Neutral Citation Number: [2009] EWCA Civ 15

Case No: A2/2008/1108 & 1089

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION
MR JUSTICE SIMON
7NE90066

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 January 2009

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE RICHARDS
and
LADY JUSTICE HALLETT

- -

Between :

(1) DEREK WATSON **(2) JULIA WATSON** **(3) JILL WILSON**	**Appellant**
- and -	
CROFT PROMO-SPORT LTD	**Respondent**

- -
- -

MR DAVID HART QC & MR JEREMY HYAM (instructed by Messrs Richard Buxton Environmental & Public Law) for the Appellant
MR RICHARD JONES QC & MR GORDON WIGNALL (instructed by Cobbetts LLP) for the Respondent

Hearing dates : 15 January 2009

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Judgment

The Chancellor:

Introduction

1. The Croft Motor Circuit, covering about 195 hectares on the site of the Croft Aerodrome built in World War II at Dalton-on-Tees, near Darlington, Co. Durham, is occupied and managed by the defendants, Croft Promo-Sport Ltd. 300m to the north of the circuit, at Vince Moor East, lie the houses owned and occupied by the claimants, Mr and Mrs Watson and their daughter Mrs Wilson. On 16th March 2006 the claimants instituted proceedings against the defendants alleging that the use of the circuit by the defendants gave rise to excessive noise and constituted a nuisance. They sought an injunction to restrain continuation of the alleged nuisance and damages as compensation for its commission in the past.

2. The claim was defended by the defendants on a number of grounds. In particular they contended that, although their activities did cause noise and some discomfort and inconvenience to the claimants, there was no actionable nuisance because their use of the circuit was reasonable having regard to the nature and character of the area arising from the grant of planning permission in 1963 and 1998. In addition they claimed that if, contrary to that and their other defences, actionable nuisances had been caused the claimants should not be granted any injunction to restrain its future commission.

3. The action was tried by Simon J in Newcastle over six days in January 2008. In addition to hearing oral evidence from the claimants, the defendants and others, Simon J viewed the circuit and its immediate surrounding area, including the claimants' houses. On 16th April 2008 Simon J handed down his judgment setting out the reasons for his decisions, amongst others, that (1) the nature and character of the locality had not been changed by the planning permissions granted in 1963 or 1998 but remained essentially rural, so that (2) the activities of the defendants did constitute an actionable nuisance, but that (3) it was not an appropriate case for the grant of an injunction. In the event he awarded damages of £109,600 to Mr and Mrs Watson and of £40,000 to Mrs Wilson as compensation for the diminution in value of their properties and loss of amenity.

4. Both parties now appeal from the order of Simon J with the permission of Jacob LJ. The defendants contend that the judge was wrong on issue (1) and, for that reason, on issue (2). They submit that the action should have been dismissed. The claimants, by contrast, are content with the judge's decisions on issues (1) and (2) but submit that, given those conclusions, the circumstances did not justify his refusal of an injunction to restrain future nuisance so that he was wrong on issue (3). I will, in due course, consider the contentions of the defendants first and then, in the light of my conclusion in respect of issues (1) and (2), the claimants' submission that the judge should have granted injunctive relief. First, it is necessary to set out the facts and the judge's conclusions in a good deal more detail.

The Facts

5. As I have indicated, Croft Aerodrome was built in WWII and covers some 195 hectares. Between 1949 and 1957 it was used intermittently for car race meetings. In addition in 1951 it was designated as a relief airfield. In 1962 the then owner of the airfield applied for planning permission for a change of use so as to permit motor trials, motor and motor cycle races and other sporting events, including pedal cycling and athletics and use by aircraft, helicopters and gliders. The first application made in July was refused on grounds of anticipated noise. A second, amended, application was made in September. In the letter accompanying the amended application it was explained that the application had been amended so as to limit the use to not more than four race meetings per annum for formula cars in order to satisfy the Croft Council. This application was also refused by the local planning authority. The applicant appealed, a local enquiry was held in March 1963 and in his report to the Minister dated 28th April 1963 the Inspector recommended that the appeal be allowed.

6. In his report the inspector set out the rival contentions of the parties. He found as a fact that there was a need for a motor and motor cycle racing track in the North East. He noted that the only objection of the local planning authority was on grounds of noise. In his conclusion he indicated that he had been impressed by the evidence of need for the proposal and the apparent convenience of the site to satisfy that need. He continued:

> "In my opinion it has not been demonstrated that the disturbance to the public due to noise would be sufficient to justify rejecting the proposal, provided the use is restricted by the conditions which the appellant indicated would be acceptable."

