Neutral Citation Number: [2024] EWHC 1248 (Admin)

Case No: AC-2023-BHM-000185

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre,
Priory Courts, 33 Bull Street,
Birmingham, B4 6DS.

Date: 23/05/2024

Before :

THE HONOURABLE MR JUSTICE TURNER

- -

Between :

Audie Alexander Dennis	
- and -	
Georgeta Andrei	**Appellants**
- and -	
Head Start Day Nursery Ltd	**First Respondent**
- and -	
The Childcare Corporation Ltd	**Second Respondent**

- -
- -

Gordon Wignall (instructed by **Keoghs LLP**) for the **Appellants**
Alison Pryor (instructed by **BDB Pitmans**) for the **Respondents**

Hearing date: 8 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE TURNER

Judgment Approved by the court for handing down.

The Hon Mr Justice Turner :

INTRODUCTION

1. This is an appeal by way of case stated against a decision of District Judge (Magistrates' Court) Mehta of 23 May 2023. The District Judge found the defendants to be not guilty of statutory nuisance. The prosecutors now say that he got the law wrong and that his verdict should be set aside.

BACKGROUND

2. Since the early 1990's, 54 Abingdon Grove has been used as a nursery for children between the ages of three months and five years. From 2018, the first defendant owned and operated the nursery business. In 2021, it was hived off to the second defendant. For the purpose of these proceedings, no distinction between the two has been drawn by the prosecutors nor relied upon by the defendants.
3. The prosecutors are Mr Dennis and Ms Andrei who are the landlord and tenant respectively of the property next door at 52 Abingdon Grove. They contended before the District Judge that the noise coming from the nursery amounted to a statutory nuisance. After the conclusion of a six day trial, the District Judge found that it didn't. He concluded that the level of noise emanating from the defendants' property fell short of passing the threshold level necessary to be capable of amounting to a nuisance. In this regard, he rejected the evidence of the witnesses called by the prosecutors.

THE CASE STATED

4. The Court's powers on a case stated are set out at section 28A (3) of the Senior Courts Act 1981:

> "The High Court shall hear and determine the question arising on the case (or the case as amended) and shall—
>
> (a) reverse, affirm or amend the determination in respect of which the case has been stated; or
>
> (b) remit the matter to the magistrates' court, or the Crown Court, with the opinion of the High Court, and may make such other order in relation to the matter (including as to costs) as it thinks fit."

5. The District Judge stated the case thus:

Question 1:

Having set out the "threshold" test correctly for determining whether there is an actionable interference with the use and enjoyment of land (see paragraph 13 of the judgment) did I then go on to apply that test when I concluded on the facts before me that there was not an actionable interference with the use and enjoyment of land?

Question 2:

Was I correct to conclude that the prosecutors created an artificially low acoustically sensitive ambience which is not usual or average?

Question 3:

In the absence of a substantial challenge as to the independence or credibility of the corroborating witnesses called by the Prosecutors, was I right to find that they were not independent or credible without having given each of these witnesses the opportunity to have commented on my objection to their impartiality or reliability, having also found their evidence to have been inconsistent with the objective data (as I did in paragraph 29 of the Judgment)?

THE STATUTORY REGIME

6. Under s.82 of the Environmental Protection Act 1990, a person aggrieved by a statutory nuisance can apply to the Magistrates' Court for an abatement order (Abatement Order). Under s.82(2):

> "If the magistrates' court … is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises…. the court…..shall make an order for either or both of the following purposes—
>
> (a) requiring the defendant … to abate the nuisance, within a time specified in the order, and to execute any works necessary for that purpose;
>
> (b) prohibiting a recurrence of the nuisance, and requiring the defendant or defender, within a time specified in the order, to execute any works necessary to prevent the recurrence; and, in England and Wales, may also impose on the defendant a fine not exceeding level 5 on the standard scale."

