so-called "servient" land, such as a right of way, a right to light, a right of support, or a right of drainage) can be acquired by prescription as well as by express grant. Prescription is a form of deemed grant and arises as a result of long use.

30. Prescription was initially introduced and developed by the judges. It has been complicated by the facts that (i) as originally developed, it was subject to some rather technical, and impractical, rules (and in particular a requirement of at least an inference of enjoyment since 1189), (ii) the courts have developed another prescriptive principle, that of lost modern grant (which is not subject to so much technicality), (iii) it has been the subject of a large number of judicial decisions, many of which are hard to understand or reconcile, (iv) Parliament enacted the ill-drafted Prescription Act in 1832 (2 & 3 Will 4, c 71), so that (v) there are now two types of common law prescription, together with statutory prescription.

31. The essential feature of prescription for present purposes is that, in order to establish a right by prescription, a person must show at least 20 years uninterrupted enjoyment as of right, that is *nec vi, nec clam, nec precario* ("not by force, nor stealth, nor with the licence of the owner"), as Lord Walker put it in *R (Lewis) v Redcar and Cleveland Borough Council* [2010] 2 AC 70, para 20), of that which he now claims to be entitled to enjoy by right.

32. An issue in the present appeal is whether the right to commit a nuisance by noise can be acquired by prescription. For this purpose, I do not think that it strictly matters whether the right to make a noise which would otherwise be a nuisance can be an easement or not. As Lord Sumner said in *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634, 649, a right in favour of a property owner over neighbouring land (in that case, to spread coal dust emanating from the property owner's land over adjoining land) may be too indeterminate to be an easement, but it can still be the subject of a perfectly valid grant. Accordingly, it seems to me that there is no inherent reason why a right to spread coal dust, or to make a noise which would otherwise be a nuisance, should not be established by prescription.

33. Having said that, I am of the view that the right to carry on an activity which results in noise, or the right to emit a noise, which would otherwise cause an actionable nuisance, is capable of being an easement. The fact that the noise from an activity may be heard in a large number of different properties can fairly be said to render it an unusual easement, but, as Mr McCracken QC for the respondents

said, whether or not there is an easement is to be decided between the owner of the property from which the noise emanates and each neighbouring property-owner. Equally, as Lewison LJ said at [2012] 1 WLR 2127, para 88, the fact that a right is only exercisable at specified times does not prevent it from being an easement. As he also pointed out at para 89, one can characterise a right to emit noise in relatively conventional terms in the context of easements, namely as "the right to transmit sound waves over" the servient land. Lord Parker of Waddington clearly assumed that the right to emit noise could be an easement in *Pwllbach* [1915] AC 634, 646, referring to *Lyttleton Times Co Ltd v Warners Ltd* [1907] AC 476. Furthermore, where there is an express grant, it should normally be reasonably easy to identify the level of permitted noise, the periods when it may be emitted, and the activities which may produce the noise.

34. Subject to questions of notice and registration, the benefit and burden of an easement run with the land, and, therefore, if a right to emit noise which would otherwise be a nuisance is an easement, it would bind successors of the grantor, whereas it is a little hard to see how that would be so if the right were not an easement. Given the property-based nature of nuisance, and given the undesirable practical consequences if the benefit and burden of the right to emit a noise would not run with the relevant land, it appears to me that both principle and policy favour the conclusion that that a right to create what would otherwise be a nuisance by noise to land can be an easement.

35. Greater difficulties arise when one comes to consider whether, and if so how, a right to commit a nuisance has been obtained by prescription. It has been suggested that is not possible to obtain by prescription a right to commit what would otherwise be a nuisance by noise, vibration, smoke or smell – see the discussion in *Clerk and Lindsell on Torts* 20th ed (2010), para 20-85.

36. As that discussion suggests, there appear to be three possible problems with the notion that such a right could be obtained by prescription. The first is that the 20 years can only run when the noise amounts to a nuisance. As Thesiger LJ giving the judgment of the Court of Appeal, agreeing with Sir George Jessel MR, put it in *Sturges* at 11 Ch D 852, 863-864, "[c]onsent or acquiescence of the owner of the servient tenement lies at the root of prescription, and … an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence." So, during such time as the noise is at such a level that it does not amount to a nuisance, time will not run: while it is not a nuisance there can be no question of the claimant being able to stop it. Secondly, there could obviously be difficulties in identifying the extent of the easement obtained by prescription: even if the level of noise can be shown to have amounted to a nuisance for more than 20 years, it will often have varied in intensity and frequency (in the sense of both timing and pitch). Thirdly, there could also be a connected problem of deciding how much, if any, more noise could be emitted pursuant to the acquired right than had been emitted during the 20 years.

37. In my view, these problems should not stand in the way of a continuing nuisance by noise being able to give rise to a prescriptive right to transmit sound waves over servient land. The first two problems are, at least largely, practical in nature, and could often present the owner of the alleged dominant land with difficulties in making out his case, but that is not a good reason for holding that he should not be entitled to do so on appropriate facts. Further, the extent of the two problems is mitigated by the fact that, to justify a prescriptive right, the 20 years use does not have to be continuous: see *Carr v Foster* (1842) 3 QB 581, 586-588, per Lord Denman CJ, and Patteson and Williams JJ. It is worth noting that Patteson J was prepared to accept that an interruption of even seven years might not destroy the claim to have acquired a right by prescription over 20 years.

38. As for the third problem, it is not dissimilar from the question of the extent of some other easements obtained by prescription, such as a right of way or a right to discharge polluted water. The precise extent of a right to transmit sound waves obtained by prescription must be highly fact-sensitive, and may often depend not only on the amount and frequency of the noise emitted, but also on other factors including the character of the neighbourhood and the give and take referred to by Lord Goff in *Cambridge Water* [1994] 2 AC 294, 299.

39. Given the potential effect on the enjoyment of the servient land of an increase in the level or frequency of noise, it seems to me that the dominant owner cannot, or at least could only very rarely, be accorded the degree of latitude available to someone with a right of way or a right of drainage obtained by prescription, as discussed in *McAdams Homes Ltd v Robinson* [2004] 3 EGLR 93, paras 24-47 and 79-84. The position is closer to a case where a right to pollute the servient owner's watercourse is obtained by prescription. Thus, in *Baxendale v McMurray* (1867) 2 Ch App 790, 795, Lord Cairns LJ indicated that, albeit in a case where a change of materials had been involved in the business of the dominant owner, the servient owner had cause for complaint if he could show "a greater amount of pollution and injury arising from the use of this new material" in order to establish a breach of his rights.

40. So far as previous cases on noise and the like are concerned, as Lewison LJ said below at para 91, Tindal CJ clearly assumed that a right to emit "noxious vapours and smells" could be acquired by prescription in *Bliss v Hall* (1838) 4 Bing NC 183, 186, and in *Sturges v Bridgman* 11 Ch D 852, 863-865, it was also clearly assumed by the Court of Appeal that a right to emit noise and vibration which would otherwise be a nuisance can be acquired by prescription. So, too, in *Crump v Lambert* (1867) LR 3 Eq 409, 413, Lord Romilly MR said that "the right of … sending smoke or noise" over a neighbour's land could be obtained if the neighbour "has not resisted for a period of 20 years". Finally in this connection, I note that in another well known nuisance case, *St Helen's Smelting Co v Tipping* (1865) 11

HLCas 642, 652, Lord Westbury LC referred to "cases where any prescriptive right has been acquired by a lengthened user of the place".

41. In these circumstances, I conclude that, in the light of the relevant principles, practical considerations and judicial dicta, it is possible to obtain by prescription a right to commit what would otherwise be a nuisance by noise, or, to put it another way, to transmit sound waves over neighbouring land.

42. Before leaving this topic, I should mention that, in the Court of Appeal, Lewison LJ at para 91 raised the possibility that all that the owner of the dominant land needed to establish in order to show a prescriptive right was that the sound waves (at a certain volume) have been passing over the servient land for a period of over 20 years irrespective of whether they constituted a nuisance during any part of that period. So far as practicalities are concerned, this approach would have the advantage of avoiding the first of the three problems identified in para 36 above, but the other two problems would remain.

43. However, this approach was not adopted by the respondents on this appeal, and I am inclined to think that they were right. The approach was considered and rejected both by Sir George Jessel and the Court of Appeal in *Sturges* 11 Ch D 852, as explained in para 36 above, on the ground that time does not run for the purposes of prescription unless the activities of the owner (or occupier) of the putative dominant land can be objected to by the owner of the putative servient land. The notion that an easement can only be acquired by prescription if the activity concerned is carried on "as of right" for 20 years, ie *nec vi, nec clam, nec precario*, would seem to carry with it the assumption that it would not assist the putative dominant owner if the activity was carried on "of right" for 20 years, as no question of force, stealth or permission could apply.

44. Lord Walker of Gestingthorpe's observations in *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, para 30 give some support for this view. He approved as a "general proposition" that if a right is to be obtained by prescription, the persons claiming that right "must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him."

45. It is true that this would not apply to a right to receive light, but the right to light is an "anomalous" easement, as Lord Hoffmann pointed out in *Hunter* [1997] AC 655, 709. In a passage which supports the view expressed in the preceding two paragraphs, he said that "[i]n the normal case of prescription, the dominant owner will have been doing something for the period of prescription (such as using a

footpath) which the servient owner could have stopped. But one cannot stop a neighbour from erecting a building with windows."

46. In any event, the right to emit noise (or smoke or smells) over neighbouring land must be a positive easement, as opposed to a negative easement such as the right to receive light, support, air or water – see *Gale on Easements* 19th ed (2012), para 1-01 and footnote 3. (It is suggested in the text that the right to emit noise etc represent a third category of easement, because they merely involve actions on the dominant land, but, as the footnote states, the easement is not to carry on the activity on the dominant land but to emit noise over or into the servient land, which is a positive easement). In every case that I can conceive, the acquisition of a positive easement can only arise from the owner or occupier of the putative dominant land doing something which would be a wrong against the owner or occupier of the putative servient land – normally trespassing: see the list of positive easements in *Gale*, para 1-74.

"Coming to the nuisance"

47. For some time now, it has been generally accepted that it is not a defence to a claim in nuisance to show that the claimant acquired, or started to occupy, her property after the nuisance had started – ie that it is no defence that the claimant has come to the nuisance. This proposition was clearly stated in *Bliss* 4 Bing NC 183, 186 per Tindal CJ. Coming to the nuisance appears to have been assumed not to be a defence in *Sturges v Bridgman* 11 Ch D 852. And in *London, Brighton and South Coast Railway Co v Truman* (1885) LR 11 App Cas 45, 52, Lord Halsbury LC described the idea that it was a defence to nuisance as an "old notion … long since exploded" and he also said that "whether the man went to the nuisance or the nuisance came to the man, the rights are the same" in *Fleming v Hislop* (1886) LR 11 App Cas 686, 697.

48. More recently, in *Miller v Jackson* [1977] 1 QB 966, 986-987, the majority of the Court of Appeal held that the principle was well-established. However, Lord Denning MR, in the minority, considered that the proper approach was for court to "balance the right of the cricket club to continue playing cricket on their cricket ground", as they had done for 70 years, "as against the right of the householder", whom he described as "a newcomer" who had built "a house on the edge of the cricket ground which four years ago was a field where cattle grazed": see pp 976 and 981. He held that there was no nuisance given that the cricket club had "spent money, labour and love in the making of [the pitch]: and they have the right to play upon it as they have done for 70 years", and answered with a resounding no his own rhetorical (in both senses of the word) question whether this was "all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building right up to the edge of it?": see p 978.

49. Geoffrey Lane LJ (with whom Cumming-Bruce LJ agreed) accepted, albeit with some regret, that it was not for the Court of Appeal "to alter a rule which has stood for so long", namely "that it is no answer to a claim in nuisance for the defendant to show that the plaintiff brought the trouble on his own head by building or coming to live in a house so close to the defendant's premises that he would inevitably be affected by the defendant's activities, where no one had been affected previously": p 987. Accordingly, he concluded that the claim in nuisance was made out.

50. The respondents suggest that there is authority prior to the decision in *Bliss* 4 Bing 183, which supports the contention that the law was somewhat different in earlier times. *Leeds v Shakerley* (1599) Cro Eliz 751 was cited as an authority for the proposition that coming to the nuisance was a defence, but it may well be explained on the ground that the wrong complained of was the single act of diverting a watercourse, as opposed to the continuing loss of the watercourse. In his *Commentaries on the Laws of England* 1st ed, (1765-1769), Vol II Chap 26, p 403, Blackstone, after explaining that a defendant can be liable in nuisance for setting up a tannery near my home, continues "but if he is first in possession of the air and I fix my habitation near him, the nuisance is of my own seeking, and must continue". And in the criminal, public nuisance, case of *R v Cross* (1826) 2 Car & P 483, 484, Abbott CJ said that a defendant whose trade was said to be a nuisance to a householder or a user of a road "would be entitled to continue his trade [if] his trade [had been] legal before the erection of the houses in the one case, and the making of the road in the other".

51. In my view, the law is clear, at least in a case such as the present, where the claimant in nuisance uses her property for essentially the same purpose as that for which it has been used by her predecessors since before the alleged nuisance started: in such a case, the defence of coming to the nuisance must fail. For over 180 years it has been assumed and authoritatively stated to be the law that it is no defence for a defendant to a nuisance claim to argue that the claimant came to the nuisance. With the dubious 16th century exception of *Leeds* Cro Eliz 751, there is no authority the other way, as the observations of Blackstone and Abbott CJ were concerned with cases where the defendant's activities had originally not been a nuisance, and had only become an arguable nuisance as a result of a change of use (due to construction works) on the claimant's property.

52. Furthermore, the notion that coming to the nuisance is no defence is consistent with the fact that nuisance is a property-based tort, so that the right to allege a nuisance should, as it were, run with the land. It would also seem odd if a defendant was no longer liable for nuisance owing to the fact that the identity of his neighbour had changed, even though the use of his neighbour's property remained unchanged. Quite apart from this, the concerns expressed by Lord Denning in *Miller* [1977] 1 QB 966 would not apply where a purchasing claimant has simply continued

with the use of the property which had been started before the defendant's alleged nuisance-causing activities started.

53. There is much more room for argument that a claimant who builds on, or changes the use of, her property, after the defendant has started the activity alleged to cause a nuisance by noise, or any other emission offensive to the senses, should not have the same rights to complain about that activity as she would have had if her building work or change of use had occurred before the defendant's activity had started. That raises a rather different point from the issue of coming to the nuisance, namely 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.

54. The observations I have quoted from Blackstone and Abbot CJ were in the context of cases where the defendant's activity only becomes a potential nuisance after a change of use or building work on the claimant's property, and they therefore provide some support for the defendant in such a case. However, in both *Sturges* and *Miller*, it appears clear that the defendant's activities pre-dated the plaintiff's construction work, and it was only as a result of that work and the subsequent use of the new building that the activities became a nuisance. However, *Miller* was not concerned with damage to the senses, but with physical encroachment on, and potential physical damage to, the plaintiffs and their property (through cricket balls). In *Sturges*, the only issue raised by the unsuccessful defendant was prescription, the nuisance at least arguably involved more than offence to the senses, and the plaintiff's construction work merely involved an extension to an existing building (see at 11 Ch D 852-853, 854, 860-861).