7. The Minister accepted the recommendation of his Inspector and in a decision letter dated 15th August 1963 granted planning permission for:

> "(a) the use of that part of Croft Airfield...shown on the plan submitted with the application for motor and motor cycle events, for driving tuition and as a sports centre..."

There followed a number of conditions and further permission as set out in paragraph (b) none of which is material. Neither the permission granted in paragraph (a) nor the conditions attached to it reflected the restriction to not more than 4 race meetings a year to which the letter accompanying the amended application had referred.

8. From 1963 to 1979 the part of the airfield to which the permission extended was used for motor racing on not more than 20 racing days a year together with

additional days of practice associated with the racing days. In 1979 the airfield, including the racing circuit, was sold. In 1981 the new owner applied for planning permission for the formation of spoil heaps of concrete and stone from the old runways which would arise if his intention to return the airfield to agricultural use was implemented. Such permission was granted but not implemented. In the period 1979 to 1994 there was no motor racing on the airfield except for rallycross on 10 days a year and some engine testing on other days. (Rallycross consists of racing modified production cars on a mixture of loose and sealed surfaces.)

9. By about 1994 the defendant had acquired a leasehold interest in, at least, that part of the airfield occupied by the circuit. It implemented the planning permission granted in 1963 by resurfacing the circuit and certain other works. In May 1995 there was held what was called the Croft Renaissance Meeting. In late 1996 and early 1997 the configuration of the circuit was changed. Motor racing recommenced in April 1997 under the auspices of the Croft Classic and Historic Motorsport Ltd to which a management contract had been awarded by the defendant in 1996.

10. In September 1998 there was a further public enquiry in relation to a deemed refusal of permission for the removal of the conditions imposed in 1963 and for other matters. After the hearing, on 8th October 1998, the defendant, as lessee, the freehold owner of the airfield and circuit and their mortgagee executed a Unilateral Undertaking made under s.106 Town and Country Planning Act 1990 for the regulation of the circuit for motor and motor cycle events, for driving tuition and as a sports centre. The defendant agreed to ensure that no vehicle using the circuit should exceed certain maximum noise levels and that the use of the circuit for motor and motor cycle events should be limited by reference to noise levels measured at a defined point on the circuit. The details are not material. It is sufficient to summarise them by reference to type of event, noise level and frequency as follows:

Event	level	frequency
N1	under 95dBA	no more than 10 days
N2	93dBA	40
N3	85dBA	70
N4	78dBA	110
N5	70dBA	unlimited

11. By his letter dated 26th October 1998 the Inspector allowed the appeal. In paragraphs 7 to 16 he rejected the argument that the permission granted in 1963 was subject to the limitation to not more than 4 race meetings a year expressed in the letter accompanying the amended application but not carried forward into the permission actually granted. In paragraphs 17 to 22 he rejected the argument that the 1963 permission had been abandoned. In paragraphs 24 to 32 he considered the issues. He concluded that

> "the project would seriously diminish residential amenity in a rural area especially in the summer and at weekends."

12. In paragraphs 33 to 42 he referred to other material considerations. These included the 1963 permission, the s.106 Agreement and its detailed terms. In that connection he considered that:

> "[37] Bearing in mind the very wide planning use rights which the site now enjoys, I am very firmly convinced that the project would strengthen significantly the ability of the local planning authority to control noise at this long established circuit.
>
> [38] By the s.106 Agreement a series of measures would control the nature and intensity of the use of the site, as well as noise impact on the locality, compared to virtually no controls provided by the existing planning permission … The Council's concern about noise … is echoed by local residents who are worried that significantly higher noise levels than occasionally occur now would happen on many days … Without the undertaking, however, there could be racing every day and, what is more significant, little control by the Council over unsilenced vehicles."

13. His conclusion expressed in paragraph 43 was:

> "If this appeal were allowed, objectors would be very upset. If it were dismissed their experiences would be very likely to remain the same; the Council would only have the planning controls that they could have enforced under the existing planning permissions. … The complaints indicate there has been a serious loss of amenity, which the Council as the local planning authority have not remedied. … It is clear to me that the project would effectively reduce the almost unrestricted rights which the operators now enjoy to operate the circuit … I conclude that the project would achieve a reasonable compromise between amenity, particularly in terms of noise experienced in the local community, and the operation of the racing community …"

14. In the result the Inspector granted planning permission for the continued use of the land for motor and motor cycle events, a sports centre and other immaterial uses free from the conditions imposed in 1963 but subject to the conditions undertaken in the s.106 Agreement.