7. No issue was taken by the defendants upon the status of the prosecutors as "persons aggrieved".

8. Under s.79(1) of the EPA, in so far as is material, the following circumstances constitute a statutory nuisance:

(g) noise emitted from premises so as to be prejudicial to health or a nuisance;…

9. In this case, the prosecutors contended that the noise from the nursery amounted to a nuisance.

10. In ***National Coal Board v Neath Borough Council*** [1976] 2 All E.R. 478, a case brought under the Public Health Act 1936, it was held that a statutory nuisance coming within the meaning of that Act must be either a private or a public nuisance as understood by the common law.

11. The central question to be determined by the District Judge was, therefore, whether the noise from the nursery amounted to a private nuisance vis a vis the prosecutors' property by the application of common law principles.

THE COMMON LAW OF PRIVATE NUISANCE

12. The scope and application of the common law of private nuisance was recently and authoritatively reviewed by the Supreme Court in ***Fearn v Board of Trustees of the Tate Gallery*** [2024] A.C. 1.

13. Having outlined the uncontroversial principles that the tort of nuisance is to provide protection against the diminution in the amenity value of land and that such diminution can be caused by any means, Lord Leggatt went on to consider the requirement that the interference in question must be substantial.

14. He held:

> *"22. Courts have adopted varying phraseology to express the point that the interference with the use of the claimant's land must exceed a minimum level of seriousness to justify the law's intervention. The terms "real", "substantial", "material" and "significant" have all been used. Put the other way round, the courts will not entertain claims for minor annoyances. As Lord Wensleydale said in St Helen's Smelting Co v Tipping (1865) 11 HL Cas 642, 653–654 : "the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected."*
>
> *23. The test is objective. What amounts to a material or substantial interference is not judged by what the claimant finds annoying or inconvenient but by the standards of an ordinary or average person in the claimant's position. As famously expressed by Knight Bruce V-C in Walter v Selfe (1851) 4 De G & Sm 315, 322, the question is whether the interference ought to be considered a material inconvenience "not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people"; see also Barr v Biffa Waste Services Ltd [2013] QB 455, para 36 (ii). The objective nature of the test reflects the fact that the interest protected by the law of private nuisance is the utility of land, and not the bodily security or comfort of the particular individuals occupying it: see para 11 above…*
>
> *108… people vary significantly in their sensitivity to noise, not only as to volume but as to different types of sound. There are smells which some people find seriously unpleasant and others do not. That is not to mention the cases of nuisance involving offensive sights. In none of these types of case is there a scientific test which a judge can apply, or more specific legal guidance which an appellate court can give, to identify where the line*

> *should be drawn. In each case the court just has to make a judgment about whether the nature and degree of interference exceeds what an ordinary person would regard as acceptable. I think that in practice courts seek to make allowance for variations in normal human reactions by building a margin into their assessment and requiring quite a high level of interference before finding an interference with the ordinary use of property to be sufficiently serious to amount to a nuisance. But of course there will be some finely balanced cases in which different judges applying the same test to the same facts may reach different conclusions. The possibility of such disagreement is inherent in the task of judging."*

15. Further protection is afforded to the defendant in nuisance cases by the concept of common and ordinary use of the land. This was summarised by Lord Leggatt in the following terms:

> *"27. The other aspect of this core principle is that, even where the defendant's activity substantially interferes with the ordinary use and enjoyment of the claimant's land, it will not give rise to liability if the activity is itself no more than an ordinary use of the defendant's own land. In the leading case of Bamford v Turnley (1862) 3 B & S 66, 83 , Bramwell B formulated a test which has since been regularly cited, approved and applied, including at the highest level. He gave what were then contemporary examples of acts such as "burning weeds, emptying cess-pools" and "making noises during repairs" which (unless done maliciously and without cause) would not be treated as nuisances, even when they caused material inconvenience or discomfort to neighbouring owners. He then said at pp 83–84:*
>
> > *"There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz, that 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 ." (Emphasis added.)*
>
> *Bramwell B justified this principle in the following way:*
>
> > *"There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."*

