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NUISANCE BY NOISE—THE UK SUPREME COURT ON INTERFERENCE WITH THE USE AND ENJOYMENT OF LAND

Lawrence v Fen Tigers Ltd[1]

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I. INTRODUCTION

Private nuisance cases rarely come before the United Kingdom's (UK) highest court,[2] and cases focusing on interference with the use and enjoyment of land (rather than physical damage or encroachment) are rarer still. Indeed, although there was some discussion of this aspect of private nuisance in *Hunter v Canary Wharf Ltd*,[3] the last case at the highest level fully to canvass the factors relevant to a claim for interference with use and enjoyment of land was *St Helen's Smelting Co v Tipping*,[4] decided by the House of Lords in 1865. Now, in *Lawrence*, the Supreme Court has been called on in a claim relating to noise to determine a number of questions, some focusing specifically on the nature of a nuisance which offends the senses and others raising points of more general application. They include the relevance of prescriptive rights and 'coming to the nuisance', the significance of both a defendant's activity and the planning permission for that activity when determining the character of the neighbourhood in which the activity takes place, and the circumstances in which damages, rather than injunctions, should be awarded in successful actions for nuisance.

The judgments in *Lawrence*, and particularly that of Lord Neuberger of Abbotsbury PSC, contain a number of observations which challenge both conventional

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1 [2014] UKSC 13, [2014] 2 WLR 433 [*Lawrence*].

2 Of the three private nuisance cases to come before the House of Lords in recent decades, two—*Cambridge Water Co v Eastern Counties Plc* [1994] 2 AC 264 (HL) [*Cambridge Water*] and *Transco plc v Stockport MBC* [2004] 2 AC 1 (HL)—concerned physical damage and focused primarily on the application of the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 (HL).

3 [1997] AC 655 (HL) [*Hunter*]. In *Hunter*, the claim related to a tall building which blocked television reception. The House of Lords concluded that this was the equivalent of loss of view or prospect, which had never been actionable. For this reason, the case contains limited discussion of the considerations relevant to determining claims for interference with use and enjoyment.

4 (1865) 11 HL Cas 642 [*St Helen's*]. Although the claim in *St Helen's* was for physical damage, the decision is notable for its comprehensive discussion of the differences between claims for physical damage to land and those for interference with use and enjoyment.

wisdom and established practice. For this reason, the decision marks a significant and potentially controversial development in the law relating to private nuisance.

II. The Facts and the Decisions of the Lower Courts

In 1975, planning permission was granted to construct a stadium for "speedway racing and associated facilities"[5] on agricultural land in Suffolk, and in 1985 the permission was made permanent. Stock car racing started in the stadium in 1984, and by 1997 this activity had also become lawful in planning terms. In 1992, additional permission was obtained for motocross activities on a track to the rear of the stadium, subject to controls over frequency and noise levels, and in 2002 this activity, too, was permitted on a permanent basis. Between 1975 and 2009, the stadium was, on average, used for speedway racing between 16 and 35 times a year, and between 1985 and 2009 it was used for stock car racing between 16 and 27 times a year, although in some years there was no speedway racing, and during 1991 and 1992 there was no stock car racing either. From 1992, the track was "used for motocross to the full extent permitted".[6] In 1995, this activity resulted in noise abatement notices being served, although subsequent proceedings proved inconclusive.

In January 2006, the claimants, Ms Lawrence and Mr Shields, purchased a bungalow, "Fenland", from the previous owners who had lived there since 1984. "Fenland" was surrounded by agricultural land and was located about 560 metres from the stadium and 860 metres from the track. In and after April 2006, the claimants complained to both the defendants[7] and the local council about the noise from the track. The defendants were ordered to carry out work to mitigate the noise, which they eventually did. However, in 2008 the claimants issued proceedings contending that, either individually or cumulatively, the stadium and the track constituted a nuisance.