15. Thereafter until 2007, as recorded by Simon J in paragraph 30 of his judgment, the activity at the circuit ranged from a low of 144 days in 2001, of which 98 were N1 to N4 days, to 207 days in 2000, of which 147 were N1 to N4 days. All these days were concentrated in the summer months.

16. Thus the use of the circuit since 1949 falls into five distinct periods:

(1) 1949 to 1962 intermittent use for car racing;
(2) 1963 to 1979 car racing on not more than 20 days a year together with additional associated practice days;
(3) 1980 to 1994 10 days a year rallycross;
(4) 1995 to 1997 sporadic race meetings interspersed with track alteration and improvements;
(5) 1998 to 2006 between 98 and 147 N1 to N4 days a year, as defined in the s.106 Agreement.

The judgment of Simon J

17. After setting out the facts, substantially as I have summarised them, the judge made certain preliminary observations on the evidence including his view and the attitude of Mr Watson to the activities of the defendant. In paragraph 33 he made the important observation that:

> "The Claimants' objections are not to the car and motor-bicycle racing fixtures which amount to about 20 (N1 and N2) events each year (over approximately 45–50 days); but to the noise from the circuit's 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."

18. Simon J then set out the issues before him. They were:

> "i) What is the nature and character of the neighbourhood relevant for assessing the question of nuisance? In particular, is the effect of the planning permissions and the s.106 Agreement such that the character of the neighbourhood must be determined by reference to the activities undertaken at the Circuit subsequent to those planning permissions and s.106 Agreement? As of what date is it to be said that any change in the nature and character of the area has been effected?
>
> ii) If the Defendant fails to establish that the nature and character of the area must be determined by reference to the planning instruments, then have the Claimants established an unreasonable user of land by the Defendants and hence a nuisance, and if so to what extent?
>
> iii) Did either of the Claimants 'come to the nuisance' and if so does that amount to a defence to their Claims?

> iv) To the extent that the Claimants establish a nuisance in the light of the answer to the above, then have the Claimants acquiesced in the infringement of their common law rights such that it would be unconscionable for them to be granted (1) equitable relief in the form of an injunction, and/or (2) a remedy in damages?
>
> v) To the extent that any rights and remedies of the Claimants are not barred by acquiescence, then should the Court's discretion be exercised to grant them an injunction, or should the Claimants be limited to a claim in damages?
>
> vi) If the Claimants are entitled to an injunction, then what should be the terms of the Court's Order?
>
> vii) If nuisance is proved, in the light of the Court's conclusions on injunctive relief, what is the value of (1) the Claimants' claim for diminution in value of Pond House and the Granary attributable to the nuisance; (2) a claim for general damages for past nuisance since March 2000? The answer to these questions involve an assessment of:
>
> > a) the un-blighted value of Pond House and the Granary, including what if any reductions to that un-blighted value should be made;
> >
> > b) the blighted value of each property in consequence of the Defendant's activities at the Circuit;
> >
> > c) the extent to which the diminution in value of the properties is to be reduced by the activities at the Circuit which do not amount to a nuisance."

It was no part of the defendants' case that they enjoyed a prescriptive right to commit a nuisance by noise arising from long usage of the circuit for motor racing or otherwise.

19. For reasons which I will deal with in detail when considering the first issue on this appeal the judge concluded that neither the planning permissions, nor the s.106 Agreement nor usage of the circuit thereunder had altered the nature and character of the locality. It remained essentially rural. In relation to the second issue the judge considered that the threshold of reasonable user was 40 N1 to N4 days per year and not the larger number permitted by the s.106 Agreement. As such threshold had been substantially exceeded the defendants were unable to make out a defence of reasonable user.

20. The law did not permit a defence of "coming to the nuisance". In any event the claimants did not do so with full knowledge of it. There is no appeal from either of those conclusions. Similarly in respect of the fourth issue Simon J concluded

that although there "had been a significant lack of activity between March 2003 and February 2005" the defence of acquiescence, on which the defendants relied, was not made out because:

> "the Claimants do not seek to prevent the core-racing activities of the Circuit; and that such expenditure as the Defendant has incurred during the periods of nuisance was incurred largely so as to enable racing to take place."

There is no appeal from those conclusions either.

21. In relation to the fifth issue the judge concluded that he should not grant injunctive relief for reasons which I shall consider in detail when dealing with the claimants' appeal. Accordingly the sixth issue did not arise before the judge. I did not understand that there was any dispute before us that if we take a different view the form of the injunction should reflect the threshold of reasonable use as found by the judge.