> *28. Subsequent cases have shown that this justification is not limited, as Bramwell B suggested, to situations where the reciprocal nuisances "are of a comparatively trifling character". The rule of "give and take, live and let live" applies wherever a nuisance results from the ordinary use of land. In Southwark London Borough Council v Tanner [2001] 1 AC 1 adjoining flats had been built without sound insulation, with the result that, as described by Lord Hoffmann at p 7:*
>
> > *"The tenants can hear not only the neighbours' televisions and their babies crying but their coming and going, their cooking and cleaning, their quarrels and their love-making. The lack of privacy causes tension and distress."*
>
> *The noise from the neighbours' activities thus caused a substantial interference with the ordinary use and enjoyment of the claimants' flats. But the House of Lords held that this interference was not an actionable nuisance because the neighbours were doing no more than making normal use of their own flats. The two conditions of Bramwell B's test were satisfied, as the acts complained of were (i) necessary for the common and ordinary use and occupation of land, and (ii) "conveniently done"—that is to say, done with proper consideration for the interests of neighbouring occupiers: see pp 16C–D (Lord Hoffmann) and 21A–B (Lord Millett). Lord Hoffmann stated, at p 15F–G:*
>
> > *"... I do not think that the normal use of a residential flat can possibly be a nuisance to the neighbours. If it were, we would have the absurd position that each, behaving normally and reasonably, was a nuisance to the other."*

16. From the authorities cited, it may be concluded that where a court takes the view that the noise complained of in any noise nuisance case does not amount to a sufficiently high level of interference with the ordinary use of property then there is no need to go on to consider the "common and ordinary use" criterion. The assessment of the nature of the locality is pertinent not to the threshold level of interference but to the "ordinary use" assessment. As Lord Leggett observed:

> *"38. It is also well settled that what is a "common and ordinary use of land" is to be judged having regard to the character of the locality."*

There is a dearth of cases involving a finding that the threshold level of noise interference has not been passed but this is not surprising because the average complainant would not regard such a low level of interference to be worth the time, effort and expense of litigation.

QUESTION ONE

17. The first question is premised on the unchallenged proposition that the District Judge correctly set out the "threshold test" thus:

> *"13. The test of what is a 'substantial' interference is an objective one. What amounts to a material or substantial interference is not judged by what the claimant finds annoying or inconvenient but by the standards of an ordinary or average person in the claimant's position. As was expressed by Knight Bruce V-C in Walter v Selfe (1851) 4 De G & Sm 315, 322, the question is whether the interference ought to be considered a material inconvenience "not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people"; see also Barr v Biffa Waste Services Ltd [2013] QB 455, para 36(ii). The objective nature of the test reflects the fact that the interest protected by the law of private nuisance is the utility of land, and not the bodily security or comfort of the particular individuals occupying it (para 23)... 'the reason for applying an objective test when assessing whether the defendant's activity causes sufficiently serious interference to amount to a nuisance is that the injury is, strictly speaking, to the utility and amenity value of the claimant's land, and not to the comfort of the individuals who are occupying it. The particular sensitivities or idiosyncrasies of those individuals are therefore not relevant, and the law measures the extent of the interference by reference to the sensibilities of an average or ordinary person. By contrast, it is the utility of the actual land, including the buildings actually constructed on it, for which the law of private nuisance provides protection – not for some hypothetical building of "average" or "ordinary" construction and design': Fearn para [68]"*

18. The issue is as to whether the District Judge went on thereafter to apply the test thus identified.

19. I am entirely satisfied that the District Judge's findings thereafter involved the proper application of this test and drove him to the conclusion that the threshold had not been met.