55. It is unnecessary to decide this point on this appeal, but it may well be that it could and should normally be resolved by treating any pre-existing activity on the defendant's land, which was originally not a nuisance to the claimant's land, as part of the character of the neighbourhood – at least if it was otherwise lawful. After all, until the claimant built on her land or changed its use, the activity in question will, *ex hypothesi*, not have been a nuisance. This is consistent with the notion that nuisance claims should be considered by reference to what Lord Goff referred to as the "give and take as between neighbouring occupiers of land" quoted in para 5 above (and some indirect support for such a view may be found in *Sturges*, at pp 865-866).

56. On this basis, where a claimant builds on, or changes the use of, her land, I would suggest that it may well be wrong to hold that a defendant's pre-existing activity gives rise to a nuisance provided that (i) it can only be said to be a nuisance because it affects the senses of those on the claimant's land, (ii) it was not a nuisance before the building or change of use of the claimant's land, (iii) it is and has been, a

reasonable and otherwise lawful use of the defendant's land, (iv) it is carried out in a reasonable way, and (v) it causes no greater nuisance than when the claimant first carried out the building or changed the use. (This is not intended to imply that in any case where one or more of these requirements is not satisfied, a claim in nuisance would be bound to succeed.)

57. It would appear that the Court of Appeal adopted this approach in *Kennaway v Thompson* [1981] QB 88. In that case, Lawton LJ seems to have assumed that the noise made by the defendant's motorboats on the neighbouring lake should not be treated as a nuisance in so far as it was at the same level as when the plaintiff built her house nearby, and was a reasonable use reasonably carried out. However, a subsequent and substantial increase in the level of noise (due to larger boats and increased proximity to the plaintiff's house) and in the frequency of activity did constitute a nuisance.

58. Accordingly, it appears clear to me that it is no defence for a defendant who is sued in nuisance to contend that the claimant came to the nuisance, although it may well be a defence, at least in some circumstances, for a defendant to contend that, as it is only because the claimant has changed the use of, or built on, her land that the defendant's pre-existing activity is claimed to have become a nuisance, the claim should fail.

Reliance on the defendant's own activities in defending a nuisance claim

59. The assessment of the character of the locality for the purpose of assessing whether a defendant's activities constitute a nuisance is a classic issue of fact and judgment for the judge trying the case. Sometimes, it may be difficult to identify the precise extent of the locality for the purpose of the assessment, or the precise words to describe the character of the locality, but any attempt to give general guidance on such issues risks being unhelpful or worse.

60. However, such questions can give rise to points of principle on which an appellate court can give guidance. Thus, the concept of "the character" of the locality may be too monolithic in some cases, and a better description may often be something like "the established pattern of uses" in the locality.

61. In this case, the ground on which the Court of Appeal overturned the judge's decision was that he had wrongly failed to take into account the respondents' activities at the Stadium and the Track when considering the character of the locality. The appellants contend that the judge was right to disregard those activities.

62. The issue therefore is whether, and if so to what extent, the use to which the defendant actually puts his property can or should be relied on when assessing the character of the locality for the purpose of assessing whether the claimant has made out her case that those activities constitute a nuisance.

63. It seems clear that the character of the locality must be assessed by reference to the position as it is as a matter of fact, save to the extent that any departure from reality, or artificial assumption, should be made as a matter of logic or legal requirement (the presumption of reality). Accordingly, in a nuisance claim, I accept that one starts, as it were, with the proposition that the defendant's activities are to be taken into account when assessing the character of the locality.

64. This approach accords with what was said by Lord Westbury in *St Helen's Smelting* 11 HL Cas 642, 650, namely:

> "[A]nything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop."

65. Where I part company with the Court of Appeal is on the issue of whether one ignores the fact that those activities may constitute a nuisance to the claimant. In my view, to the extent that those activities are a nuisance to the claimant, they should be left out of account when assessing the character of the locality, or, to put it another way, they should be notionally stripped out of the locality when assessing its character. Thus, in the present case, where the judge concluded that the activities at the Stadium and the Track were actually carried on in such a way as to constitute a nuisance, although they could be carried on so as not to cause a nuisance, the character of the locality should be assessed on the basis that (i) it includes the Stadium and the Track, and (ii) they could be used for speedway, stockcar, and banger racing and for motocross respectively, but (iii) only to an extent which would not cause a nuisance.

66. In so far as the respondents' activities at the Stadium and the Track cause no nuisance, they are lawful. There is therefore no reason to disregard them when assessing the character of the neighbourhood. Indeed, it would be unrealistic, and indeed unfair on the respondents, if those activities were disregarded. However, in so far as the activities are unlawful, in particular in so far as they constitute a nuisance to the appellants, it would seem to me to be illogical, as well as unfair to the appellants, to take those activities into account. It would involve the respondents invoking their own wrong against the appellants in order to justify their continuing to commit that very wrong against the appellants.

67. The Court of Appeal appears to have accepted at para 75 of Jackson LJ's judgment that, if the respondents had used the Stadium or the Track in breach of planning conditions, a claim in nuisance may well have been made out. But the reason for that must be that a use in breach of planning law is unlawful and should therefore not be taken into account when assessing the character of the locality (unless, perhaps, it was shown that planning permission was likely to be forthcoming). It appears to me that the same conclusion should, as a matter of logic, indeed perhaps *a fortiori*, apply to a use which constitutes the very nuisance of which the appellants are complaining.

68. The respondents rely on the fact that the activities carried on at the Stadium and the Track had been going on for many years before the judge made his assessment of the character of the neighbourhood. As Jackson LJ put it [2012] 1 WLR 2127, paras 69 and 72, these activities were "an established feature, indeed a dominant feature, of the locality" and "one of the noise characteristics of the locality" by the time that the appellants brought their claim. However, in so far as those activities were being carried on unlawfully, for instance because they give rise to a nuisance to the claimants making the nuisance claim, they should not be taken into account when assessing the character of the locality, whether they have been going on for a few days or many years.

69. Of course, once the nuisance has been going on for 20 years, the position may be different, as the respondents may well have obtained a right to cause what would otherwise be a nuisance. I should perhaps add that if a defendant's actual activities have been held to be a nuisance by the court, but the court has then decided to refuse an injunction and award damages instead, then, whether or not the activities can be described as "lawful", it would in my view be proper to take them into account as part of the character of the locality: they have effectively been sanctioned by the court.

70. I do not consider that this conclusion is inconsistent with the reasoning of the Court of Appeal in *Rushmer v Polsue & Alfieri Ltd* [1906] 1 Ch 234, affirmed [1907] AC 121. In my view, the brief opinion of Lord Loreburn LC at pp 122-123,

encapsulates the effect of the judgments of Stirling and Cozens-Hardy LJJ in the Court of Appeal, namely that (i) whether an activity gives rise to a nuisance may depend on the character of the particular locality, (ii) the trial judge rightly directed himself as to the law, and (iii) there was no reason to think that he had not applied his own directions to the facts of the case (and I think that the rather discursive judgment of Vaughan Williams LJ is to much the same effect). The only relevant point for present purposes which I can discern from the reasoning of the Court of Appeal is that an activity can be a nuisance even if it conforms to the character of the locality – a point made by all three members of the court, perhaps most clearly by Cozens-Hardy LJ at pp 250-251. But that is entirely consistent with the above analysis.

71. It must be acknowledged, however, that there appears to be an element of circularity in the notion that, when assessing the character of the locality, one has to ignore the defendant's activities if, or to the extent that, they constitute a nuisance, given that the point one is ultimately seeking to decide is whether the defendant's activities amount to a nuisance. However, it seems to me that there should be no real problem in this connection. In many cases, it is fairly clear whether or not a defendant's activities constitute a nuisance once one has established the facts, and nice questions as to the precise identification of the locality or its character do not have to be addressed. In those cases where the precise character of the locality is of importance, the point should not cause much difficulty either. In this case, for example, the question for the judge was the extent to which the noise levels from the Stadium and the Track were or would be acceptable in what was a sparsely populated area, with a couple of small villages and a military airfield between a mile and two miles away, and he answered it by taking the noise levels at other well-established racing circuits elsewhere in the country.

72. However, in some cases, there will be an element of circularity. In such cases, the court may have to go through an iterative process when considering what noise levels are acceptable when assessing the character of the locality and assessing what constitutes a nuisance. Nonetheless, the circularity involved in my conclusion does give cause for concern.

73. The concern is, however, allayed once one considers the two other possible approaches. Either one ignores the activity in question altogether when assessing the character of the locality. That may often be the simplest and fairest way of dealing with the issue but, at least in some cases, it could be unfair on a defendant in a nuisance case. Or one adopts a solution which is both even more circular than the one which I prefer, and surprising in its consequences, namely the approach taken by the Court of Appeal. If the activity which causes the alleged nuisance is taken into account, without modification, as part of the character of the locality, it would mean that there could rarely be a successful claim for nuisance, as I see it. If the matters complained of by the claimant are part of the character of the locality, then

it is hard to see how they could be unacceptable by a standard which is to be assessed by reference to that very character. Furthermore, to the extent that the defendant's activities constitute a nuisance, it seems wrong that he should be able to have them taken account when assessing the character of the locality: he would be relying on his own wrong against the claimant.

74. Accordingly, I conclude that a defendant, faced with a contention that his 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 – and to avoid any misunderstanding, if the activities couldn't be carried out without creating a nuisance, then they would have to be entirely discounted when assessing the character of the neighbourhood.

75. Similarly, any other activity in the neighbourhood can properly be taken into account when assessing the character of the neighbourhood, to the extent that it does not give rise to an actionable nuisance or is otherwise unlawful. There will, no doubt, frequently be many uses which may not have obtained a specific sanction (through being agreed to by the claimant, through a prescriptive right or through the court refusing an injunction), but which are unobjectionable as a matter of law, and may therefore properly be taken into account.

76. In addition, as Lord Carnwath says at para 185 below, the fact that it is not open to a neighbouring claimant to object to the defendant's activities simply because they emit noise does not mean that the defendant is free to carry on those activities in any way he wishes. The claimant is entitled to expect the defendant to take all reasonable steps to ensure that the noise is kept to a reasonable minimum, consistent with what was said by Bramwell B in *Bamford* 3 B & S 62 (see para 5 above). This is consistent with the approach taken by the court in relation to the noise temporarily caused by building works - see eg *Andreae v Selfridge & Co Ltd* [1938] 1 Ch 1, 7.

The effect of planning permission on an allegation of nuisance

77. The interrelationship of planning permission and nuisance has been considered in a number of cases, and has been discussed in a number of articles and books. The grant of planning permission for a particular use is potentially relevant to a nuisance claim in two ways. First, the grant, or terms and conditions, of a planning permission may permit the very noise (or other disturbance) which is alleged by the claimant to constitute a nuisance. In such a case, the question is the extent, if any, to which the planning permission can be relied on as a defence to the nuisance claim. Secondly, the grant, or terms and conditions, of a planning permission may permit the defendant's property or another property in the locality

to be used for a certain purpose, so that the question is how far that planning permission can be relied on by the defendant as changing the character of the locality.

78. As explained in para 18 above, the judge effectively by-passed these issues by concluding that the grant of planning permission should not be taken into account when assessing whether the respondents' activities at the Stadium or the Track constituted a nuisance, for two reasons. The first reason was that the permissions in question were personal, and the second was that they only permitted those activities at certain times. I find the first reason largely unconvincing and the second reason baffling.

79. The fact that a planning permission for a particular use is personal does not alter the fact that it removes the bar which would otherwise exist on that use, and that the use is acceptable in planning terms at least if carried on by, or on behalf of, the very person who is carrying it on. However, there is something in the point that, by granting a permission which was both permanent and personal, the planning authority was, as it were, hedging its bets – a view supported by the fact that the question whether to grant planning permission was controversial. Nonetheless, the fact remains that the use in question did have planning permission.

80. I fail to understand why the restriction as to number of days and the time limitations contained in an otherwise relevant planning permission should invalidate its relevance to the issue of nuisance. Apart from the inherent illogicality of the judge's conclusion, such restrictions and limitations were no doubt imposed, at least in part, in the interests of those in the neighbourhood of the Stadium and Track. Accordingly, I agree with the Court of Appeal that the judge's reasons for refusing to take into account the fact that planning permissions had been granted for the activities carried on by the respondents are unsupportable.

81. However, that leaves open the question as to what weight, if any, should be given to the fact that planning permission has been granted for the very activities which a claimant contends give rise to a nuisance by noise. More particularly, what weight, if any, should be given to the fact that there is a planning permission for a use which will inevitably give rise to the noise which is said to constitute a nuisance, and/or which contains terms or conditions which specifically allow the emission of the noise which is said by a claimant to constitute a nuisance?

82. The implementation of a planning permission can give rise to a change in the character of the locality, but, subject to one possible point, it is no different from any other building work or change of use which does not require planning permission. Thus, if the implementation of a planning permission results in the

creation of a nuisance to a claimant, then, subject to one possible point, it cannot be said that the implementation has led to a change in the character of the locality - save, as explained above, (i) to the extent that the implementation could have been effected in a way which would not have created a nuisance, or (ii) if the defendant can show a prescriptive right to create the nuisance, or (iii) the court has decided to award the claimant damages rather than an injunction in respect of the nuisance.

83. I have described the conclusions in the preceding paragraph as being "subject to one possible point". That point is the extent, if any, to which a defendant, in seeking to rebut a claim in nuisance, can rely on the fact that the grant, or terms and conditions, of a planning permission permit the very noise (or other disturbance) which is alleged by the claimant to constitute the nuisance (or which is relied on by the defendant as forming part of the character of the locality).

84. In the Court of Appeal, Jackson LJ discussed the cases in which the relationship between planning decisions and claims in nuisance had been considered. In *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343, 359, Buckley J accepted that "planning permission is not a licence to commit a nuisance", but he went on to say that "a planning authority can, through its development plans and decisions, alter the character of a neighbourhood". As Jackson LJ explained [2012] 1 WLR 2117, para 57, even though the implementation of the planning permission in *Gillingham* resulted in "noise, vibration, dust and fumes [which] caused serious disturbance local residents, … Buckley J dismissed the claim for public nuisance". In the following paragraph of his judgment, having described that as a "[h]arsh … outcome", Jackson LJ said it was nonetheless a correct outcome, as the planning authority "had made a decision in the public interest and the consequences had to be accepted."