22. In the light of the judge's conclusions on the fifth issue the questions in relation to damages, reflected in his formulation of the seventh issue, were important. He assessed damages under two heads, namely (1) net diminution in value of the claimants' properties due to the nuisance and (2) damages for past nuisance. Under the first head he assessed the damage sustained by Mr and Mrs Watson at £93,600 and that incurred by Mrs Wilson at £34,000. In relation to the second head he assessed proper compensation for Mr and Mrs Watson at the rate of £2,000 per annum and for Mrs Wilson at the rate of £750 per annum. The respective awards worked out as £16,000 for the former and £6,000 for the latter. Thus the total award of damages was £127,600 under head (1) and £22,000 under head (2) making a total award of £149,600. The defendants have not appealed against any part of these awards. It appears to me that if we dismiss the appeal of the defendants on issues (1) and (2), as described in paragraph 3 above, and allow that of the claimants on issue (3) then the quantum of damages awarded by the judge for diminution in value may have to be revisited.

Nuisance or no nuisance?

23. I turn then to the appeal of the defendants in respect of issues (1) and (2) as described in paragraph 3 above. The judge's consideration of the nature and character of the neighbourhood and the effect of the planning permissions of 1963 and 1998 and of the s.106 Agreement is contained in paragraphs 35 to 57 of his judgment. In paragraphs 35 to 39 he recorded the submissions of counsel. The remaining paragraphs in this section contain the reasons for his conclusion.

24. The judge started by setting out two principles of law which he described as "reasonably well settled". They were that (1) a planning authority (including a

minister and an inspector) have no jurisdiction to authorise a nuisance, though they may have the power to permit a change in the character of a neighbourhood [41] and (2) the question whether a permissive planning permission has changed the character of a neighbourhood so as to defeat what would otherwise constitute a claim in nuisance is one of fact and degree [47]. In support of the first proposition he relied on and quoted from the judgments of Cumming-Bruce LJ in **Allen v Gulf Oil Refinery** [1980] QB 156, 174G-H, of Buckley J in **Gillingham Council v Medway Dock Co.** [1993] QB 343, 359, of all three members of the Court of Appeal in **Wheeler v JJ Saunders Ltd** [1996] Ch. 19, 28A-H, 30C-D, 34G-H and 38B, of Pill LJ in **Hunter v Canary Wharf Ltd** [1997] AC 655, 669A-B and the speech of Lord Cooke of Thorndon on appeal at page 722F-G. In support of the second proposition he referred again to the judgment of Staughton and Peter Gibson LJJ in **Wheeler v JJ Saunders Ltd** [1996] Ch. 19, 30D-E and 35G and the speech of Lord Hoffmann in **Hunter v Canary Wharf Ltd** [1997] AC 655, 710B-D.

25. His conclusions in respect of the application of the second principle are set out in paragraphs 52 to 55 in the following terms:

> "52 The 1963 consent permitted the use of the circuit for the purposes of racing; but neither the consent nor the actual limited use of the Circuit for the permitted purposes changed the essential rural character of the neighbourhood.
>
> 53 The 1981 application was to allow for the reversion of the airfield to agricultural use and the application was granted. In fact the permission was not implemented; but the permission did not change the character of neighbourhood, it reinforces the impression of its essentially rural character.
>
> 54 I accept that the 1998 decision was robust in the sense that it was based on a full and thorough Inquiry; and the Defendant may be right to say that there could not have been a better forum for a consideration as to what the nature and character of the area should be. However, I do not accept that there was a decision as to the nature and character of the area, which defeats the present claim. It is clear that the Inspector regarded the 1963 planning permission as providing the developer with a very wide consent; and the s.106 Agreement as a protection against what he otherwise described in [43] of the Report as 'the almost unrestricted rights which the operators now enjoy to operate the circuit'. The decision cannot properly be regarded as a strategic decision affected by considerations of public interest. The Inspector considered that some controls were better than none; and it was only to that extent that a public interest arose.
>
> 55 The Defendant is correct in saying that the noise from racing has occurred for forty years; but I do not accept that the character of the neighbourhood has been changed. From 1949 to 1994 the character and nature of the locality was essentially

> rural, but with the use of the former airfield for a limited number (no more than 20) of races each year. It is clear that the circuit could be, and was, run in a way that was consistent with its essentially rural nature. That essential character did not change, despite the gradual development of the Circuit with an intensification of the level of noise."