20. He first considered and accepted the evidence of an Environmental Health Officer, Mr Smith:

> *"I heard evidence from Mr. Smith who is an experienced Environmental Health Officer. Mr Smith listened to 42 recordings of the noise complained of after installing a Rion NNR 52 noise monitor in accordance with manufacturers' guidelines. The monitor was calibrated prior to and after installation. He listened to and evaluated recordings which contained peak noise limits and highest noise levels displayed on corresponding noise on the noise software. This was in order to target and select the most intrusive recordings made. This was a*

> *sampling strategy which he has always used where many hours of audio recordings have been made.He opined that the noise coming through the wall was faint, low level and muffled. Mr. Smith states in his report:*
>
> > *"Most recordings I listened to were barely audible and distinctly muffled due to noise transmission through the party wall. From a total of 64 audio recordings, I listened to 42, which I deemed to be a representative sample considering the number of recordings made. Most recordings are very quiet and barely discernible above the background noise level in the study the equipment was located. On occasion infrequent noises of banging, children laughing, playing, shouting and crying could be picked out when concentrating hard."*

21. The District Judge roundly rejected the evidence of the prosecutors to the contrary:

> *"I find that Mr Dennis and Miss Andre have exaggerated their responses to the noise to fit their case. Their responses simply do not fit the recorded evidence."*

22. The District Judge found further evidence to support his assessment from other experts: Mr Clarke and Mr Randall:

> *"I heard evidence from Mr. Clarke and Mr Randall and have carefully considered the joint expert reports submitted by the experts. Mr Clarke and Mr Randall agreed that the levels of noise transmitted from the nursery are relatively low. Mr Clarke added in his oral evidence that you would have to hold your breath to hear anything and that when he and Mr Clark jointly visited number 52 Abington Grove as well as the nursery next door they had stood still.*
>
> *They were silent when a song was being played in the nursery. They added that if anyone had spoken it would have been barely audible. I accept this to be accurate and true reflection of the noise. Mr Randall produces a graph from February 2022 in which he says that when number 52 was empty for 24 hours the LAeq level did not exceed 30 decibels during the day and he compares (in his reports) that with an indicative level considered suitable for a bedroom in a new build property of 35 decibels.*
>
> *25. I place significant weight upon the conclusions reached by Mr Clarke when he deals in his report with the evidence presented within the RandTech Report compiled by Mr Randall. The sounds heard on the recordings are predominantly of a low level of children playing and laughing with the nursery staff. There is a high level of background hiss and distinct levels of what appear to be internal activity within 52 Abington Grove. Mr Clarke listened to the audios and it appears that whoever was*

> *taking the readings is moving, walking and perhaps opening doors or windows to monitor the sound. These events appeared audibly louder on the recordings than the sound of the children playing and the higher peaks observed on the graph and heard in the order recordings are from internal activity by the occupants of 52 Abington Grove which have erroneously been attributed to nursery activity."*

23. The District Judge also accepted the evidence of the regional operations manager of the nursery:

> *"I heard from Miss Gray who is the regional operations director for the nursery. She said that babies and children are not left crying for long periods of time, there are rules in place but in relation to children's voices being low she refers to as inside voices and walking feet so as to regulate the amount of noise generated within the nursery. Staff do not encourage children to make noise for the purpose of upsetting the neighbours, there are physical measures which are in place for noise reduction such as door closing mechanisms and that no one other than the Mr Dennis and Miss Andrei has complained about the noise from the nursery since at least 1998. Miss Gray was asked about noise levels at the nursery and any difficulty in making phone calls or hearing due to noise levels. She stated that there are regular phone calls and meetings held and spoke of a recent presentation that was presented remotely via teams where they could hear the presentation of all of those involved and there were no difficulties due to the noise levels within the nursery. She further stated that there are no issues in having a conversation between staff due to the noise from the children in the nursery. I found Miss Gray to be an honest and truthful witness and accept what she had said about the noise levels in the nursery. She is an experienced nursery manager who gave evidence in a straightforward and compelling manner. Her evidence is consistent with the objectively measured evidence. Miss Gray's evidence as to the running of the nursery and the noise limitations in place there are corroborated by Mr Clarke who states in his report that in his professional experience (which includes acoustic importing assessment as an expert witness and planning applications, acoustic design, noise management and impact assessment) Head Start nursery appeared to be a well – run, well organised typical nursery which due to its construction also happened to benefit from a higher than typical level of sound insulation between it and its adjoining residential neighbours.*

