PLANNING, ENVIRONMENT AND NUISANCE

Planning a Nuisance?

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Our relatively small and densely populated country has always had to cope with issues of conflicting use of land. With an ever increasing population, as well as wider environmental concerns, the pressures have perhaps never been greater.

It is therefore inevitable that changes that the planning process frequently result in conflict between the developer's interests and those of the existing occupiers. There is increased reliance on developing brown-field sites for housing (with additional streamlined planning processes promised) as well as the proliferation of wind farms being two common situations where these conflicts arise.

In both situations – i.e. where a planning development is likely to bring people into contact with a property where activities that may amount to a nuisance are being carried out ('coming to the nuisance'), and where the development itself is likely to be the subject of a nuisance complaint ('causing a nuisance'), those involved with the planning applications or advising those affected by them, ought to have regard at the planning stage to any likely consequences on the subsequent ability to use the land.

Causing a nuisance

While the general principle is that every person has the right to reasonable enjoyment of their land, and that right subsists regardless of planning consent being granted, the Supreme Court in *Coventry and others v Lawrence and another* [2014] UKSC 13 provided various nuances to the general principles that can substantially affect both victim and perpetrator of any alleged nuisance.

Setting aside any issues of prescriptive rights and easements, it is clear from the various judgements given in *Coventry v Lawrence* (including Lord Neuberger criticising his own judgement in *Barr v Biffa Waste Services Ltd* [2013] QB 455 as being 'unduly simplistic') that the effect of planning upon a nuisance action is not as straightforward as many have contended.

Significantly the door has been left open, in certain cases, for documents and considerations used within the planning process to be taken into account in any subsequent nuisance action. Lord Neuberger dealing with the use of such evidence saying:

"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."

Lord Carnwath took the matter further saying that a planning permission may be relevant in two distinct ways in any subsequent nuisance claim:

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."

Of course, whatever the merits of any admissibility arguments in subsequent civil action for nuisance or enforcement proceedings, the first port of call for many complainants is the local authority - whose environment officer's approach to the issues in practice will almost certainly take these considerations into account in determining their approach to the conflict.

Coming to the nuisance

In *Coventry v Lawrence* Lord Neuberger (paras 56 and 58) identified two key considerations.

"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)

It followed that:

"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."

It is likely that the undertaking affected by an application where the planning permission

causes the complainant to come to the nuisance will be a third party to the planning application.

The rights of 'third parties' affected by the planning process are severely restricted. (Although there are the obvious statutory exceptions such as the provisions of Sections 279 to 282 of the Town and Country Planning Act 1990. (Compensation to Statutory Undertakers)).

Legal challenges to the grant of permission are permissible by any party who can show locus; however, the scope of such challenge cannot alter a decision on policy where all factors have been properly considered in granting the permission.

The question remains, to what extent a business or individual who is likely to have their activities curtailed by a nuisance complaint should try to involve themselves in the planning process through the consultation process? The possible permutations are endless and there can clearly be no definitive answer. In the ordinary course of a planning application though, this will afford the only opportunity for the 'third party' to make representations as to the nature of the development, planning conditions or 106 agreements that could be used to mitigate the threat of later action. It could also afford an opportunity to set out a position from which a defence to a nuisance claim could later be founded. It is clear from the judgement in *Coventry v Lawrence* that where the planning authority has made a fully informed grant of permission in circumstances where the case for and against the grant was detailed and carefully considered and took into account the matter(s) complained of, that could assist the respondent to a nuisance claim.

Where the grant of planning permission causes a nuisance.

In the second situation, whereby the execution of a grant of planning permission gives rise to a nuisance, there remains very little scope for using the grant of permission as a defence to a nuisance complaint. Lord Neuberger clearly re-iterated existing principles stating:

> " 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."

Lord Mance in his judgement added the following:

> "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."

Lord Carnwath spoke of the planning authority's decision as a non-binding "starting point" for consideration of the issue

Proactive involvement in the planning process?

While there is no doubt that the grant of planning permission of itself will not afford a defence to a claim or prosecution for a nuisance, it is clear from their Lordships' judgements in *Coventry v Lawrence* that, while not binding on the judge, compliance with a carefully designed set of conditions while not being determinative, could be used to assist the court.

While it may be superficially attractive to a developer to underplay or mask areas of concern in relation to a development that are likely to result in a nuisance complaint in order to succeed in a planning application, consideration ought to be given to the later defensibility of the position if, or when, the complaints start to arise.

For example, the grant of unconditional planning permission for the erection of a wind farm that is being objected to by local people, while giving immediate room for manoeuvre for the applicant, is likely to afford no assistance when the complaints result in the service of an enforcement notice or civil proceedings for injunctive relief or damages. Following the same example, a detailed consideration of the ETSU-97-R standards as to the likely effect of the wind farm on the locality when planning permission is granted (possibly together with conditions) could be taken into account by later courts in determining not only whether there is a nuisance, but also if proved, whether the remedy lies in injunctive relief or damages.

Conclusions

Of course every situation is different, but especially in cases where a complaint is likely to follow a development based upon the grant of planning permission, consideration ought to be given as to whether the applicant is best placed to deal with these issues as part of a planning process.

Likewise, operators of facilities that are likely to receive complaints from occupiers of a new development need to consider how actively they become involved in the application process. Is it sufficient to register their concern/objection, or should a more active stance be adopted dealing with the details of likely disputes? Failure to get involved in that situation, in practical terms, will result in the existing business creating the alleged nuisance or having to foot bill, either through remediation of the 'nuisance', changing their work practices, having to relocate their operations or even having to close them as well as possibly being faced with a damages claim.

The answer to the question whether it is better to become proactively involved in the planning process where a nuisance action is likely to follow the grant of permission will be case specific. What is clear though is that an active consideration of the implications at the planning stage might well prove the adage , ‘An ounce of prevention is better than a pound of cure.’

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