26. In paragraphs 56 and 57 the judge dealt with two specific submissions made to him. The first, made by reference to a passage in the speech of Lord Hoffmann in **Hunter,** was to the effect that the planning system may provide a better means of control on development than an action for private nuisance. This principle was rejected in its suggested application to the 1998 planning permission on the ground that that permission merely sought to control the otherwise largely unlimited permission granted in 1963. The second, as described by Simon J, was to the effect that it is wrong for a civil court to deal with the same issues as a planning enquiry and reach an inconsistent decision. The judge rejected this submission on the basis that it was inconsistent with the first principle he had set out at the start of this section of his judgment, namely that the planning authority has no jurisdiction to authorise a nuisance.

27. These conclusions are criticised by counsel for the defendants, but before considering those criticisms I should also refer to the judge's conclusions on the second issue. In that connection he noted that the common law of nuisance requires some degree of 'give and take' so that a defendant who is using his land in a reasonable manner is not liable for any consequential harm to his neighbour arising from that reasonable use. He concluded [61] that:

> "In the light of the evidence I have heard as to the intensity, the frequency and duration of the noise (as well as the Defendant's realistic concession) I am clear that the Defendant cannot establish the defence of reasonable user."

28. The judge then considered what would be a reasonable use given that the claimants did not wish to preclude the normal racing activities of the defendants, see paragraph 17 above. The case for the defendants had been throughout that, on one basis or another, it should be permitted to do whatever the terms of the s.106 Agreement allowed. In effect this would have meant that reasonable user would permit some 110 N1 to N4 days.

Simon J recorded the submission of the claimants that reasonable user of the circuit for the core activities of the defendants would be 20 N1 to N4 days per year but that they would accept compensation for another 20 such days. The judge's conclusion was:

> "It seems to me that, even adopting the Claimants' approach, the threshold for which they contend is too low. In striking a proper balance between the respective legitimate interests of

> the parties, in the light of the past and present circumstances, it seems to me that it is appropriate to take a threshold figure of 40 N1–N4 days." [66]

29. The submissions for the defendants on this appeal may be summarised as follows: (1) the judge was wrong in law in not concluding that the nature and character of the locality had been changed by the planning permissions of 1963 and 1998 and by the s.106 Agreement; (2) the correct test for resolving that question is whether (a) there is some new and distinctive feature about the locality which has been effected by the planning consent under consideration and, if so, (b) whether that feature was the product of a planning process which involved a fair and conclusive adjudication on matters of public interest in such a way as to restrict private right or is otherwise 'strategic' in nature; (3) the judge's conclusions as to what constituted reasonable user was perverse and insufficiently reasoned.

30. Logically the second submission should be considered first, notwithstanding that in his oral argument counsel for the defendants made it plain that it was very much a secondary argument. Counsel for the defendant emphasised the inconvenience which may result if the outcome of a statutory process such as that which governs whether any particular development should be permitted from a public perspective is to be revisited in a private law tort claim. He stressed that in this case both the permission of 1963 and that of 1998 was granted after an exhaustive consideration of the consequences of the noise which would be generated by the developments for which permission was then being sought. He suggested that the consequence of those permissions was to introduce an element of noise which, necessarily, qualified the essentially rural character of the locality to the extent of the noise element so introduced. Given that that noise element was restricted by the terms of the s.106 Agreement that should be the benchmark for a consideration of both the nature and character of the locality and/or the standard of reasonable user.

31. In support of that submission counsel for the defendants relied on certain dicta in **Wheeler v JJ Saunders Ltd** [1996] Ch. 19, 30E and **Hunter v Canary Wharf Ltd** [1997] AC 655, 722E in relation to the effect of those planning decisions which may properly be regarded as 'strategic planning decisions affected by considerations of public interest'. It is suggested that in such cases the grant of planning permission of itself affects the private rights of the citizen to complain of a common law nuisance.

32. I would reject this submission for a number of reasons. First, it is well established that the grant of planning permission as such does not affect the private law rights of third parties. This was clearly stated by Cumming-Bruce LJ in **Allen v Gulf Oil Refinery** [1980] QB 156, 174G-H and has been consistently applied in all the subsequent cases, see per Buckley J in **Gillingham Council v Medway Dock Co.** [1993] QB 343, 359, all three members of the Court of Appeal in **Wheeler v JJ Saunders Ltd** [1996] Ch. 19, 28A-H, 30C-D, 34G-H and 38B, Pill LJ in **Hunter v Canary Wharf Ltd** [1997] AC 655, 669A-B and the speech of Lord Cooke of Thorndon on appeal at page 722F-G. Second, the implementation of that planning permission may so alter the nature and character of the locality as to shift the

standard of reasonable user which governs the question of nuisance or not. This too is clearly recognised in the judgments of Staughton and Peter Gibson LJJ in **Wheeler v JJ Saunders Ltd** [1996] Ch. 19, 30D-E and 35G and the speech of Lord Cooke of Thorndon in **Hunter v Canary Wharf Ltd** [1997] AC 655, 722G.