24. The District Judge concluded:

> *"The noise levels coming through the wall are not a substantial interference. The low level of sound coming through the wall would not be annoying or inconvenient to the average person.*

> *The noise would be barely audible if the average person was to be having conversations or had the television turned on.*
>
> *39. For the reasons set out above I am not sure the noise transmitted into Number 52 is beyond that which, objectively, a normal person would find it reasonable to have to put up with."*

25. In my view the District Judge clearly found on the facts that the threshold test of substantial interference had not been passed. The consequence of this was that no further consideration was needed of any other matter in issue.
26. Contrary to the prosecutors' submissions, there was no need for the District Judge to go on to consider the question of common and ordinary use of the defendants' premises.

QUESTION TWO

27. The issue here was stated to relate to whether the District Judge was right to find that the prosecutors created an artificially low acoustically sensitive ambience which is not usual or average.
28. I take the view that the whole issue of the "sensitivity" of 52 Abingdon Grove was, and remains, a red herring. There is nothing about the physical structure of the house that means that the occupiers are more likely to be exposed to an actionable interference than would usually be the case.
29. It is true that the background noise levels in the house are usually very low but that is a consequence of its location in a quiet area not because of some unusual structural feature. Indeed, the dividing wall with the nursery had been soundproofed which is a feature of resilience rather than sensitivity. The issue of location is one which falls to be considered only after the threshold level of interference has been passed and not as part of the assessment.
30. Further the "artificially low acoustically sensitive ambience" was a product of the subjective oversensitivity of the prosecutors. It is clear from the judgment that the behaviour of the prosecutors in the context of perceived interference of the enjoyment of their property was indicative of a bizarre level of over-reaction to trivial noise levels.
31. The evidence in support of this conclusion was compelling. As the District Judge found:

> *"Mr Dennis and Miss Andre by their own admission have spent hours and hours each day listening out for noise from next door. They have followed that by writing down descriptions of what they purport to hear and then typing those notes up into logs. They have gone as far as counting the number of steps and the number of times doors which have closed. They have persistently and possessively stood in the house counting and recording every noise. Miss Andre stood still and timed an alarm as 86*

> *seconds. Mr Dennis has blown a whistle at a small group of children who are playing in nursery garden, he has leaned out of the window overlooking the garden laughing and seeing what the children play and regularly stands in the window watching the staff and the children with a notebook in hand. They literally wait for noises to occur. That is not, objectively, normal. The average person does not sit and wait for noises to occur in this way. The prosecutors have engineered a situation which is not normal."*

32. And:

> *"The prosecutors in this case are not "the average person". They accused Mr. Smith of being obstructive and Miss Andre accused him of colluding with and conspiring with other branches of the defendant nursery chain and ensuring that their complaint was not properly investigated. They were both particularly demanding and made complaints about his decisions. The prosecutors are, in my judgement, serial complainers and I have no doubt that is why the council felt it necessary to initiate their persistent and unreasonable complainers' procedure. Not being satisfied with Mr Smith's conclusion as to nuisance or lack of it they complained to the ombudsman and their complaint was rejected. The ombudsman found that Mr Smith had adhered to the correct procedure. In December 2020 the prosecutors turned their attention to the planning department to complain about the operating hours of the nursery. Mr Dennis purchased a mosquito device and set it off so that it would make low frequency noise is audible only to young children. These are not actions representative of the average person. They have created an artificially low acoustically sensitive ambience which is not usual or average."*

33. These findings were entirely relevant to the issue as to whether, upon the application of the threshold test, the interference was substantial "not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people."
34. The evidence was clear. The prosecutors were wedded to a perception of victimhood which was not merely objectively unjustified but in some respects was entirely detached from reality. The fact that an adult, such as the first prosecutor, could ever have considered it appropriate deliberately to set off a high pitched noise to the intended discomfiture of innocent babies and toddlers gives a clear indication of an individual who has lost all sense of proportion.