85. Jackson LJ seems to have concluded that the same reasoning applied in *Hirose Electrical UK Ltd v Peak Ingredients Ltd* [2011] Env LR 680: see para 62. However, he also accepted in para 59 that it was not open to a defendant in a nuisance claim to be able to rely on a planning permission for "a change of use of a very small piece of land", which was the basis of the decision of the Court of Appeal in *Wheeler v JJ Saunders Ltd* [1996] Ch 19. In that case, Staughton LJ suggested that only "a strategic planning decision affected by considerations of public interest" would assist a defendant in a nuisance claim, and Peter Gibson LJ, while plainly dubious about the reasoning in *Gillingham*, suggested that it could only apply in relation to a "major development": see pp 30 and 35. Further, as I read the analysis of Jackson LJ at para 66, he also thought that that reason justified the decision of the Court of Appeal in *Watson v Croft Promosport Ltd* [2009] 3 All ER 249.

86. It seems to me that the effect of Jackson LJ's analysis is that, where the planning permission is granted for a use of the defendant's property which inevitably

results in, or specifically permits, what would otherwise be a nuisance to the claimant, that use is to be treated as part of the character of the locality, if the permission relates to a large area, but not if it relates to a small area. Further, as is apparent from the contrasting outcomes in *Gillingham* and *Hirose*, as against *Wheeler* and *Watson*, where the planning permission for the nuisance-making activity is "strategic" in nature or relates to a "major development", it would defeat the claim for nuisance, whereas where it is for a small area, it would have no effect on the nuisance claim. As mentioned in para 73 above, that is scarcely surprising, as once one accepts that the noise complained of forms part of the character of the locality for the purpose of considering what constitutes a nuisance, it is hard to see how that very noise could be held to be a nuisance.

87. In my judgment, the conclusion reached by the Court of Appeal on this issue is unsatisfactory, both in principle and in practice, although it is only fair to add that they may understandably have considered that their hands were tied by the decisions mentioned in paras 84-86 above. Logically, the fact that the alleged nuisance arising from the defendant's property is permitted by the planning authority should be a decisive factor, a relevant factor, or an irrelevant factor when assessing whether it is a nuisance. Which of those three possibilities applies should not depend on whether the permission relates to a large or small area of land. Furthermore, while Jackson LJ was at pains to emphasise that the grant of planning permission would not defeat a nuisance claim, it seems to me that that was precisely the effect of a planning permission for a large area, according to the reasoning of Buckley J in *Gillingham*, of the Court of Appeal in *Watson*, and of Jackson LJ in this case.

88. It also would be somewhat paradoxical if the greater the likely disagreeable impact of a change of use permitted by the planning authorities, the harder it would be for a claimant to establish a claim in nuisance. Yet that seems to be the effect of Jackson LJ's analysis, as the greater the area covered by the planning permission, (i) the more likely it is to provide a defence to a claim in nuisance, and (ii) the more intrusive any noise or other intrusion is likely to be. Quite apart from this, it is hard to know what is meant by a large area.

89. 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.

90. Quite apart from this, it seems wrong in principle that, through the grant of a 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, when there is no provision in the planning legislation which suggests such a possibility. This point is reinforced when one turns to sections 152 and 158 of the Planning Act 2008: section 158 expressly excludes claims in nuisance by neighbours as a result of the use of a property consequent upon a ministerial order permitting that use, and section 152 provides for appropriate compensation where a neighbour would, but for section 158, have had a claim in nuisance. It is also to be noted that section 76 of the Civil Aviation Act 1982 expressly excludes an action for nuisance owing to aircraft, but section 1 of the Land Compensation Act 1973 provides for compensation for neighbours (including in respect of nuisance by noise attributable to aircraft) when land is developed as an "aerodrome".

91. As for practical considerations, I am not impressed by the suggested difference between "a strategic planning decision affected by considerations of public interest" (or a planning decision relating to a "major development") and other planning decisions. No doubt all planning applications take into account the public interest, and the difference between a "strategic" planning permission (or a planning permission for a "major development"), and other planning permissions seems to me to be a recipe for uncertainty.

92. In my view, therefore, Carnwath LJ was right when he said in *Barr v Biffa Waste Services Ltd* [2013] QB 455, para 46(ii), that

> "The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. There is no principle that the common law should 'march with' a statutory scheme covering similar subject matter. Short of express or implied statutory authority to commit a nuisance…, there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights."

93. Peter Gibson LJ expressed much the same view in *Wheeler* at 35, where he suggested that "[t]he court should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge". In an observation that also relates to the final topic raised on this appeal, he added that, where "a major development altering the character of a neighbourhood with wide consequential effects such as required a balancing of competing public and private interests before permission was granted", he could "well see that in such a case the public interest must be allowed to prevail and that it would be inappropriate to grant an injunction (though whether that should preclude any award of damages in lieu is a question which may need further consideration)".

94. Accordingly, I consider that the mere fact that the activity which is said to give rise to the nuisance has the benefit of a planning permission is normally of no assistance to the defendant in a claim brought by a neighbour who contends that the activity cause a nuisance to her land in the form of noise or other loss of amenity.

95. A planning authority has to consider the effect of a proposed development on occupiers of neighbouring land, but that is merely one of the factors which has to be taken into account. The planning authority can be expected to balance various competing interests, which will often be multifarious in nature, as best it can in the overall public interest, bearing in mind relevant planning guidelines. Some of those factors, such as many political and economic considerations which properly may play a part in the thinking of the members of a planning authority, would play no part in the assessment of whether a particular activity constitutes a nuisance – unless the law of nuisance is to be changed fairly radically. Quite apart from this, when granting planning permission for a change of use, a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance action; it could not be expected to take on itself the role of deciding a neighbour's common law rights.

96. However, there will be occasions when the terms of a planning permission could be of some relevance in a nuisance case. Thus, the fact that the planning authority takes the view that noisy activity is acceptable after 8.30 am, or if it is limited to a certain decibel level, in a particular locality, may be of real value, at least as a starting point as Lord Carnwath says in para 218 below, in a case where the claimant is contending that the activity gives rise to a nuisance if it starts before 9.30 am, or is at or below the permitted decibel level. While the decision whether the activity causes a nuisance to the claimant is not for the planning authority but for the court, the existence and terms of the permission are not irrelevant as a matter of law, but in many cases they will be of little, or even no, evidential value, and in other cases rather more.

97. The evidence before the planning authority when it was deciding to grant planning permission may also be before the court when deciding a nuisance claim. This evidence will often consist of letters or other submissions from neighbours (sometimes including the claimant), expert assessments, and advice from planning officers. The weight to be given to this sort of evidence obviously depends very much on the facts of the particular case, but, in a nuisance case with live witnesses, it will be likely to be of significantly less value if the people who produced the documents are not available to be cross-examined.

98. It should be added that I am very dubious about the notion that it would always be safe to assume that the reasons given by planning officers for recommending that planning permission be granted were the actual reasons which

the planning authority had in mind when granting planning permission. While the planning officers' reasons would normally feature large in the minds of members of the planning committee, it would be little short of naïve to assume that even the majority of those members who were in favour of granting permission agreed with all those reasons, or had no other reasons. Where a planning authority is defending a public law attack on the grant of a planning permission, and the only positive evidence of its reasons for the grant of the permission are those contained in the planning officer's advice, and the authority has adduced no evidence to suggest that it had not accepted those reasons (and there is no other evidence to suggest otherwise), I can see some ground for making the assumption. However, where the issue arises in private law proceedings in which the planning authority is not a party and the planning permission itself is not under attack, and in which there is normally oral evidence, I do not think it would be necessarily correct to make such an assumption. Whether it would be right to make the assumption in a particular case would depend on the evidence, including the contemporary documentation and possibly expert evidence, as well as on the arguments.

99. It is right to add that I should not be taken as necessarily suggesting that the actual decision that there was no liability in nuisance in *Gillingham* [1993] QB 343 was wrong, although much of Buckley J's reasoning, despite the fact that it was approved in the dissenting judgment of Lord Cooke of Thorndon in *Hunter* [1997] AC 655, 722, cannot stand. As Lord Carnwath points out in para 203 below, the alternative basis for the decision in *Gillingham*, which was based on discretion, was probably right.

The award of damages instead of an injunction

100. As explained in paras 24-25 above, in addition to awarding the appellants damages for the nuisance by noise which they had suffered in the past, the judge granted them an injunction limiting the levels of noise which could be emitted from the Stadium and the Track, and he also gave liberty to apply. He was not invited to award the appellants damages instead of an injunction. On this appeal, however, the respondents contend that, if the judge was right in concluding that their activities at the Stadium and the Track constituted a nuisance, then this was a case where he ought to have awarded damages instead of an injunction.

101. 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; of course, the precise form of any injunction will depend very much on the facts of the particular case. However, ever since Lord Cairns' Act (the Chancery Amendment Act 1858 (21 & 22 Vict c 27)), the court has had power to award damages instead of an injunction in any case, including a case of nuisance -

see now section 50 of the Senior Courts Act 1981. Where the court decides to refuse the claimant an injunction to restrain a nuisance, and instead awards her damages, such damages are conventionally based on the reduction in the value of the claimant's property as a result of the continuation of the nuisance. Subject to what I say in paras 128-131 below, this is clearly the appropriate basis for assessing damages, given that nuisance is a property-related tort and what constitutes a nuisance is judged by the standard of the ordinary reasonable person.

102. The question which arises is what, if any, principles govern the exercise of the court's jurisdiction to award damages instead of an injunction. The case which is probably most frequently cited on the question is *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, but there has been a substantial number of cases in which judges have considered the issue, some before, and many others since. For present purposes, it is necessary to consider *Shelfer* and some of the subsequent cases, which were more fully reviewed by Mummery LJ in *Regan v Paul Properties DPF No 1 Ltd* [2007] Ch 135, paras 35-59.

103. In *Shelfer*, the Court of Appeal upheld the trial judge's decision to grant an injunction to restrain noise and vibration. Lindley LJ said at pp 315-316:

> "[E]ver since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the legislature intended to turn that court into a tribunal for legalising wrongful acts; or in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (eg, a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed."

104. A L Smith LJ said at 322-323, in a frequently cited passage:

> "[A] person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.

> There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution. … In my opinion, it may be stated as a good working rule that - (1) If the injury to the plaintiff's legal rights is small, (2) And is one which is capable of being estimated in money, (3) And is one which can be adequately compensated by a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction - then damages in substitution for an injunction may be given."

105. Significant *obiter* observations were subsequently made on the question in *Colls v Home & Colonial Store Ltd* [1904] AC 179, where the House of Lords reversed the courts below who had concluded that the defendant had infringed the plaintiff's right to light (and had awarded an injunction). Lord Macnaghten said at p 192 that he had "some difficulty within following out [the] rule" that "an injunction ought to be granted when substantial damages would be given at law". He added at p 193 that "if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit", then he was "disposed to think that the court ought to incline to damages rather than to an injunction". Lord Lindley (as he had by then become), at pp 212-213, after reviewing some of the previous cases on the topic, including *Shelfer*, described "the result of the foregoing review of the authorities" as "not altogether satisfactory", and adding that "there is the uncertainty as to whether the proper remedy is an injunction or damages", but that "the good sense of judges and juries may be relied upon for adequately protecting rights to light on the one hand and freedom from unnecessary burdens on the other".

106. In *Kine v Jolly* [1905] 1 Ch 480, the Court of Appeal discharged an injunction restraining an interference to a right to light. At p 504, Cozens-Hardy LJ said he thought that "the tendency of the speeches in the House of Lords in *Colls*" was to go "a little further than was done in *Shelfer*", and indicated that "as a general rule the court ought to be less free in granting mandatory injunctions than it was in years gone by". Vaughan Williams LJ appears to have thought that the two cases involved different approaches, but concluded that each approach yielded the conclusion that there should be no injunction. Romer LJ, dissenting on the issue of liability, did not need to decide the point, and did not indicate which he preferred.

107. In the subsequent decision of *Slack v Leeds Industrial Co-operative Society Ltd* [1924] 2 Ch 475, which was also concerned with an interference with the plaintiff's right to light, all three members of the Court of Appeal (Sir Ernest Pollock MR, and Warrington and Sargant LJJ) considered that nothing in *Colls* served to undermine the "good working rule" of A L Smith LJ in *Shelfer*, although they discharged a *quia timet* injunction and ordered an inquiry as to damages.

108. In *Fishenden v Higgs & Hill Ltd* (1935) 153 LT 128, another rights of light case, the Court of Appeal adopted a rather different approach, when allowing an appeal against Crossman J's refusal to award damages instead of an injunction. Lord Hanworth MR (as Sir Ernest Pollock had become) observed that his judgment in *Slack* should not be read as saying that A L Smith LJ's four tests "by themselves were now prescribed as the guiding tests for the court". Indeed, he observed at p 139 that "we ought to incline against an injunction if possible".

109. Romer LJ said at p 141 that A L Smith LJ's four tests "were not intended to be a fetter on the exercise of the court's discretion", and suggested that, while it was true that an injunction should be refused if those tests were satisfied, "it by no means follow[ed]" that an injunction should be granted if they were not. In deciding to overturn the injunction, Romer LJ was strongly influenced by the fact that the defendants had "acted fairly [and] in a neighbourly spirit" as well as by the conduct of the plaintiff. At p 144, Maugham LJ said that "the working rule laid down by A L Smith LJ" was not "a universal or even a sound rule in all cases of injury to light", and said he preferred the approach of Lord Lindley in *Shelfer* and *Colls.*

110. In more recent times, the Court of Appeal seems to have assumed that the approach of Lindley and A L Smith LJJ in *Shelfer* represents the law, and indeed that the four tests suggested by A L Smith LJ are normally to be applied, so that, unless all four tests are satisfied, there was no jurisdiction to refuse an injunction. That seems to have been the approach of Geoffrey Lane LJ in *Miller* [1977] 1 QB 966 (discussed in paras 48-49 above), and of Lawton LJ in *Kennaway* [1981] QB 88 (discussed in para 57 above).

111. *Jaggard v Sawyer* [1995] 1 WLR 269, was a case where the Court of Appeal upheld the trial judge's decision to award damages instead of an injunction restraining the defendant trespassing on the plaintiff's land. In so doing, the judge effectively gave the defendant a right of way to his house over the plaintiff's land, against the plaintiff's will, in return for a capital payment from the defendant to the plaintiff (see pp 286-287).

112. At pp 282-283, Sir Thomas Bingham MR (with whom Kennedy LJ agreed), specifically tested the trial judge's decision to award damages by reference to A L Smith LJ's four tests, and emphasised that "the test is one of oppression, and the court should not slide into application of a general balance of convenience test". He held that the judge had rightly concluded that the four tests were satisfied.

113. Millett LJ said at p 287 that "A L Smith LJ's checklist has stood the test of time", but emphasised that "it is only a working rule and does not purport to be an exhaustive statement of the circumstances in which damages may be awarded

instead of an injunction". As he immediately went on to emphasise on the next page, the decision whether or not to award damages instead of an injunction is a discretion. Accordingly, he said, the cases where judges have awarded or refused to award damages can be no more than "illustrations of circumstances in which particular judges have exercised their discretion". He also suggested that "[t]he outcome of any particular case usually turns on the question: would it in all the circumstances be oppressive to the defendant to grant the injunction to which the plaintiff is prima facie entitled?" He then went on to refer to the significance of the defendant's state of mind, including openness, good faith, and understanding.