33. In the light of these two well established principles I find it hard to understand how there can be some middle category of planning permission which, without implementation, is capable of affecting private rights unless such effect is specifically authorised by Parliament. It has not been suggested to us that there is any section in the statutory code governing the application for and grant of planning permission which could have that result. For that reason alone I would reject the second ground of appeal put forward by the defendants.

34. In any event, even if there be some middle category such as that for which the defendants contend neither of the grants of planning permission on which the defendants rely can be properly described as 'strategic'. The 1963 grant was specific to the part of the airfield to which it applied. It dealt with the issue of noise, but in a more confined context than what might reasonably be described as 'strategic'. In the case of the 1998 grant it is plain from the passages in the inspector's report to which I have drawn attention that the purpose and effect of that grant was to introduce some restriction and control over the otherwise unrestricted activities authorised by the 1963 grant. In effect it dealt with the unimplemented parts of the 1963 grant. It follows that, on the facts of this case, neither grant of permission can come within any such third category.

35. I turn then to the first ground of the defendants' appeal summarised in paragraph 29 above. The defendants submit that the judge erred in law in failing to conclude that the nature and character of the locality had been changed by the grant of planning permission in 1963 and 1998 or the terms of the s.106 Agreement. The relevant change must have arisen from the implementation of those grants and that Agreement, not their mere existence. But the consideration of that implementation must be made in the context, as the claimants submit, that neither the tortious activities of a defendant (**Dennis v Ministry of Defence** [2003] EWHC 793) nor the intensification of a particular use (**Wheeler v Saunders** [1996] Ch. 19) can change the essential character of the locality. These submissions were made to the judge and, apparently, accepted by him, though not expressly. They were not challenged on the hearing of this appeal. Nor did the defendants challenge the judge's conclusion that whether there has been a change in the nature and character of the locality is a question of fact and degree.

36. It follows, and counsel for the defendants accepted this in the course of his oral submissions, that the case for the defendants on their first ground is to the effect that the judge's conclusion was plainly wrong or perverse. I would reject that submission. The judge had the benefit of a view, which we have not. He analysed the uses made of the circuit in the five periods to which I have referred in paragraph 16 above. He dealt with the first three periods in paragraph 55 of his judgment, which I have quoted in paragraph 25 above. Given the evidence to which he had earlier referred, and which I have summarised, his conclusion on those periods are plainly conclusions to which he was entitled to arrive. It is not suggested that the fourth period wrought the fundamental change on which the defendants rely.

37. So this issue boils down to the question whether the events and activities of the defendants in the fifth period could produce the change to the nature and character of the locality to the extent suggested by the defendants. The last sentence of paragraph 55 of the judge's judgment is somewhat obscure. He stated that:

> "That essential [ie rural] character did not change, despite the gradual development of the Circuit with an intensification of the level of noise."

I am not sure if that was a reference to the fifth period or a recognition that the intensification of use from the fourth period in the fifth period, whether tortious or not, could not alter the nature or character of the locality. Either way it does not justify this court interfering with the judgment of Simon J on the essential issue of fact and degree.

38. So I turn to the third submission for the defendants to the effect that the judge's judgment when adopting the threshold of 40 N1 to N4 days as the standard of reasonable use is insufficiently reasoned. Counsel for the defendants submitted that no explanation is given for the threshold adopted or why the judge rejected the threshold of the s.106 Agreement advanced by the defendants.

39. I would reject this submission too. The arguments before the judge involved the two extremes of 20 N1 to N4 days advanced by the claimants and, in effect, 110 N1 to N4 days, as permitted by the s.106 Agreement, for which the defendants contended. The judge would have had in mind that the objection was not to what was described as the core activities at the circuit which occurred on 45 to 50 days a year (see paragraph 33 of the judgment) as opposed to the other activities, namely vehicle testing days and track days. No doubt he could have picked a number of other points in the spectrum between the case for the claimants and that for the defendants. The point that he did select is plainly within the permissible range open to him. It was a matter for his judgment, not for any further reasoning.

40. For all these reasons I would dismiss the defendants appeal from the judge's conclusions on issues (1) and (2). It follows that the appeal of the claimants must be approached on the basis of an established nuisance against a threshold of reasonable use of 40 N1 to N4 days a year. In those circumstances what was the appropriate remedy?

Injunction or damages instead?