QUESTION THREE

35. Question three was expressed thus:

> *"In the absence of a substantial challenge as to the independence or credibility of the corroborating witnesses called by the Prosecutors, was I right to find that they were not independent or credible without having given each of these witnesses the opportunity to have commented on my objection to their impartiality or reliability, having also found their evidence to have been inconsistent with the objective data (as I did in paragraph 29 of the Judgment)?"*

36. The District Judge dealt with these witnesses in his judgment:

> *"Those witnesses are in no means independent and their evidence is also inconsistent with the objective data. It is abundantly clear that whoever lived at number 52 spent a considerable amount of time talking amongst themselves and I have no doubt that this has infected their impartiality. I reject their evidence. This is especially so because despite what they perceived to be excessive noise coming from the nursery they still went back to number 52 to pay visits, Miss Dragulin stating that she visits almost daily when she has time. It is not credible that she would do that if the noise was to the level alleged by the prosecution witnesses."*

37. The defendants rightly point out that the basis of the District Judge's findings can be summarised thus:
    (i) The witnesses are by no means independent;
    (ii) Their evidence is inconsistent with the objective data;
    (iii) It is clear that who ever lived at number 52 spent a considerable amount of time talking amongst themselves and he had no doubt that this has infected their impartiality; and
    (iv) Despite what the prosecution witnesses perceived to be excessive noise coming from the nursery they still went back to number 52 to pay visits.
38. The extent to which a court is entitled to draw conclusions about the credibility of the evidence of a witness whose credibility is not directly challenged was considered by the Privy Council in the case of ***Chen v Ng (British Virgin Islands)*** [2017] UKPC 27. The Court observed:

> *"52. In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such*

> *as this, where the Judge sensibly rationed the time for cross-examination and the witness concerned needed an interpreter. Once it is accepted that not every point may be put, it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it."*

39. In this case, the findings of the District Judge were fully open to him to make.
40. First, the witnesses were, as a matter of indisputable fact, not independent of the appellants. One was the second prosecutor's partner. The second and third witnesses were her sister and niece. The fourth witness told the court in her oral evidence that she had known her for between 18-20 years.
41. Secondly, it was also indisputable that there was a stark conflict between the objective data as to noise levels transmitted from No.54 to the prosecutor' property and the evidence of the lay witnesses.
42. Thirdly, two of the witnesses were indeed asked in cross-examination whether they had discussed the issue of noise with the second prosecutor and a third was asked if he had discussed the contents of his statement with her. The fourth was cross-examined about whether the second prosecutor had influenced the content of her witness statement in a particular way. There can be no doubt as to the purpose behind these lines of questioning and the entitlement of the District Judge to reject their answers.
43. Fourthly, the visiting witnesses were indeed asked why they continued to visit No.52 so frequently if, as they had asserted, they were unable to enjoy their visits because of the noise from No.54 that they experienced whilst there. The judge was thus fully entitled to form the view that their evidence on this issue was inconsistent with their evidence on noise levels and roundly to reject it accordingly.
44. In my view, the points relied upon by the District Judge in support of his conclusion that the prosecutors' lay witnesses should be disbelieved were adequately explored in cross-examination. Even if they had not been, this was one of those cases referred to in ***Chen*** in which the judge was nevertheless entitled to draw the conclusion he did.

CONCLUSION

45. It follows from the above that the answer to each of the three questions posed is in the affirmative and so this appeal must fail.