114. Some seven years ago, in *Regan* [2007] Ch 135, the Court of Appeal rejected the trial judge's view that, where the defendant's building interfered with the claimant's right to light, the onus was on the claimant to show that damages were not an adequate remedy. In his judgment, Mummery LJ then effectively decided that an injunction should be granted on the basis that three of A L Smith LJ's tests were not satisfied: see paras 70-73.

115. In *Watson* [2009] 3 All ER 249, the Court of Appeal reversed the trial judge's decision to award damages instead of an injunction in a case where the nuisance was very similar in nature and cause to that alleged in this case. At para 44, Sir Andrew Morritt C described "the appropriate test" as having been "clearly established by the decision of the Court of Appeal in *Shelfer*", namely "that damages in lieu of an injunction should only be awarded under 'very exceptional circumstances'". He also said that *Shelfer* "established that the circumstance that the wrongdoer is in some sense a public benefactor is not a sufficient reason for refusing an injunction", although he accepted at para 51 that "the effect on the public" could properly be taken into account in a case "where the damage to the claimant is minimal".

116. It seems to me that there are two problems about the current state of the authorities on this question of the proper approach for a court to adopt on the question whether to award damages instead of an injunction.

117. The first is what at best might be described as a tension, and at worst as an inconsistency, between two sets of judicial dicta since *Shelfer*. Observations in *Slack*, *Miller*, *Kennaway*, *Regan*, and *Watson* appear to support the notion that A L Smith LJ's approach in *Shelfer* is generally to be adopted and that it requires an exceptional case before damages should be awarded in lieu of an injunction, whereas the approach adopted in *Colls*, *Kine*, and *Fishenden* seems to support a more open-minded approach, taking into account the conduct of the parties. In *Jaggard*, the Court of Appeal did not need to address the question, as even on the stricter approach it upheld the trial judge's award of damages in lieu, although Millett LJ seems to have tried to reconcile the two approaches.

118. The second problem is the unsatisfactory way in which it seems that the public interest is to be taken into account when considering the issue whether to grant an injunction or award damages. The notion that it can be relevant where the damages are minimal, but not otherwise, as stated in *Watson*, seems very strange. Either the public interest is capable of being relevant to the issue or it is not. As part of this second problem, there is a question as to the extent to which it is relevant that the activity giving rise to the nuisance has the benefit of a planning permission.

119. So far as the first problem is concerned, the approach to be adopted by a judge when being asked to award damages instead of an injunction should, in my view, be much more flexible than that suggested in the recent cases of *Regan* and *Watson*. It seems to me that (i) an almost mechanical application of A L Smith LJ's four tests, and (ii) an approach which involves damages being awarded only in "very exceptional circumstances", are each simply wrong in principle, and give rise to a serious risk of going wrong in practice. (Quite apart from this, exceptionality may be a questionable guide in any event – see *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2011] 2 AC 104, para 51).

120. 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, particularly in the very constrained way in which the Court of Appeal has suggested in *Regan* and *Watson*. And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good. On this aspect, I would adopt the observation of Millett LJ in *Jaggard* [1995] 1 WLR 269, 288, where he said:

> "Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently."

121. Having approved that statement, it is only right to acknowledge that this does not prevent the courts from laying down rules as to what factors can, and cannot, be taken into account by a judge when deciding whether to exercise his discretion to award damages in lieu. Indeed, it is appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible. I would accept that 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. And, subject to one possible point, I would cautiously (in the light of the fact that each case turns on its facts) approve the observations of Lord Macnaghten in *Colls* [1904] AC 179, 193, where he said:

> "In some cases, of course, an injunction is necessary - if, for instance, the injury cannot fairly be compensated by money - if the defendant has acted in a high-handed manner - if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."

122. The one possible doubt that I have about this observation relates to the suggestion in the antepenultimate sentence that the court "ought to incline to damages" in the event he describes. If, as I suspect, Lord Macnaghten was simply suggesting that, if there was no prejudice to a claimant other than the bare fact of an interference with her rights, and there was no other ground for granting an injunction, I agree with him. However, it is right to emphasise that, when a judge is called on to decide whether to award damages in lieu of an injunction, I do not think that there should be any inclination either way (subject to the legal burden discussed above): the outcome should depend on all the evidence and arguments. Further, the sentence should not be taken as suggesting that there could not be any other relevant factors: clearly there could be. (It is true that *Colls*, like a number of the cases on the issue of damages in lieu, was concerned with rights of light, but I do not see such cases as involving special rules when it comes to this issue. *Shelfer* itself was not a right to light case; nor were *Jaggard* and *Watson*. However, in many cases involving nuisance by noise, there may be more wide-ranging issues and more possible forms of relief than in cases concerned with infringements of a right to light.)

123. Where does that leave A L Smith LJ's four tests? While the application of any such series of tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in *Fishenden* 153 LT 128, 141. First, the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion". Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if

those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted.

124. As for the second problem, that of public interest, I find it hard to see how there could be any circumstances in which it arose and could not, as a matter of law, be a relevant factor. Of course, it is very easy to think of circumstances in which it might arise but did not begin to justify the court refusing, or, as the case may be, deciding, to award an injunction if it was otherwise minded to do so. But that is not the point. The fact that a defendant's business may have to shut down if an injunction is granted should, it seems to me, obviously be a relevant fact, and it is hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood, although in many cases that may well not be sufficient to justify the refusal of an injunction. Equally, I do not see why the court should not be entitled to have regard to the fact that many other neighbours in addition to the claimant are badly affected by the nuisance as a factor in favour of granting an injunction.

125. It is also right to mention planning permission in this context. In some cases, the grant of planning permission for a particular activity (whether carried on at the claimant's, or the defendant's, premises) may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of whether or not to grant an injunction. Accordingly, the existence of a planning permission which expressly or inherently authorises carrying on an activity in such a way as to cause a nuisance by noise or the like, can be a factor in favour of refusing an injunction and compensating the claimant in damages. This factor would have real force in cases where it was clear that the planning authority had been reasonably and fairly influenced by the public benefit of the activity, and where the activity cannot be carried out without causing the nuisance complained of. However, even in such cases, the court would have to weigh up all the competing factors.

126. In some such cases, the court may well be impressed by a defendant's argument that an injunction would involve a loss to the public or a waste of resources on account of what may be a single claimant, or that the financial implications of an injunction for the defendant would be disproportionate to the damage done to the claimant if she was left to her claim in damages. In many such cases, particularly where an injunction would in practice stop the defendant from pursuing the activities, an injunction may well not be the appropriate remedy.

127. Since writing this, I have read with interest Lord Sumption's suggestions as to how the law on the topic of damages instead of an injunction in nuisance cases might develop. At any rate on the face of it, I can see much merit in the proposals which he proffers. However, it would be inappropriate to go further than I have gone

at this stage, in the light of the arguments which were raised on this appeal. There may well be objections, qualifications, and alternatives which could be made in relation to Lord Sumption's suggested approach, and they should be considered before the law on this topic is developed further. In that connection, I see real force in what Lord Mance says in para 168.

128. A final point which it is right to mention on this issue is the measure of damages, where a judge decides to award damages instead of an injunction. It seems to me at least arguable that, where a claimant has a *prima facie* right to an injunction to restrain a nuisance, and the court decides to award damages instead, those damages should not always be limited to the value of the consequent reduction in the value of the claimant's property. While double counting must be avoided, the damages might well, at least where it was appropriate, also include the loss of the claimant's ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction.

129. Support for such an approach may be found in the reasoning in *Jaggard* [1995] 1 WLR 269, which suggests that this is a proper approach to damages where an injunction is refused to restrain a trespass, and damages were awarded instead. Sir Thomas Bingham MR said this at pp 281-282, when explaining and approving an earlier case where a judge had assessed damages for breach of a restrictive building covenant, which he then applied to the claim in *Jaggard*:

> "The defendants had committed a breach of covenant, the effects of which continued. The judge was not willing to order the defendants to undo the continuing effects of that breach. He had therefore to assess the damages necessary to compensate the plaintiffs for this continuing invasion of their right. He paid attention to the profits earned by the defendants, as it seems to me, not in order to strip the defendants of their unjust gains, but because of the obvious relationship between the profits earned by the defendants and the sum which the defendants would reasonably have been willing to pay to secure release from the covenant."

130. To the same effect, Millett LJ said this at p 292 in *Jaggard:*

> "In my view there is no reason why compensatory damages for future trespasses and continuing breaches of covenant should not reflect the value of the rights which she has lost, or why such damages should not be measured by the amount which she could reasonably have expected to receive for their release."

131. However, there are factors which support the contention that damages in a nuisance case should never, or only rarely, be assessed by reference to the benefit to the defendant in no injunction being granted, as pointed out by Lord Carnwath in para 248 below. For that reason, as well as because we have not heard argument on the issue, it would be inappropriate for us to seek to decide on this appeal whether, and if so in what circumstances, damages could be recoverable on this basis in a nuisance claim.

132. There are differences between the various members of the Court on this final issue. Most, probably all, of these differences are ones of emphasis and detail rather than of principle, but I nonetheless accept that we are at risk of introducing a degree of uncertainty into the law. The nature of the issue, whether to award damages in lieu of an injunction, is such that a degree of uncertainty is inevitable, but that does not alter the fact that it should be kept to a reasonable minimum. Given that we are changing the practice of the courts, it is inevitable that, in so far as there can be clearer or more precise principles, they will have to be worked out in the way familiar to the common law, namely on a case by case basis.

The resolution of this appeal

133. Having dealt with the points of principle raised on this appeal, I can now turn to the application of those principles to the facts of this appeal.

134. First, there is no question of the respondents being able to rely on the fact that the appellants came to the nuisance, or any other similar argument. The appellants used their property, Fenland, as a residence, which was the same purpose to which it had been put ever since before the activities currently carried on at the Stadium and the Track had started.

135. Secondly, there is the relevance of the planning situation in relation to the appellants' nuisance claim. As already explained (paras 77-79 above) the judge was wrong to hold that (i) the planning permission granted in 1985 and the CLEUD issued in 1997 in relation to the use of the Stadium, and (ii) the planning permission granted in 2002 for the use of the Track, were irrelevant for the purposes of the appellants' nuisance claim on the ground that the planning permissions were personal and they and the CLEUD were for discontinuous periods. Accordingly, the two permissions and the CLEUD were, at least in principle, evidence which could have been taken into account.

136. However, I do not consider that the judge's failure to take them into account can fairly be said to undermine his conclusion that the respondents' activities at the

Stadium and the Track constituted a nuisance. The CLEUD was of no relevance, other than as evidence which supported the argument that the activities to which it related had been going on for ten years before it had been applied for. The planning permissions showed that the planning authority considered that at least most of the uses of which the appellants complained were acceptable in planning terms, and turned their minds to some extent to noise pollution by limiting the frequency and the times of the activities.

137. Further, the judge's failure to give any weight to the planning permissions or the CLEUD on the issue of nuisance does not call into question his ultimate conclusion on that issue in favour of the appellants. It was not the appellants' case, nor was it the judge's conclusion, that the current use of the Stadium and the Track was by any means necessarily inappropriate: the concern was over the level of noise, which was not a matter specifically covered by the planning permissions or the CLEUD (save the 2002 permission for the motocross activities on the Track). This is best illustrated by the judge's concern to make an order which enabled the business at the Stadium and the Track to continue.

138. Quite apart from this, as already explained, the fact that a particular use has been granted planning permission is not normally a matter of much weight, and there was no reason to think that this was an exceptional case. On the contrary. The evidence showed that it was not an easy decision whether to grant the planning permissions, as was demonstrated by the initial temporary permissions, and the cautious nature of the planning officers' recommendation. Further, the background documents to the planning permissions (including letters of support and opposition, and the planning officers' reports) were available to the judge, and he took them into account, and there was a wealth of other evidence available to the judge at the trial, and that evidence was subject to cross-examination, and he took it all into account.

139. As I have already explained, the Court of Appeal took the view that the 1985 and 2002 planning permissions, given that they had been implemented, were highly relevant to, indeed effectively determinative of, the appellants' claim in nuisance. For the reasons which I have given in paras 80-98 above, that was wrong (although understandable in the light of earlier decisions of the Court of Appeal), and, as I have just explained, although the Judge also went wrong on the issue of the relevance of the permissions, I do not think that his error justified interfering with his conclusion.

140. The third question is whether the Judge went wrong in holding that the respondents had failed to establish a right by prescription to create what would otherwise be a nuisance of noise at the Stadium. On that topic, I consider that the judge was right for the wrong reason. I do not consider that he was entitled to hold that the interruption for two years prevented the respondents obtaining the right to

create what would otherwise be a nuisance of noise if they had otherwise satisfied the requirements for establishing such a right. If a person regularly causes a nuisance by noise through holding motocross events more than 20 times a year for a period of 20 years, save that during two years of that period, there are no such events, I consider that the requirements of a prescriptive right would be satisfied (subject, of course, to there being any of the normal defences).

141. In that connection, I have already referred in para 37 above to the judgments in *Carr v Foster* 3 QB 581. Mere non-use, or inactivity, for two out of 20 years, at least in the absence of other evidence, would be insufficient to justify a court concluding that an action which has been carried out for the other 18 years fairly consistently and to a significant extent in each of those years failed to justify the conclusion that a prescriptive right had been established. It is a question of degree, and that is shown by contrasting the facts of the present case and of *Carr* with those of *White v Taylor (No 2)* [1969] 1 Ch 160, where non-use for two periods, each more than five years, did defeat a prescription claim.

142. The essential question in a prescription case has been said to be whether the nature and degree of the activity of the putative 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 is being asserted and ought to be challenged if it is intended to be resisted (see *Gale op cit*, para 4.54, and per Lord Walker in *Lewis* [2010] 2 AC 70, para 30). This somewhat circular and hypothetical test appears to involve questions of degree and judgment. However, one must take as a starting point the somewhat arbitrary, but at least clear, proposition that, where the use or activity in question has been carried on as of right for 20 years or more, then, absent special facts, the dominant owner gets a right to carry on the use or activity. Accordingly, the answer to my mind on the facts of this case is plain: assuming that the activities at the stadium and the Track had caused a nuisance over a period of at least 20 years, the putative servient owner should have appreciated what was being claimed. Given the consistent and substantial activities at the Stadium for all but two of those 20 or more years the two years' interruption should not be capable of being a problem for the respondents' prescriptive claim.