41. Simon J dealt with this issue in paragraphs 83 to 88 of his judgment. In paragraphs 83 and 84 he summarised the arguments of the parties. In the case of the claimants they were to the effect that if a nuisance is established it should be restrained because only in exceptional circumstances should they be deprived of

their rights. They relied on the well-known decision of the Court of Appeal in **Shelfer v City of London Electric Lighting Co.** [1895] 1 Ch. 287 and later cases in which the principle had been applied. The argument of the defendants was to the effect that the only proper standard was that struck by the s.106 Agreement so that there was no basis for the proper grant of an injunction.

42. Simon J then referred to and quoted from the judgment of Mummery LJ in **Regan v Paul Properties** [2007] Ch. 135 paras 35-37 as to the continuing effect of the decision in **Shelfer.** He quoted from the judgments of Sir Thomas Bingham MR and Millett LJ in **Jaggard v Sawyer** [1995] 1 WLR 262, 278, 286 and 288. His conclusions were:

> "87 I am firmly of the view that this is not an appropriate case for granting an injunction. First, although falling short of giving rise to a defence of acquiescence, there has been considerable delay in bringing these proceedings. Secondly, the Claimants have shown that they are prepared to be compensated for noise on N1–N4 days on more than 20 days, up to 40 days. Whilst a willingness to compromise should not count against a party, it seems to me that a willingness to accept compensation instead of an injunction constitutes a matter which counts against granting an injunction. Put in conventional terms, it demonstrates that the Claimant can be compensated by the award of damages. For these reasons I decline to grant an injunction.
>
> 88 There is one further matter which in my judgment can properly be taken into account without disregarding the approach set out in the Shelfer case. The Circuit is a well-run business providing both employment locally and an opportunity for those who wish to race cars at speed, legally and in relative safety. The racing of cars at speed is plainly enjoyed by some people; and I suspect that part of the enjoyment comes from the loudness of the noise which comes from the racing, just as the loudness of music at outdoor venues may be the source of enjoyment for others. Although it was not investigated at trial, it is clear that there are a limited number of places where the range of activities carried out at the Circuit can take place. It seems to me that this is a legitimate matter to be taken into account when balancing the interests of the parties to this private dispute. However, as I have indicated, I have come to the conclusion that an injunction is not an appropriate remedy without taking these matters into account."

43. The judge's conclusions are challenged by the claimants on two basic grounds. The first is that the judge failed to apply the proper test. The second is that the grounds he gave are illogical and insufficient. The defendants dispute both

contentions and submits that the judge's conclusion was right even if some of his reasons are illogical. In my view the claimants' objections are well made.

44. I start with the appropriate test. It is clearly established by the decision of the Court of Appeal in **Shelfer** that damages in lieu of an injunction should only be awarded under 'very exceptional circumstances'. It also established that the circumstance that the wrongdoer is in some sense a public benefactor is not a sufficient reason for refusing an injunction.

45. In **Jaggard v Sawyer** [1995] 1 WLR 262 Sir Thomas Bingham MR referred (p. 278) to the **Shelfer** test as a good working rule but added at p. 283

> "...that the test is one of oppression, and the court should not slide into application of a general balance of convenience test."

To the same effect was Millett LJ at pp. 287 and 288.

46. In **Regan v Paul Properties Ltd** Mummery LJ summarised the relevant principles to be derived from **Shelfer** as:

> "(1) A claimant is prima facie entitled to an injunction against a person committing a wrongful act, such as continuing nuisance, which invades the claimant's legal right.
>
> (2) The wrongdoer is not entitled to ask the court to sanction his wrongdoing by purchasing the claimant's rights on payment of damages assessed by the court.
>
> (3) The court has jurisdiction to award damages instead of an injunction, even in cases of a continuing nuisance; but the jurisdiction does not mean that the court is "a tribunal for legalising wrongful acts" by a defendant, who is able and willing to pay damages: per Lindley LJ at pages 315 and 316.
>
> (4) The judicial discretion to award damages in lieu should pay attention to well settled principles and should not be exercised to deprive a claimant of his prima facie right "except under very exceptional circumstances." (per Lindley LJ at p 315 and 316).
>
> (5) Although it is not possible to specify all the circumstances relevant to the exercise of the discretion or to lay down rules for its exercise, the judgments indicated that it was relevant to consider the following factors: whether the injury to the claimant's legal rights was small; whether the injury could be estimated in money; whether it could be adequately compensated by a small money payment; whether it would be oppressive to the defendant to grant an injunction; whether the claimant had shown that he only wanted money; whether the conduct of the claimant rendered it unjust to give him more

> than pecuniary relief; and whether there were any other circumstances which justified the refusal of an injunction: see AL Smith LJ at pages 322 and 323 and Lindley LJ at page 317."