In the High Court,[8] Judge Richard Seymour QC found for the claimants. With respect to the character of the neighbourhood and the noise emitted, he implicitly concluded that the defendants' own activities should not be taken into account, and overtly concluded that the planning permission on which these activities were based was not relevant. He rejected the defendants' argument that the 20 years of racing activities could create a prescriptive right, but held that, even if such a right *could* exist, it had been precluded by the two-year period of interruption. He therefore granted an injunction[9] to restrain the use of the track and stadium, which he delayed to give the defendants time to reorganise their affairs. (Fenland had, by then, been seriously damaged in a fire, rendering it uninhabitable pending reconstruction.) He also awarded damages for past nuisance.[10]

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5 *Lawrence*, *supra* note 1 at para 7 (Lord Neuberger).

6 *Ibid* at para 11 (Lord Neuberger).

7 There were six defendants: (1) "Fen Tigers", the company (which was dissolved after proceedings were issued) which ran a speedway team at the stadium; (2) the owner of the stadium; (3) the operator of the motocross track; (4) and (5) the joint owners of the motocross track; and (6) a former owner of the stadium.

8 *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB).

9 The injunction was granted against only the second and third defendants.

10 Damages were awarded against the second, third and sixth defendants. The claims against the fourth and fifth defendants were dismissed. The sums awarded against the second and third defendants were

The Court of Appeal[11] (Mummery, Jackson and Lewison LJJ) reversed this decision. Jackson LJ (giving the main judgment, with which his colleagues agreed) held that Judge Seymour had been wrong not to consider the defendants' own activities, or the relevant planning permission, when assessing the character of the neighbourhood. Once these things were taken into account, nuisance could not be established.

III. The Decision of the Supreme Court

The claimants appealed to the Supreme Court.[12] The two defendants[13] who appeared before the Court (comprising Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption and Lord Carnwath JJSC) raised additional arguments when defending the claim at this level. As a result, the following issues fell to be decided. They were summarised by Lord Neuberger, the only member of the Court whose judgment dealt with every issue, and with whom the other judges concurred on most points:

> [T]he 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.[14]

A. *Prescriptive Rights*

Dealing first with the issue of whether a prescriptive right could be established, Lord Neuberger recognised that cases such as *Sturges v Bridgman*[15] had acknowledged the possibility of acquiring a right by prescription to emit noises and vibrations.[16]

£10,325 and £10,425 respectively. However, since the sixth defendant was held to have been responsible for the nuisance only between 28 January and 4 April 2008, he was merely ordered to pay £100.

[11] *Lawrence v Fen Tigers Ltd* [2012] 1 WLR 2127 (CA). The Court allowed the appeal by the second and third defendants, dismissed the claimants' cross-appeal against the judge's dismissal of their claim against the fourth defendant and most of their claim against the sixth defendant, and the judge's refusal to extend the injunction to the fourth and sixth defendants.

[12] The second, third, fourth and sixth defendants were named as respondents.

[13] Only the second and third defendants appeared before the Supreme Court. The fourth and sixth defendants did not appear and were not represented. (On a subsequent restoration of the appeal for a further hearing to determine whether the fourth and sixth defendants were liable in nuisance as landlords, the Court held that they were not liable, since their conduct did not amount to authorisation of, or participation in, the relevant activities: see *Lawrence v Fen Tigers Ltd (No 2)* [2014] UKSC 46, [2014] 3 WLR 555.)

[14] *Lawrence*, *supra* note 1 at para 6.

[15] (1879) 11 Ch D 852 at 863-865 (CA) (Thesiger LJ) [*Sturges*].

[16] *Lawrence*, *supra* note 1 at para 40.

Whatever the practical issues associated with noise-related cases—including possible variations in intensity and volume during the relevant period—a defendant who could establish the "essential feature" of "at least 20 years uninterrupted enjoyment"[17] could therefore acquire a prescriptive right.

In this case, however, the defendants had failed to establish such a right. While the interruption during 1991 and 1992 did not, as Judge Seymour had concluded, preclude the possibility of arguing 20 years' prescription (it having been established in *Carr v Foster*[18] that a short period of inactivity need not prove fatal), it was not enough for them to show that their activities had created "consistent and substantial"[19] noise for more than 20 years. A prescriptive right would exist only where the activity had created *a nuisance* for 20 years, since "[o]therwise, 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."[20] In this case, the evidence fell short of proving that the activities had caused a nuisance to Fenland for 20 years, even ignoring the periods of interruption.[21]