143. However, the reason why, in my view, the respondents fail to establish a prescriptive right to create what would otherwise be a nuisance in this case, is that, even allowing for the fact that gaps such as that discussed in the preceding two paragraphs would not be fatal to their claim, they did not show that their activities during a period of 20 years amounted to a nuisance. As explained in paras 35-37 above, in order to justify the establishment of a right to create a noise by prescription, it is not enough to show that the activity which now creates the noise has been carried on for 20 years. It is not even enough to show that the activity has created a noise for 20 years. What has to be established is that the activity has (or a combination of activities have) created a nuisance over 20 years. Otherwise, it could not be said that

the putative servient owner had the opportunity to object to the nuisance, or could be said notionally to have agreed to it.

144. As acknowledged in paras 35-39 above, this requirement will often present evidential problems for a person seeking to establish by prescription a right to commit what would otherwise be a nuisance. Of course, the strictness of this requirement is mitigated by the fact that the nuisance does not need to have occurred anything like every day during the 20 years, as just explained.

145. In the present case, it seems to me that, on the findings made by the judge, and the evidence as explained by him, fell well short of establishing that the activities had caused a nuisance to Fenland for a continuous period of 20 years (even allowing for periods of no nuisance as in *Carr*) at any time between the commencement of the use of the Stadium in 1976 and the date on which these proceedings were issued in 2008.

146. Mr Relton (the appellants' predecessor in title) apparently first formally complained of noise to the council in 1992 (only 16 years before the proceedings were brought), and this resulted in the abatement notices referred to in para 11 above. At least as recorded in the judgment, no witness appears to have suggested, through either first hand or hearsay evidence, either expressly or inferentially, that there was nuisance by noise to Fenland much before 1994. The appellants' witnesses seem to have come to the area after 1990, and (with the exception of Mrs Relton) the respondents' witnesses seem to have been in a similar position, and Mrs Relton denied that there was a significant noise problem (and indeed described her husband as over-sensitive to noise).

147. There is also an argument that the judge did not properly approach the question whether the respondents caused a nuisance by noise on the right basis, as he decided that Fenland was to be treated as being in a purely agricultural environment, rather than in an environment which included the Stadium and the Track used for activities which did not create a nuisance (as explained in para 65 above). There are passages in his judgment which suggest that he may have approached the issue on this basis. However, it is clear that he did not do so, as, in para 243 of his decision, he fixed the acceptable level of noise from the Stadium and Track by reference to the levels of noise emitted from land used for similar activities (see para 24 above).

148. The consequence of these conclusions is that, subject to a final point, the injunction granted by the judge should be restored (together with all the other terms, including the permission to apply).

149. The final point is whether the judge should have awarded damages rather than an injunction. Given that he was not asked to do so, it is scarcely surprising that he did not address this issue. Further, it is not an issue which an appellate court should determine when the trial judge was not asked to do so, save in the most exceptional circumstances. The decision whether to award damages instead of an injunction can be dependent on a number of issues, including the behaviour and attitude of the parties. It is therefore a matter on which the trial judge is particularly well positioned to assess in a case such as this, where there was substantial oral evidence. Further, a defendant who wishes to argue that the court should award damages rather than an injunction should make it clear that he wishes to do so well in advance of the hearing, not least because the claimant may wish to adduce documentary or oral evidence on that issue which she would not otherwise consider relevant. The appellants were not afforded such an opportunity in this case.

150. However, as Lord Clarke said in argument, it would be wrong to be very critical of the respondents for not raising the point at or before the trial as the decisions in *Regan* and *Watson* would have precluded the trial judge from awarding damages in lieu of an injunction, although it is right to add that the respondents should ideally have reserved their position on the point.

151. In my judgment, the fairest way to deal with the point that the judge should have awarded damages instead of an injunction is to refuse the respondents permission to raise it, but to hold that they should be free to raise the argument that the injunction granted by the judge should be discharged, and damages awarded instead under the provision in the judge's order giving the parties permission to apply.

152. I should emphasise that, if such an application were made by the respondents, I am not in any way seeking to fetter the judge's discretion when deciding whether to award damages instead, or seeking to suggest how that discretion might be exercised. No doubt the judge will carefully consider the effect of, and give such appropriate weight as he sees fit to, all the circumstances, including the evidence and arguments which he has already received, and any fresh evidence and argument which he sees fit to receive, in the light of the points made in paras 119-130 above.

Conclusion

153. As the first, second and fifth issues set out in para 6 above were raised by the respondents, and the third and fourth issues were raised by the appellants, the effect of this decision is that the appeal is allowed, and the order of Judge Seymour QC is restored.

LORD SUMPTION

154. I agree that this appeal should be allowed for the reasons given by Lord Neuberger.

155. It is, I think, worth pointing out that the question what impact the grant of planning permission should have on liability in tort for private nuisance and the question what remedies should be available for a nuisance are closely related. They both raise a broader issue of legal policy of some importance, namely how is one to reconcile public and private law in the domain of land use where they occupy much the same space?

156. I agree with Lord Neuberger that the existence of planning permission for a given use is of very limited relevance to the question whether that use constitutes a private nuisance. It may at best provide some evidence of the reasonableness of the particular use of land in question. But planning authorities are concerned with the public interest in development and land use, as that interest is defined in the planning legislation and any relevant development plans and policies. Planning powers do not exist to enforce or override private rights in respect of land use, whether arising from restrictive covenants, contracts, or the law of tort. Likewise, the question whether a neighbouring landowner has a right of action in nuisance in respect of some use of land has to be decided by the courts regardless of any public interest engaged.

157. What saves, or could save the law from anomaly and incoherence is the court's discretion as to remedies. An injunction is a remedy with significant side-effects beyond the parties and the issues in the proceedings. Most uses of land said to be objectionable cannot be restrained by injunction simply as between the owner of that land and his neighbour. If the use of a site for (say) motocross is restrained by injunction, that prevents the activity as between the defendant and the whole world. Yet it may be 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. 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. In a case where planning permission has actually been granted for the use in question, there are particularly strong reasons for adopting this solution. It is what the law normally provides for when a public interest conflicts with a proprietary right.

158. The main question, as it seems to me, is not whether the judge in deciding on the appropriate remedy should take account of the public interest or, more generally, of interests which are not before the court. He will usually lack the information to do so effectively, and is in danger of stepping outside his main function of deciding the issue between the parties. The main question is whether the current principles of law governing the availability of injunctions are consistent with the public interest reflected in the successive and increasingly elaborate legislative schemes of development control which have existed in England since 1947.

159. The ordinary principle is that the court does not grant an injunction in a case where there is an adequate legal remedy. In particular, it does not do so where damages would be an adequate remedy. Where an injunction is granted, it is usually because the injury to the Claimant is "irreparable", in the sense that money cannot atone for it. However, this principle has never been consistently followed in cases of nuisance. The leading case is *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 which created a strong presumption in favour of an injunction, to be displaced only in the four narrowly defined categories identified by AL Smith LJ at pp 322-323. The exceptions applied only to cases where the injury to the claimant was small and the grant of an injunction would be oppressive. In *Colls v Home and Colonial Stores Ltd* [1904] AC 179, 192, Lord Macnaghten wondered why an injunction should be granted "when substantial damages would be given at law", and there were subsequent attempts to widen the discretion. But the courts have not taken the hint. In *Regan v Paul Properties DPF No 1 Ltd* [2007] Ch 135 and *Watson v Croft Promosport Ltd* [2009] 3 All ER 249 the Court of Appeal have reverted to substantially the same position as the Court of Appeal in *Shelfer* more than a century before.

160. The courts might have defended the special treatment of nuisance by pointing to the traditional attitude of equity to land as being unique, an approach which is exemplified in its willingness to grant specific performance of contracts for the sale of land. From this, it might have been concluded that paying the claimant enough to buy a comparable property elsewhere where there was no nuisance was not equivalent to letting him use his existing land free of the nuisance. In fact the *Shelfer* principle was based mainly on the court's objection to sanctioning a wrong by allowing the defendant to pay for the right to go on doing it. This seems an unduly moralistic approach to disputes, and if taken at face value would justify the grant of an injunction in all cases, which is plainly not the law. In his dissenting judgment in the Court of Appeal in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] Ch 286, 304 (subsequently upheld in the House of Lords [1998] AC 1), Millett LJ said:

> "The competing arguments in the present case, and the difference in the views of the members of this court, reflect a controversy which has persisted since the dispute between Sir Edward Coke and Lord

> Ellesmere LC. Sir Edward Coke resented the existence of an equitable jurisdiction which deprived the defendant of what he regarded as a fundamental freedom to elect whether to carry out his promise or to pay damages for the breach. Modern economic theory supports Sir Edward Coke; an award of damages reflects normal commercial expectations and ensures a more efficient allocation of scarce economic resources. The defendant will break his contract only if it pays him to do so after taking the payment of damages into account; the plaintiff will be fully compensated in damages; and both parties will be free to allocate their resources elsewhere. Against this there is the repugnance felt by those who share the view of Fuller CJ in *Union Pacific Railway Co v Chicago, Rock Island and Pacific Railway Co* (1896) 163 US 564, 600 that it is an intolerable travesty of justice that a party should be allowed to break his contract at pleasure by electing to pay damages for the breach. English law has adopted a pragmatic approach in resolving this dispute... The leading principle is usually said to be that equitable relief is not available where damages are an adequate remedy. In my view, it would be more accurate to say that equitable relief will be granted where it is appropriate and not otherwise; and that where damages are an adequate remedy it is inappropriate to grant equitable relief."

161. In my view, the decision in *Shelfer* is out of date, and it is unfortunate that it has been followed so recently and so slavishly. It was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control. The whole jurisprudence in this area will need one day to be reviewed in this court. 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. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission. However, at this stage, in the absence of argument on these points, I can do no more than identify them as calling for consideration in a case in which they arise.

LORD MANCE

162. I agree that the appeal should be allowed for the reasons given by Lord Neuberger.

163. In addition to their reasons for allowing this appeal, the judgments prepared by Lord Neuberger, Lord Sumption and Lord Carnwath address a number of wider issues which were argued before us. For the most part, I also agree with the way in which Lord Neuberger addresses these issues in his judgment.

164. It is common ground that a change in the intensity of a previous activity may, just as much as the introduction of a new activity, give rise to a nuisance. The fact that the nuisance is already being committed cannot make it part of the character of the locality (see Lord Neuberger's judgment paragraphs 65 to 76). But Lord Neuberger (paragraphs 72 and 74) and Lord Carnwath (paragraph 187) suggest, as I see it, that such a change or the introduction of a new activity may in some circumstances and to some degree be compatible with the existing character of the locality, and to that extent not involve the creation of a nuisance. With or without planning permission, the character of an area may be susceptible over time to gradual change and development. Each step in the process may be said by itself to fit with the existing character and be largely imperceptible, though, ultimately, the difference resulting from the totality of all the steps may be considerable. In the meantime, those occupying property, living or working, in the area, will have had time to adapt. That is a quite different process from one brought about by an activity increased in intensity or introduced for the first time and bringing about a radical change over a relatively short period. In the latter case and to the extent that the increased or new activity goes beyond anything which would fit with the existing character of the locality, an aggrieved occupier can have cause for complaint about a resulting nuisance, unless and until the increased or new activity is allowed to continue as a nuisance either for 20 years without proceedings being issued or by a court by refusal of an injunction.

165. With regard to the significance of planning permission, I agree with what Lord Neuberger says in paragraphs 77 to 97 and 99. The reasoning in *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343 suggests that a development plan or a "strategic" planning decision adopted in the public interest can of itself bring about a corresponding major alteration in the character of a neighbourhood without any need to compensate for any private nuisance thereby caused. I regard that as unsustainable in principle and fairness. If the increase in an existing activity or the introduction of a new activity constitutes a nuisance in relation to the previously existing character of the locality, I see no basis for treating differently a decision to permit such an increase or new activity taken in the public interest by a development or planning authority. The general public interest may have led to a particular private interest being overlooked or overridden. If it is to be acceptable to permit this, then it should at least be permitted on a basis that affords compensation.

166. That is not to suggest that the grant, terms and conditions of a planning permission may not have some relevance in some nuisance cases, as Lord Neuberger

indicates in his paragraphs 96 to 97 and also (in relation to remedy) in paragraph 118. As to the reliance which might be placed on planning officers' reports, on which Lord Neuberger touches in paragraph 98, it seems to me that it must all depend on the nature of the decision and of the debate before the planning committee and so on all the circumstances (as I understand Lord Neuberger also to say in the last sentence of paragraph 98), and I prefer myself to say no more without rather more information about these in a specific case.

167. With regard to remedy, I am broadly in agreement with Lord Neuberger. However, I would adopt the qualifications made by Lord Carnwath in his paragraphs 246 and 247. I do not think that a grant of planning permission can give rise to any presumption that there should be no injunction, and, while I would, in a case where it was relevant, like to hear argument on this, I am not at present persuaded that cases on the right to light involve the same considerations as those arising, or are therefore necessarily helpful, where the question is the appropriate remedy in respect of a nuisance of the present different nature.

168. I would only add in relation to remedy that the right to enjoy one's home without disturbance is one which I would believe that many, indeed most, people value for reasons largely if not entirely independent of money. With reference to Lord Sumption's concluding paragraph, I would not therefore presently be persuaded by a 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" – a suggested example of the latter being given as a case where a use of land has received planning permission. I would see this as putting the significance of planning permission and public benefit too high, in the context of the remedy to be afforded for a private nuisance. As already indicated, I agree with Lord Neuberger's nuanced approach.

LORD CLARKE

169. I agree with the conclusions and reasoning of Lord Neuberger subject to one or two points. First, I agree that the fact that planning permission has been granted is capable of being relevant to an action in nuisance in a number of respects but, as Lord Carnwath has shown, the facts of such cases are so varied that it is difficult to lay down hard and fast rules. As so often, all depends upon the circumstances. However, I agree with Lord Neuberger, Lord Sumption and Lord Carnwath that the existence of planning permission for the activity complained of may well be of particular relevance to the remedy to be granted.

170. Secondly, I agree with Lord Neuberger at para 120 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. In these circumstances, in the absence of submissions on the point, I would wish to reserve the question upon whom the burden of proof should be placed on the question how that discretion should be exercised.

171. Thirdly, as I see it, the most important aspect of this case relates to the correct approach to remedies. In particular I agree with the views of Millett LJ in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Limited* [1996] Ch 286 at 305, which was a dissenting judgment but was subsequently upheld by the House of Lords at [1986] AC 1. He concluded that the general principle is or should be that equitable relief will be granted where it is appropriate and not otherwise and that, where damages are an adequate remedy, it is inappropriate to grant equitable relief. Lord Sumption set out Millett LJ's views at his para 160, as I read it, with approval. I entirely agree with Lord Sumption (at para 161) that the decision in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 is out of date and that it is unfortunate that it has been followed so recently and so slavishly. Indeed, I would so hold now in this appeal, although (in the absence of submissions) I would not now lay down precise principles which should be followed in the future. They must be developed on a case by case basis and in each case all will depend upon the circumstances. I agree with Millett LJ's general approach.