47. In reaching his conclusions Simon J referred to the summary of **Shelfer** contained in the judgment of Mummery LJ in **Regan.** In addition he referred to the judgments of Sir Thomas Bingham and Millett LJ in **Jaggard** but not to those parts of them which equated the exceptional circumstances required by **Shelfer** to justify withholding an injunction to oppression of the defendant if an injunction is granted. The reasons given by the judge in paragraph 87 of his judgment are not related to either exceptional circumstances within the broad illustrations given by Mummery LJ in **Regan** or otherwise, nor to being oppressive of the defendant. I agree with counsel for the claimants that though, at an earlier stage, the judge recognised the limitations on his discretion to withhold an injunction when it came to exercising his discretion he did not give effect to them.

48. I also accept the criticism of counsel for the claimants that the second reason given by the judge in paragraph 87 of his judgment is illogical. The mere fact that a claimant may be prepared to accept monetary compensation up to a certain level of inconvenience does not mean that he is either willing or capable of being compensated with money for inconvenience suffered in excess of that level. For these two reasons I accept that the judge's conclusion is one with which this court is entitled to interfere; the remaining question is whether we should.

49. Counsel for the defendants seeks to justify the judge's conclusions with a raft of considerations which the judge did not mention. He relies on the delay to which the judge referred and the expenditure incurred by the defendants in improving the circuit and minimising the effect of the noise it generates. He submits that the court should have regard to the public interest to which the judge referred in paragraph 88 of his judgment, the facts that the evidence established that there is nowhere else in the north east where the defendants activities can be carried on and that those activities are subject to the control of the local planning authority in accordance with the s.106 Agreement.

50. Counsel for the claimants dealt with these points seriatim in his written argument in reply. For the most part I accept his observations. At the core of them is the basic position of the claimants, as recorded by Simon J in paragraph 33 of his judgment, to the effect that the claimants do not seek to prevent the defendants' core activities. Most of the expenditure on the circuit on which the defendants rely is directed to those activities, as the judge recognised in paragraph 80 of his judgment. The fact that some of the expenditure was on unsuccessful measures to avoid a nuisance can hardly support a case for refusing an injunction. The judge must have concluded that the defendants' core activities could be carried out within the limit of the 40 N1 to N4 days which he considered was the threshold for the alleged nuisance. As the s.106 Agreement allowed many more, by definition, it could not be the appropriate restriction of the defendants' activities.

51. There remains the public interest element to which the judge referred in paragraph 88. In a marginal case where the damage to the claimant is minimal I can accept that, consistent with the principles of **Shelfer,** the effect on the public of the grant of an injunction is properly to be taken into account. But the fact that the public benefit might be relevant in those circumstances does not mean that its existence can, alone, negate the requirement of exceptional circumstances or oppression of the defendant which both **Shelfer** and **Jaggard** clearly require. There was no evidence or finding of the judge as to the effect on the public interest of a restriction on the defendants' use of their circuit to their core activities. But even if there were I am unable to see how this could be regarded as a marginal case so as to let in consideration of the public interest.

52. The judge did not weigh his conclusion on whether to withhold an injunction with his later findings in relation to the diminution of the value of the claimants' properties consequential on the nuisance he found. Given the scale of his award of damages the injury to the claimants' rights can hardly be described as small. Nor are any of the other illustrative circumstances referred to by Mummery LJ in paragraph 36(5) of his judgment in **Regan** present in this case.

53. In summary this case appears to me to be one of substantial injury to the claimants in their enjoyment of their properties. The grant of an appropriate injunction so as to restrict the defendants to their core activities would not be oppressive of them. Nothing occurred in the period of delay to which the judge referred, namely March 2003 to February 2005, to render the grant of an injunction unconscionable; in particular the expenditure of the defendants was directed to their core activities, not just those of vehicle testing or track days to which the claimants objected.

54. For these reasons I conclude that Simon J was wrong not to have granted an injunction to the claimants restricting the defendants use of their circuit to 40 N1 to N4 days a year. I would allow the claimants appeal and grant such an injunction.

Summary of conclusions

55. For all these reasons I would:

(1) dismiss the appeal of the defendants,
(2) allow the appeal of the claimants,
(3) vary the order of Simon J so as to include an injunction on the lines of that described in paragraph 54 above.

For the reasons given in paragraph 22 above, if the other members of the court agree with my conclusions, I would invite counsel for the parties to consider and, if possible, agree on the extent to which the judge's award of damages needs to be varied to take account of the grant of the injunction to which I have referred.

Lord Justice Richards

56. I agree.

Lady Justice Hallett

57. I also agree.