172. Fourthly, I would leave open the question how damages should be assessed. The traditional approach had been to assess the loss of value of the property caused by the nuisance. There may also be scope for an award of general damages: see eg, in the context of noise, *Farley v Skinner* [2002] 2 AC 732. Although the claim was in contract, Lord Steyn, who gave the leading speech, would have reached the same conclusion if the claim had been in nuisance: see para 30. It may however be that, in the light of the views expressed by Lord Hoffmann in H*unter v Canary Wharf* [1997] 1 AC 655 at 706, such damages could only be awarded in nuisance as loss of the amenity value of the land. This could be in the form of general damages if it is not possible to prove a specific loss of value, rather as in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 244, which is referred to by Lord Hoffmann at page 706F.

173. Finally, I would leave open the question whether it may in some circumstances be appropriate to award what have been called gain-based damages in lieu of an injunction. I appreciate the possible problems identified by Lord Neuberger and Lord Carnwath but it does seem to me that, where a claimant is seeking an injunction to restrain the noise which has been held to amount to a nuisance, 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. So, for example, as Lord Neuberger notes at para 111, in *Jaggard v Sawyer* [1995] 1 WLR 269 the Court of Appeal awarded damages for trespass in lieu of an injunction which in effect gave the defendant a right of way over the plaintiff's land in return for a capital sum. If that can be done in trespass I do not at present see why it should not in principle be done in nuisance in a case like this, where a similar payment would give the respondents the right to commit what would otherwise be a nuisance by noise. Moreover, as Lord Neuberger observes at para 128, there may be scope for assessing the claimant's loss by reference to the benefit to the defendant of not suffering an injunction. However, these are all matters for the future and I recognise that before reaching final conclusions it would be necessary to consider the relevant authorities and to receive appropriate submissions.

174. I agree with Lord Neuberger's proposals as to the resolution of the appeal. In particular, as to the future, I agree with his paras 148 to 151, especially 150 and 151. Thus, while I naturally hope that issues of remedy can now be resolved by agreement, some of the questions raised by Lord Neuberger and the other judgments in this appeal may fall for decision in this very case.

LORD CARNWATH

Basic principles

175. The present appeal raises important issues relating to an area of the law which has received little attention at the highest level, that is "nuisance by interference with enjoyment" (as distinct from "nuisance by encroachment or damage": see *Clerk & Lindsell on Torts* 20th ed (2010), para 20-07, -09). Although many of the relevant principles are treated by the textbooks as long-settled, the authorities are generally in the Court of Appeal and below. Particular aspects of the law of nuisance, notably the rule in *Rylands v Fletcher* (1868) LR 3 HL 330, have received recent attention in the House of Lords (*Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 and *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1), and some of the speeches have commented on more general principles. But for authoritative statements at the highest level on this area of the law one has to go back almost 150 years, to the landmark case of *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642, long before the advent of modern planning control.

176. Ben Pontin in his valuable recent book *Nuisance Law and Environmental Protection* (2013) shows how 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. He sees the present appeal as an important opportunity for the Supreme Court to review the proper role of this part of the law of nuisance in the modern world (p 184).

177. Lord Neuberger has highlighted five particular issues raised by the appeal, in summary:

i) Prescriptive right

ii) "Coming to the nuisance"

iii) The defendant's activity as part of the "character of the area"

iv) Relevance of planning permission

v) Remedies

178. On the first two issues I agree respectfully with Lord Neuberger and have nothing to add. On the others, although I agree with his overall conclusions, I prefer to explain my reasoning in my own words.

"Reasonable user"

179. It is important at the outset to identify the test to be applied in determining what amounts to a nuisance. In his introduction (para 5), Lord Neuberger quotes without comment a passage in *Cambridge Water Company v Eastern Counties Leather plc* [1994] 2 AC 264, 299, in which Lord Goff referred to the "controlling" principle of "reasonable user – the principle of give and take…". As I explained in *Barr v Biffa Waste Services Ltd* [2013] QB 455, paras 60-72, Lord Goff was not seeking to lay down a general rule, and the concept is not without its problems. The criterion of "reasonableness" has also been strongly criticised by some academics. (See for example, Allan Beever *The Law of Nuisance* (2013) p 9ff: "it is presented as an explanation of the operation of the law, but it does not, cannot, explain anything".) In *Barr v Biffa Waste Services Ltd* (para 72), I referred to Tony Weir's qualification of the reasonableness test:

> "Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot by being unduly sensitive, constrain one's neighbour's freedoms), but what objectively a normal person would find it reasonable to have to put up with." (Weir *An Introduction to Tort Law*, 2nd ed (2006), p 160)

"The character of the locality"

180. Another important question is the context in which the reasonableness test is to be applied. Traditionally the acceptability of the defendant's activity is to be judged by reference to "the character of the locality", a concept which dates back at least to *Sturges v Bridgman* (1879) 11 Ch D 852. At that time the mix of uses in an area would have been the result largely of unrestrained market forces, and the degree of regulatory control was very limited. Although the same principle has survived into the modern law, it is unrealistic to leave out of account the many factors which influence the character of an area in the modern world, including the impact of planning control. In *Hunter v Canary Wharf Ltd* [1997] AC 655, Lord Cooke (dissenting on this part of the case) highlighted these changes:

> "…the lineaments of the law of nuisance were established before the age of television and radio, motor transport and aviation, town and country planning, a 'crowded island', and a heightened public consciousness of the need to protect the environment. All these are now among the factors falling to be taken into account in evolving the law…." (p 711 D-E)

Lord Hoffmann, in the majority, also commented on the significance of the introduction of modern planning control, which he saw as an argument against further extending the law of nuisance:

> "In a case such as this, where the development is likely to have an impact upon many people over a large area, the planning system is, I think, a far more appropriate form of control, from the point of view of both the developer and the public, than enlarging the right to bring actions for nuisance at common law. …" (p 710B-D)

181. Against that background, in areas where conflicts may arise, the character of any locality may not conform to a single homogeneous identity, but rather may consist of a varied pattern of uses all of which need to coexist in a modern society. Due account also needs to be taken of the process by which the pattern of uses has

developed. The impact of general planning control since 1948, which includes development plan allocations as well as decisions on individual planning applications, will have played a major part in ensuring, as Lord Hoffmann said, an appropriate balance between developers and the public.

182. However planning control is only part of the story. The pattern of uses will include, not only uses approved under modern planning permissions, but also other lawful uses – lawful either because they began before 1948, or because they have become established in law since then (such as stock car racing in this case). Potentially unneighbourly uses, even if not subject to specific planning permission, are likely to have been subject to other regulatory controls to ensure their acceptability within their particular environment. Other activities may have been encouraged to relocate, with or without threats of discontinuance orders, or financial incentives.

183. After more than 60 years of modern planning and environmental controls, it is not unreasonable to start from the presumption that the established pattern of uses generally represents society's view of the appropriate balance of uses in a particular area, taking account both of the social needs of the area and of the maintenance of an acceptable environment for its occupants. The common law of nuisance is there to provide a residual control to ensure that new or intensified activities do not need lead to conditions which, within that pattern, go beyond what a normal person should be expected to put up with.

184. This analysis seems to me consistent with that of the Lord Westbury LC in *St Helens* case in the different circumstances of the Victorian world. In the passage quoted by Lord Neuberger (para 64), Lord Westbury spoke of the need for a person living in a town to subject himself to consequence of trade operations in his locality which are "necessary for trade and commerce… and for the benefit of the inhabitants of the town and of the public at large": 11 HL Cas 642, 650. There is no reason why, in a modern context, the same analysis should not apply to activities other than trade which contribute to the ordinary life of a modern community, and which need to be accommodated within the urban fabric.

185. An example mentioned in argument was a major football stadium. Significant disturbance on match days may be regarded as a necessary price for an activity regarded as socially important, provided it is subject to proper controls by the public authorities, including the police, to ensure that the disturbance is contained as far as reasonably practicable. In those circumstances, if someone buys a house next to such a stadium, he should not be able to sue for nuisance, even though the noise may be highly disturbing to ordinary home life on those days. This is not because he came to the nuisance, nor (necessarily) because it has continued for 20 years. Rather it is because it is part of the established pattern of uses in the area, and society attaches

importance to having places for professional football within urban areas. He can however sue if there is something about the organisation, or lack of it, which takes the disturbance beyond what is acceptable under the reasonableness test.

186. Nor is there any reason why this approach should be confined to urban areas. As the present case illustrates, similar patterns of potentially conflicting uses may arise in the country as much as in the town.

Relevance of the defendant's activity

187. The above analysis seems to me to provide the answer to Lord Neuberger's third issue, concerning the relevance of the actual use complained of by the claimant. An existing activity can in my view clearly be taken into account if it is part of the established pattern of use. That is clear from many of the reported cases which proceed on the basis that the defendant's activity contributes to the character of the locality against which the new or intensified use is to be considered.

188. So in *Rushmer v Polsue & Alfieri Ltd* [1906] 1 Ch 234 (approved by the House of Lords [1907] AC 121) the Court of Appeal specifically rejected an argument that because the defendant's activities conformed to the character of the area, there could not be a nuisance when a new more intrusive element was introduced. Similarly, in *Halsey v Esso Petroleum* [1961] 1 WLR 683, Veale J started from the position of the "ordinary man" -

> "… who may well like peace and quiet but will not complain, for instance, of the noise of traffic if he chooses to live on a main street in an urban centre, nor of the reasonable noises of industry, if he chooses to live alongside a factory" (p 692).

Thus the defendant's activities, at their previous level, were accepted as part of the established pattern of uses in the area, also reflected in the development plan zoning (p 688), and thus as the starting point for consideration of the alleged nuisance.

189. In *Kennaway v Thompson* [1981] QB 88 it was common ground that the plaintiff could not complain of noise of motor boats at the levels accepted by her as tolerable when she built her house (p 94B). The terms of the injunction were designed to protect the defendant's activities at that level, with a limited number of days for noisier boats (p 94F-95A). Similarly in *Watson v Croft Promosport Ltd* [2009] 3 All ER 249 the injunction, even as modified by the Court of Appeal, did not stop the defendant's activity altogether, but sought to define the level of acceptable use, by limiting numbers of days and defining noise limits (paras 53-54).

190. In none of these cases did the court find it necessary to undertake an "iterative process" as proposed by Lord Neuberger (para 72). The judges proceeded on the basis that a change in the intensity or character of an existing activity may result in a nuisance, no less than the introduction of a new activity. It was a matter for the judge, as an issue of fact and degree, to establish the limits of the acceptable, and if appropriate to make an order by reference to the limits so defined.

Planning control

The problem

191. The most difficult problem raised by the present appeal, in my view, is the fourth of Lord Neuberger's issues, that is the relevance of the planning history of the defendant's activity.

192. Modern planning legislation dates from the coming into force in 1948 of the Town and Country Planning Act 1947. More limited regulatory controls of activities on land had existed since around the mid-19th century, but until the 1947 Act there was no attempt to provide a comprehensive system for the allocation of land use and development. Decisions made by local planning authorities and planning inspectors reflect, or should reflect, an attempt by the authorities consciously to balance the likely benefits of a proposed development against any potential adverse consequences. That process often involves consideration of the interests of neighbouring property owners, including the impact of noise. Thus, national planning advice encourages planning authorities to restrict new development which could give rise to significant adverse impacts from noise; but emphasises that planning is concerned with the acceptability of the use in principle, rather than control of processes or emissions which are subject to other regulatory controls (National Planning Policy Framework (2012), paras 122-123).

193. The law of private nuisance, of far greater antiquity than modern planning legislation, also fulfils the function of protecting the interests of property owners. There is, however, a fundamental difference between planning law and the law of nuisance. The former exists to protect and promote the public interest, whereas the latter protects the rights of particular individuals. Planning decisions may require individuals to bear burdens for the benefit of others, the local community or the public as a whole. But, as the law stands, it is generally no defence to a claim of nuisance that the activity in question is of benefit to the public.

194. Thus planning controls and the law of nuisance may pull in opposite directions. A development executed in accordance with planning permission may

nevertheless cause a substantial interference with the enjoyment of neighbouring properties. Should a property owner be able in effect to undermine the planning process by bringing a claim of nuisance against the developer and securing not only damages but also an injunction prohibiting the activity in question, regardless of its public significance?

195. This is not a problem which arises if the project is authorized by statute. In the 19th century, long before modern planning control, railways were built under private acts which not only conferred the necessary powers to acquire or interfere with private property interests, but also conferred effective immunity from actions for nuisance. The same principle has provided protection for more modern activities, such as oil refineries. But, as Lord Wilberforce explained in *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 the defence applies only where Parliament has "by express direction or by necessary implication" authorised the activity in question and the alleged nuisance is the inevitable consequence of that activity (pp 1011F, 1013F).

196. The Planning Act 2008 has adopted the same solution for nationally significant infrastructure projects, such as airports and power stations. The Act is designed to provide a more efficient method for securing planning and other approvals necessary for such projects, within the context of a policy framework approved by Parliament. Section 158 of the 2008 Act provides statutory immunity from liability for private or public nuisance for activities authorised by an order granting development consent under the Act, subject to any contrary provision contained in the order. By section 152 compensation is payable to any person whose land is injuriously affected by the carrying out of the works (within the relatively narrow limits defined by section 10 of the Compulsory Purchase Act 1965 and Part I of the Land Compensation Act 1973: section 152(5)(7)). There is no equivalent statutory protection for other forms of development authorised under ordinary planning procedures, whether by the local planning authority or the Secretary of State following a public inquiry.

197. In *Barr v Biffa Waste Services Ltd* [2013] QB 455, para 46, a case relating to waste disposal under an environmental licence, in a passage quoted by Lord Neuberger (para 91), I pointed out that the common law of nuisance had co-existed with statutory controls since the 19th century without the latter being treated as a reason for cutting down private law rights. However, the context is important. I was speaking about environmental regulation rather than planning control, which was not in issue.

198. Further, while my statement was an accurate reflection of the historical position, it is open to the criticism that as a blueprint for the future development of the law it was unduly simplistic. In a perceptive article on the decisions of the Court

of Appeal in the present case and in *Barr v Biffa Waste Services Ltd*, Maria Lee concludes:

> "It is not realistic to look for a single, across the board response to the complicated relationship between tort and regulation, or even just nuisance and planning permission… Courts are not generally in a position to assess the substantive quality of regulation…" (*Nuisance and Regulation in the Court of Appeal* [2013] JPEL 277, 284)

She suggests that an examination of the process followed by the regulation could help the court to determine how much authority the external assessment of the public interest should have, but that no single process issue could be decisive (p 284).

Gillingham Docks and subsequent cases

199. The issue has attracted particular attention over the last 20 years, since the judgment of Buckley J in the *Gillingham Docks* case (*Gillingham Borough Council v Medway (Chatham) Dock Co* Ltd [1993] QB 343). That has been considered by the Court of Appeal in two cases before the present judgment (*Wheeler v JJ Saunders Ltd* [1996] Ch 19 and *Watson v Croft Promosport* [2009] 3 All ER 249) and once in the House of Lords (*Hunter v Canary Wharf Ltd* [1997] AC 655).

200. The facts of the Gillingham Docks case were unusual. The council as local planning authority had granted planning permission to the defendant to develop part of the historic Chatham Royal Naval Dockyard as a commercial port. It had been clear to both the council and local residents at the time that the port would be operated on a 24-hour basis, and that the only access to the port for vehicles would be via two residential roads. In spite of strong objections by local residents the council decided that the promised economic benefits outweighed the inevitable disturbance of local residents.

201. Several years later, the priorities of the council changed and they brought an action in public nuisance seeking to restrain the use of the residential roads by heavy goods vehicles at night. Modifying the planning permission to achieve the same effect would have involved the payment of compensation. The judge rejected the claim. Although he accepted that the principle of statutory immunity had no direct application, he attached weight to the fact that Parliament had delegated to the local planning authority the task of balancing the likely pros and cons of a proposed development, under a procedure which enabled local residents to object. He said:

> "It has been said, no doubt correctly, that planning permission is not a licence to commit nuisance and that a planning authority has no jurisdiction to authorise nuisance. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood. That may have the effect of rendering innocent activities which prior to the change would have been an actionable nuisance..." (p 359)

202. The grant of planning permission for the dock had authorised a change to the character of the neighbourhood, against which the reasonableness of the use was to be judged. The dock company was not operating the port other than as a normal commercial undertaking, and it could not operate a commercial port without disturbing nearby residents. It would not, he thought, be realistic to attempt to limit the amount of trade at the port:

> "It would be a task for which a court would be ill equipped, involving as it would the need to consider the interests of the locality as a whole and the plaintiff's and county council's plans in respect of it. In some cases even the national interest would have to be considered. These are matters to be decided by the planning authority and, if necessary, the minister and should be subject only to judicial review." (pp 360-361)

203. There was an alternative public law challenge based on the unreasonableness of the council's action in bringing public nuisance proceedings in respect of a project which it had itself authorised on public interest grounds, and where there was available the alternative of modification of the permission or discontinuance accompanied by compensation (see pp 350-351). The judge found it unnecessary to consider how those arguments would have been resolved in judicial review proceedings. However, he indicated that, even if he had held otherwise on liability, he would have refused an injunction as matter of discretion, having regard to the history and the damage to the dock undertaking, leaving it to the authority to resolve the "planning problem" using its statutory powers (p 364A-C).

204. That judgment was considered by the Court of Appeal, some three years later, in *Wheeler v JJ Saunders Ltd* [1996] Ch 19. Again the facts were unusual. Dr Wheeler was a veterinary surgeon specialising in pigs. He had earlier been involved in the management of a pig farm operated by the defendant company close to his home. But the relationship broke down and the business was subsequently conducted without his involvement. In 1988 and 1989, the company obtained planning permission to construct two new buildings to house their pigs (some 800 in total), one of which was only 11 metres from a holiday cottage owned by Dr

Wheeler and his wife. Government guidelines recommended a normal separation distance of at least 100 metres from the nearest dwelling house.

205. Dr Wheeler and his wife succeeded in their action for damages and an injunction restraining the use of the new pig sheds, notwithstanding that they had been erected and used in accordance with planning permission. Staughton LJ noted that the company had given the council the misleading impression that the planning applications were merely to continue an activity which had been tolerated in the past, and that nothing much would change as regards the number of pigs on the farm or the conditions in which they were to be kept. Also, the local planning authority had failed to consult the council's environmental health department. Peter Gibson LJ described the grant as "incomprehensible" (p 36).

206. It was held that the reasoning in *Gillingham Docks* had no application to the facts of this case. The planning permission had not changed the character of the neighbourhood, which remained a pig farm but with an intensified use of part of it. In the words of Staughton LJ, the planning permission was not "a strategic planning decision affected by considerations of public interest" (p 30). Peter Gibson LJ said:

> "Prior to the *Gillingham* case the general assumption appears to have been that private rights to claim in nuisance were unaffected by the permissive grant of planning permission, the developer going ahead with the development at his own risk if his activities were to cause a nuisance. The *Gillingham* case, if rightly decided, calls that assumption into question, at any rate in cases, like *Gillingham* itself, of a major development altering the character of a neighbourhood with wide consequential effects such as required a balancing of competing public and private interests before permission was granted. I can well see that in such a case the public interest must be allowed to prevail and that it would be inappropriate to grant an injunction (though whether that should preclude any award of damages in lieu is a question which may need further consideration). But I am not prepared to accept that the principle applied in the *Gillingham* case must be taken to apply to every planning decision. The Court should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge." (p 35)

207. In the meantime, the *Gillingham Docks* case had been considered by the House of Lords in *Hunter v Canary Wharf* [1997] AC 655. The case involved a claim for nuisance, brought by local residents in relation to interference with television signals due to the construction of a tower as part of the Canary Wharf development. The development had been carried out under planning permission

granted under a special procedure by the London Docklands Development Corporation. There was no appeal from the Court of Appeal's decision that the grant of planning permission could not itself provide immunity from liability for nuisance. In the House of Lords, Lord Cooke of Thorndon, who alone thought that there could be liability in principle, endorsed the *Gillingham Docks* judgment as directly relevant to the circumstances of Canary Wharf. He contrasted *Wheeler* in which there had been "an injudicious grant of planning consent, procured apparently by the supply of inaccurate and incomplete information" (p 722). By contrast, the Canary Wharf Tower had been built in an enterprise zone in an urban development area and authorised under the special procedure designed to encourage regeneration:

> "The Canary Wharf project in general, and the tower at One Canada Square in particular, were obviously of a scale totally transforming the environment… In these circumstances, to adopt the words of Staughton L.J. in *Wheeler v J J Saunders Ltd*, at p 30, the tower falls fairly within the scope of 'a strategic planning decision affected by considerations of public interest'." (p 722E)

208. Of the *Gillingham Docks* case itself he said:

> "… the judge held that, although a planning consent could not authorise a nuisance, it could change the character of the neighbourhood by which the standard of reasonable user fell to be judged. This principle appears to me to be sound and to apply to the present case as far at least as television reception is concerned. Although it did interfere with television reception the Canary Wharf Tower must, I think, be accepted as a reasonable development in all the circumstances." (p 722F-G)

209. More recently, the issue arose again, in circumstances much closer to those of the present case, in *Watson v Croft Promosport Ltd* (2009) 3 All ER 249. A World War II aerodrome had been turned into a motor racing circuit, pursuant to planning permission granted in 1963 after a public inquiry. Although there were no planning restrictions on the levels of activities, its use was relatively limited until 1994 (there were no more than 10 meetings a year between 1982 and 1994), and appears to have caused little disturbance to local residents. In that year, after the circuit had changed ownership, an application was made for more extensive use, involving 37 race days, 24 exclusive test days and 120 days when the track would be used for other purposes. Permission was granted by the local authority in July 1995.

210. In 1998, following a period of disputes with local residents, and an adjourned planning inquiry, the owner made a further application for planning permission on

the basis that he was prepared to enter into an enforceable planning obligation under section 106 of the Town and Country Planning Act 1990 to set limits to the amount of noise from racing on the circuit. The proposed agreement contained a detailed set of measurement criteria by which noise from the circuit would be assessed and monitored, and prescribed the racing activities which could be undertaken, and when quiet and rest days were to be held. The activities were divided into N1 to N5 activities, according to the noise levels which were generated.

211. Permission was granted by the inspector on this basis. He accepted that "the Development Plan policies weigh heavily against the project" and that the noise had at times "been of such character, duration and intensity and tone as to seriously harm the amenity to which residents reasonably feel they are entitled"; but that had to be weighed against the existing planning permission which allowed uncontrolled use of the circuit. Bearing in mind "the very wide planning use rights which the site now enjoys", he considered that the agreement would strengthen significantly the ability of the local planning authority to control noise at the circuit.

212. Local residents brought an action claiming that, even within the constraints set by the agreement, the activities constituted a nuisance. Simon J [2008] EWHC 759 (QB) noted that their objections were not to the car and motor-bicycle racing fixtures, amounting to about 20 (N1 and N2) events each year (over approximately 45-50 days), but to the noise from other activities, in particular Vehicle Testing Days and Track Days (when members of the public drive vehicles at speed all day) at noise levels which reach N2-N4 levels. He held that the character of the locality had been "essentially rural", and that the circuit "could be, and was, run in a way that was consistent with its essentially rural nature" (para 55). He declined to accept the 1998 planning permission as an indication (in Lord Hoffmann's terms) of the appropriate balance between developer and public, since the limits had in effect been dictated by the owners (paras 55-56). He held that there was an actionable nuisance.

213. The claimants had argued that the N1-N4 noise from the circuit should be confined to 20 days, as representing the "the threshold of the nuisance", and that 40 days would be acceptable only upon the payment of compensation for the difference between 20-40 days. This, they submitted, would accommodate "the core" activities of the circuit. The judge regarded the proposed threshold as too low. Striking "a proper balance between the respective legitimate interests of the parties, in the light of the past and present circumstances", he held that the threshold should be set at 40 N1-N4 days.

214. However he declined to grant an injunction, awarding damages instead (based on the diminution in value of the claimant's properties). He took account of the delay in bringing the proceedings, and the claimant's willingness to accept damages for at least part of the nuisance. He also took account of his perception of

the social value of the activity, and the limited number of sites on which it could take place (paras 87-88).

215. The finding of nuisance was upheld by the Court of Appeal. The court accepted that the implementation (not the mere grant) of planning permission might so alter the character of a neighbourhood as to render innocent an activity which would otherwise have been a nuisance (paras 32-3). Whether it did so was a question of fact and degree. In this case the planning permissions had not changed the character of the local neighbourhood, which remained essentially rural, nor could they be regarded as "strategic" (para 34).

216. Further, the Court of Appeal held that the judge had been wrong to refuse an injunction. Applying the principles established in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, the circumstances of the case were held not to be sufficiently exceptional to justify the refusal of an injunction. The court accepted that, in a marginal case where the damage to the claimant is minimal, the social value of the activity in question could be taken into account consistently with *Shelfer*. However, the existence of a public benefit could not alone negate the requirement of exceptional circumstances or oppression of the defendant (para 51).

Relevance of planning history

217. I have reviewed these cases is some detail, because they illustrate the wide variety of circumstances in which planning decisions may be made, and the danger of laying down any general propositions about their relevance to the application of the reasonableness test in any particular case.

218. They suggest that a planning permission may be relevant in two distinct ways:

i) It may provide evidence of the relative importance, in so far as it is relevant, of the permitted activity as part of the pattern of uses in the area;

ii) Where a relevant planning permission (or a related section 106 agreement) includes a detailed, and carefully considered, framework of conditions governing the acceptable limits of a noise use, they may provide a useful starting point or benchmark for the court's consideration of the same issues.

219. Before considering those alternatives, I should note my respectful disagreement with Lord Neuberger's reservations (para 98) about the potential utility of planning officer's reports as evidence of the reasoning of the planning authority itself. Judged by my own experience in practice and on the bench over some 40 years, I have found that a planning officer's report, at least in cases where the officer's recommendation is followed, is likely to be a very good indication of the council's consideration of the matter, particularly on such issues as public interest and the effect on the local environment. The fact that not all the members will have shared the same views on all the issues does not detract from the utility of the report as an indication of the general thrust of the council's thinking. That is illustrated by some of the planning reports in this case (as Lord Neuberger implicitly recognises, when relying on the "cautious" nature of the planning officer's recommendations – para 138). In any event, in so far as the focus is on the evidence before the planning authority (to which Lord Neuberger refers in para 138), rather than the decision itself, the planning officer's report is likely to offer the most comprehensive summary of the relevant material.

(i) Relative importance

220. The first alternative begs the question whether the relative importance of an activity to the public is relevant at all. In *Miller v Jackson* [1977] QB 966 the Court of Appeal held by a majority that public benefit was not relevant to liability, but (by a different majority) that it may be relevant to remedies. In *Kennaway v Thompson* [1981] QB 88 the court declined to follow the latter view, holding that public benefit was not relevant at either stage.

221. Clerk & Lindsell para 20-107 notes the position as apparently established by those cases, but adds that since a finding of nuisance "necessarily involves the balancing of competing interests", public interest, while not itself a defence, should be "a factor in assessing reasonableness of user". The only case cited *Dennis v Ministry of Defence* [2003] Env LR 741 (noise from military aircraft) does not directly support the proposition, since Buckley J held there to be a nuisance, but awarded damages in lieu of a declaration or injunction because of the public interest in the activity (paras 48, 80).

222. In agreement with Peter Gibson LJ in *Wheeler* [1996] Ch 19, 35, I think there should be a strong presumption against allowing private rights to be overridden by administrative decisions without compensation. The public interest comes into play in the limited sense accepted by Lord Westbury 11 HL Cas 642, 650, as discussed above, that is in evaluating the pattern of uses "necessary… for the benefit of the inhabitants of the town and of the public at large", against which the acceptability of the defendant's activity is to be judged. Otherwise its relevance generally in my view should be in the context of remedies rather than liability.

223. I would accept however that in exceptional cases a planning permission may be the result of a considered policy decision by the competent authority leading to a fundamental change in the pattern of uses, which cannot sensibly be ignored in assessing the character of the area against which the acceptability of the defendant's activity is to be judged. I read Staughton LJ's use of the word "strategic" as equivalent to Peter Gibson LJ's reference to "a major development altering the character of a neighbourhood with wide consequential effects such as required a balancing of competing public and private interests before permission was granted". For this reason, in my view (differing respectfully from Lord Neuberger on this point) the reasoning of the judge in *Gillingham Docks* can be supported. Similarly, the Canary Wharf development was understandably regarded by Lord Cooke as strategic in the same sense. But those projects were exceptional both in scale and the nature of the planning judgements which led to their approval. By contrast, in neither *Wheeler v Saunders* and nor *Watson v Croft Promosport Ltd* did the relevant permissions result in a significant change in the pattern of uses in the area, let alone one which could be regarded as strategic; and for the reasons noted above neither decision could be regarded as reflecting a considered assessment by the authorities concerned of the appropriate balance between public and private interests.

(ii) Benchmark

224. Apart from such strategic cases, a planning permission may also be of some practical utility in a different way. As many of the cases show, a major problem when dealing with nuisance by noise is to establish any objective and verifiable criteria by which to judge either the existence of a nuisance or the limits of any injunction. In some cases there may have been a single planning permission which established, by condition or by a linked section 106 agreement, a framework of noise levels and time limits, which can be taken as representing the authority's view, with the benefit of its expert advisers, of the acceptable limits. Lord Neuberger makes a similar point in paragraph 96.

225. *Watson v Croft Promosport Ltd* offers one example of such a framework, in the form of a unilateral undertaking incorporating a relatively sophisticated set of noise criteria. As has been seen, that did not purport to be an assessment of what was seen by the planning inspector as objectively reasonable, but rather an attempt to control the uncontrolled. However, some of the noise criteria found in the agreement were used by the judge in setting the threshold of the acceptable, and by the Court of Appeal in framing the limits of their injunction.

226. Where the evidence shows that a set of conditions has been carefully designed to represent the authority's view of a fair balance, there may be much to be said for the parties and their experts adopting that as a starting-point for their own consideration. It is not binding on the judge, of course, but it may help to bring some

order to the debate. However, if the defendant seeks to rely on compliance with such criteria as evidence of the reasonableness of his operation, I would put the onus on him to show compliance (see by analogy *Manchester Corpn v Farnworth* [1930] AC 171, relating to the onus on the defendant to prove reasonable diligence under a private Act). By contrast, evidence of failure to comply with such conditions, while not determinative, may reinforce the case for a finding of nuisance under the reasonableness test.

227. The present case is illustrative of the opposite case, where the conditions of the planning permissions, such as they were, were of little help to the judge. It is perhaps unfortunate that the authority did not at some stage attempt to secure an overall agreement relating to the operation of activities on the combined sites. The permission for the stadium contained no noise-limits, other than some limits on days and hours of use. Three breach of condition notices served by the planning authority between 2007 and 2009 related to apparently isolated breaches of those limits. The established use certificate contained some limitation of hours, but it is unclear how if at all they could be enforced. In relation to the noise limit of 85dB LAeq over one hour at the boundary of the site, set by the 1997 permission for the motocross site, the most recent evidence we were shown of compliance was in a planning report of December 2001.

228. With the help of its own expert advice, the council did attempt in 2008 to impose some overall control by use of their statutory nuisance powers ([2011] EWHC 360 (QB), paras 115-117). That may be an uncertain guide in the context of the common law, given the statutory defence of "best practicable means". (Thus, as Lord Neuberger says, the 1995 noise abatement proceedings had been "inconclusive", not because of their result which was in favour of the owners, but because it was not possible to say whether the justices held that there was no nuisance, or merely that the owners were using best practicable means.) In any event, although the authority's expert's report was available, he was not called as a witness, his approach was strongly criticised by the claimant's expert, and the judge was unimpressed by the council officer's evidence that the abatement works had solved the problem (para 207).

229. In those circumstances, the judge was entitled to regard the conditions in the planning permissions and the terms of the abatement notices as of very little assistance in establishing the appropriate noise limits of the defendant's activity.

The judgment of the Court of Appeal

230. Against that background, I turn to the reasoning of Jackson LJ in the present case. Dealing with what he called "the planning permission issue", he reviewed the

sequence of cases since *Gillingham Docks* and summarised their effect in the following propositions:

> "(i) A planning authority by the grant of planning permission cannot authorise the commission of a nuisance.
>
> (ii) Nevertheless the grant of planning permission followed by the implementation of such permission may change the character of a locality.
>
> (iii) It is a question of fact in every case whether the grant of planning permission followed by steps to implement such permission do have the effect of changing the character of the locality.
>
> (iv) If the character of a locality is changed as a consequence of planning permission having been granted and implemented, then:
>
> > (a) the question whether particular activities in that locality constitute a nuisance must be decided against the background of its changed character;
> >
> > (b) one consequence may be that otherwise offensive activities in that locality cease to constitute a nuisance." (para 65).

231. He held that the appeal should be allowed. I should quote the relevant passage in full (paras 71-75):

> "71. The judge, at para 158, identified the following question as an important issue in the case:
>
> > 'whether it was appropriate, in assessing whether the noise generated by the activities at the stadium and at the track was capable of causing a reasonable person annoyance to a degree amounting to a nuisance, to take into account as one of the noise characteristics of the locality the noise generated by those very activities.'

72. The judge did not immediately state his answer to that question. It is clear, however, from the later passages, as Mr Peter Harrison for the claimants concedes, that the judge's answer to that question is 'no'. In my view, that is the wrong answer. Throughout the period when the claimants were living at Fenland the noise generated from time to time by motor sports was 'one of the noise characteristics of the locality'.

73. The judge, at para 203, stated his conclusion as follows:

> 'What was clear from Mr Sharps's measurements, and was borne out by the recordings of measurements annexed to the second report of Mr Stigwood, was that noise from the activities at the stadium and at the track, after the completion of the works undertaken in 2008-2009, was intermittently much louder, typically by 10 dB, than the ambient noise level leaving out of account those activities. It is, in my judgment, those dramatic increases in loudness which really constitute the nuisance in the present case, in other words the contrast between the loud levels and the noise levels prevailing when there was nothing going on at the stadium or at the track.'

74. In my view that conclusion is flawed. The noise of motor sports emanating from the track and the stadium are an established part of the character of the locality. They cannot be left out of account when considering whether the matters of which the claimants complain constitute a nuisance.

75. I quite accept that if the second and third defendants had ignored the breach of condition notices and had conducted their business at noise levels above those permitted by the planning permissions, the claimants might have been able to make out a case in nuisance. It appears, however, that this was not the case. Abatement works were carried out in 2008 to the satisfaction of Forest Heath District Council. No breach of condition notices have been served since then, apart from one which did not relate to noise level."

232. It will be apparent from my discussion of the *Gillingham Docks* case that I regard that case as of no relevance to the present. It has not been argued that the change resulting from the various permissions was "strategic", and the Court of Appeal rightly did not so find. That, however, did not detract from the relevance of the permitted or established uses as part of the established pattern of uses in the area.

The Court of Appeal were right to regard them as matters to be taken into account in judging the acceptability of the current use.

233. However, like Lord Neuberger, and in respectful disagreement with the Court of Appeal, I do not consider that the judge's essential reasoning is open to challenge on this basis. Admittedly, as Lord Neuberger has pointed out (paras 77-79), the judge's reasons for discounting the particular permissions (his para 66) seem unconvincing. However, he was entitled in my view on the facts of this case to approach the matter on the basis (his para 67) that it was more relevant to look, not so much at the permissions as such, as at their practical effects on the locality. This led to his conclusion (para 95) that the activities at the stadium and track were part of the character of the area, but only intermittently, and even then not necessarily involving a noise amounting to a nuisance. I find that conclusion hard to criticise.

234. Furthermore, para 158, on which the Court of Appeal relied, seems to me to have been taken by them out of context (albeit apparently with the acquiescence of counsel then appearing for the claimant). As I read it, the second part of para 158 was not raising an issue of law as to the relevance of the defendant's existing activities. The judge had already made clear his view on that issue in dealing with the character of the area (see above).

235. Rather para 158, though perhaps not very clearly expressed, was his introduction to the discussion of the respective expert views on the appropriate methods of assessment of noise. It would serve no purpose in this judgment to review the noise evidence in any detail, particularly as the judge's task was complicated by the failure of the experts to agree a common methodology. However, it is clear that there was a significant difference of approach. The defendants' expert favoured comparison with what he called "fixed benchmark values", which he saw as appropriate for a situation where "the noise from the stadium and motocross track are part of the background noise level of the area" (see especially judgment paras 164, 188). By contrast, the claimant's expert favoured comparison with the background noise levels in the absence of the relevant noise source, noting differences on occasion of at least 10dBA over those levels. The judge preferred the latter approach, because it was those "dramatic" differences which constituted the real nuisance (para 203, 243).

236. The judge's treatment of the noise evidence cannot in my view be equated (as the Court of Appeal seemed to think) with "leaving out of account" the noise from the existing activities. It simply reflected his reasonable assessment, preferring on this point the expert evidence for the claimant, that the impact of the extreme events which were the real cause of the nuisance was not mitigated by the more acceptable noise levels experienced on other days or at other times. This was not a conclusion of law, but one of factual judgement properly based on the evidence before him.

237. Finally, while I agree with Jackson LJ as to the potential relevance of evidence of a substantial failure to comply with planning conditions, there was nothing in the evidence in this case which should have led to any assumption in that respect in favour of the defendant. Regardless of any specific enforcement action by the authority, it was for the defendant, if he wished to rely on any planning conditions, to prove not only compliance with them but also their significance to the judge's assessment of nuisance. On the facts of this case, as I have said, the judge was entitled to give very little weight to that factor.

Remedies

238. On the way the case has been argued in the lower courts, the final issue addressed by Lord Neuberger does not strictly arise. As the judge recorded, it was accepted that if a nuisance was established an injunction should follow, the only issue being its terms. The defendants have sought to open the issue in this court for the first time, on the basis that in the lower courts having regard to the authorities such an argument would have been doomed to failure. However, the result is that we have no relevant findings, either as to how the judge would have exercised his discretion if he been able to do so, or as to how he would have assessed future damages, had he decided on that course. In those circumstances, we should approach the issue with caution, conscious that anything we say can be no more than guidance.

239. With that caveat, I agree with Lord Neuberger and the rest of the court that the opportunity should be taken to signal a move away from the strict criteria derived from *Shelfer* [1895] 1 Ch 287. This is particularly relevant to cases where an injunction would have serious consequences for third parties, such as employees of the defendant's business, or, in this case, members of the public using or enjoying the stadium. In that respect, in my view, the Court of Appeal in *Watson* [2009] 3 All ER 249 was wrong to hold that the judge had no power to make the order he did, and to limit public interest considerations to cases where the damage to the claimant is "minimal".

240. As has been seen, Peter Gibson LJ in *Wheeler* [1996] Ch 19 saw more flexible remedial principles as a possible answer to the public interest aspect of cases such as *Gillingham Docks*, rather than creating an exception to the law of nuisance. Commenting on the restrictive view taken by the Court of Appeal in *Watson*, Maria Lee has said:

> "The fact that something should go ahead in the public interest does not tell us where the costs should lie; we need not assume that injured parties should bear the burden associated with broader social benefits… The continued strength of private nuisance in a regulatory

> state probably depends on a more flexible approach to remedies…" (*Tort Law and Regulation: Planning and Nuisance* (2011) 8 JPL 986, 989-990)

I agree.

241. The practice of other common law countries has varied. For example, the Australian courts have generally followed the *Shelfer* principles (see eg *Munroe v Southern Dairies* [1955] VLR 332. So also in New Zealand: see *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525, where Hardie Boys J said (p 535):

> "To the extent that this is an appeal to set the public interest ahead of the private interests of the plaintiffs, then I regret that authority requires me to close my ears to it."

So also in Ireland, in the leading case of *Bellew v Cement Ltd* [1948] Ir R 61, the majority adopted a strict *Shelfer* approach. Maguire CJ said:

> "I am of the opinion that the court is not entitled to take the public convenience into consideration when dealing with the rights of private parties. This matter is a dispute between private parties, and I think that the court should be concerned, only, to see that the rights of the parties are safeguarded." (p 64)

242. In Canada by contrast the Supreme Court has allowed a more flexible approach. Thus in *Canada Paper Co v Brown* (1922) 63 SCR 243 the court adopted *Shelfer* principles, but Duff J added:

> "An injunction will not be granted where, having regard to all the circumstances, to grant it would be unjust; and the disparity between the advantage to the plaintiff to be gained by the granting of that remedy and the inconvenience and disadvantage which the defendant and others would suffer in consequence thereof may be a sufficient ground for refusing it." (para 252)

Similarly, in *Bottom v Ontario Leaf Tobacco Co.* [1935] 2 DLR 699, in refusing an injunction to close a factory, the court gave weight to the fact that closure would cause unemployment which would be disastrous to a small community. Riddell JA said (para 3):

> "The public good can never be absent from the mind of the Court when dealing with a matter of discretion."

243. A more flexible approach has also been adopted in the United States. A leading case is *Boomer v Atlantic Cement Company* (1970) 26 NY 2d 219, in the New York Court of Appeal. The case has been described as "a staple of the [US] law school curriculum and a constant preoccupation of [US] legal scholars" (Farber, D.A. *The Story of Boomer – Pollution and the Common Law* (2005) 32 Ecology LQ 113). A nuisance had been caused to local residents by the operation of a cement factory but the court refused to grant an injunction requiring the closure of the plant, taking account of the facts that it had cost $45 m to construct and employed more than 300 local people. As Justice Bergan said at p 223, the total damage to the plaintiffs' properties was "relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek". The court accordingly permitted the defendant company to continue operating the factory on payment of damages in lieu of an injunction, to be assessed by the lower court.

244. Further support for a more flexible approach can be found in a number of academic writings, most recently by Mark Wilde in *Nuisance Law and Damages in Lieu of an Injunction: Challenging the Orthodoxy of the Shelfer Criteria* (in *Tort Law: Challenging Orthodoxy* ed Stephen Pitel and others (2013) cap 12).

245. While therefore I agree generally with the observations of Lord Neuberger and Lord Sumption on this aspect, I have three particular reservations.

246. First, I would not regard the grant of planning permission for a particular use as in itself giving rise to a presumption against the grant of an injunction. As I have said, the circumstances in which permissions may be granted differ so much as to make it unwise to lay down any general propositions. I would accept however that the nature of, and background to, a relevant planning permission may be an important factor in the court's assessment.

247. Secondly, I would be cautious of too direct a comparison with cases relating to rights of light, particularly where (as in *Kine v Jolly* [1905] 1 Ch 480) the court was asked to make a mandatory injunction to demolish a house built in good faith (see also Wilde *op cit* p 372, citing Sargant LJ in *Slack v Leeds Industrial Co-operative Society* [1924] 2 Ch 475, 496). Cases such as the present are not concerned with such drastic alternatives. The judge is not asked to bring the defendant's activity to an end altogether, but to set reasonable limits for its continuation. In so doing he should take into account not only the claimant's environment but also the viability of the defendant's business. In some cases it may be appropriate to combine

an injunction with an award of damages (as happened at first instance in *Watson v Croft Promosport*). I also agree with Lord Mance that special importance should attach to the right to enjoy one's home without disturbance, independently of financial considerations.

248. Thirdly, without much fuller argument than we have heard, I would be reluctant to open up the possibility of assessment of damages on the basis of a share of the benefit to the defendants. The issues are complex on any view (for a detailed academic discussion of the recent authorities, see Craig Rotherham "*Gain-based relief in tort after A-G v Blake*" (2010) 126 LQR 102). *Jaggard v Sawyer* [1995] 1 WLR 269, to which Lord Neuberger refers, gives Court of Appeal support for an award on that basis for trespass or breach of a restrictive covenant, but the same approach has not hitherto been extended to interference with rights of light (see *Forsyth-Grant v Allen* [2008] Env LR 877). In cases relating to clearly defined interference with a specific property right, it is not difficult to envisage a hypothetical negotiation to establish an appropriate "price". The same approach cannot in my view be readily transferred to claims for nuisance such as the present relating to interference with the enjoyment of land, where the injury is less specific, and the appropriate price much less easy to assess, particularly in a case where the nuisance affects a large number of people. Further, such an approach seems to represent a radical departure from the normal basis regarded by Parliament as fair and appropriate in relation to injurious affection arising from activities carried out under statutory authority.

Conclusion

249. For all these reasons, I agree with the disposal of the appeal proposed by Lord Neuberger.