B. *Coming to the Nuisance*

In terms of coming to the nuisance, Lord Neuberger referred, *inter alia*, to both *Sturges*[22] and Lord Halsbury LC's dictum in *London, Brighton and South Coast Railway Co v Truman*,[23] which described the notion as an old one, "long since exploded."[24] And although his Lordship (apparently with some sympathy) noted Lord Denning MR's minority opinion to the contrary in *Miller v Jackson*,[25] he concluded that coming to the nuisance was inconsistent with private nuisance being a property-based tort, in which "the right to allege a nuisance should, as it were, run with the land."[26] However, while observing that in the present case, where the claimant's use of the land was the same as that of previous owners, the law was clear, he went on to say that in cases where a claimant built on, or changed the use of, his property after the defendant had started the activity in question, the claimant should not have the same right to complain.[27] In such circumstances, the issue:

> … 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

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[17] *Ibid* at para 31.
[18] (1842) 3 QB 581.
[19] *Lawrence*, *supra* note 1 at para 142.
[20] *Ibid* at para 143.
[21] *Ibid* at para 145.
[22] *Supra* note 15.
[23] (1885) 11 App Cas 45 (HL).
[24] *Ibid* at 52.
[25] [1977] QB 966 (CA) [*Miller*]. In *Miller*, where the claimant moved in to a new house by a cricket field, Lord Denning, at 978, famously held that there was no nuisance since the cricket club had "spent money, labour and love" on the pitch, asking whether all this was "to be rendered useless… by the thoughtless and selfish act of an estate developer in building… to the edge of it?" Note that, although Geoffrey Lane and Cumming-Bruce LJJ disagreed with Lord Denning on this point, Cumming-Bruce LJ agreed to award damages rather than an injunction.
[26] *Lawrence*, *supra* note 1 at para 52.
[27] *Ibid* at paras 51-53.

land, as part of the character of the neighbourhood—at least if it was otherwise lawful.[28]

C. *The Relevance of the Defendant's Own Activities in Determining the Character of the Neighbourhood*

Turning to the relevance of the defendant's own activities in determining the character of the neighbourhood, Lord Neuberger referred to the concept of "reasonable user", based on the notion of give and take between land owners.[29] He indicated that the character of a neighbourhood must be assessed by taking account of "the established pattern of uses"[30] within it, in which respect a defendant could normally rely on his own activities as constituting part of the relevant character. However—although this might admittedly give rise to an "element of circularity"[31]—a defendant's activities would have to be discounted once it was clear that they could not be carried on without creating a nuisance.[32] In this case, his Lordship concluded that, whatever Judge Seymour's apparent views on the matter, he had in practice taken account of the defendant's activities when he compared the level of noise emitted from the stadium with that "emitted from land used for similar activities".[33]

Lord Carnwath, who delivered a separate judgment on all three of the remaining issues, warned of the need to interpret "reasonable user" objectively. Where the defendant's own activities were concerned, he considered that the established pattern of uses within a neighbourhood would (subject to the residual control provided by the law of nuisance) normally be assumed to represent an acceptable balance, in which respect the defendant's activities could be considered as part of that pattern.[34]

D. *The Significance of Planning Permission in Determining the Character of the Neighbourhood*

On the significance of planning permission, Lord Neuberger considered a number of key cases, including *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd*,[35] *Wheeler v JJ Saunders Ltd*[36] and *Barr v Biffa Waste Services Ltd*.[37] Expressing views broadly shared in separate judgments by Lord Sumption[38] and Lord Mance,[39] he agreed with Carnwath LJ (now Lord Carnwath, and one of his fellow judges) in *Barr* that "[s]hort of express or implied statutory authority to commit a nuisance… there is no basis… for using… a statutory scheme to cut down private law rights."[40]

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[28] *Ibid* at para 55.
[29] *Ibid* at para 5, citing Lord Goff of Chieveley in *Cambridge Water*, *supra* note 2 at 299.
[30] *Lawrence*, *supra* note 1 at para 60.
[31] *Ibid* at para 72.
[32] *Ibid* at paras 72-74.
[33] *Ibid* at para 147.
[34] *Ibid* at paras 183, 187.
[35] [1993] QB 343 (QB) [*Gillingham*].
[36] [1996] Ch 19 (CA).
[37] [2013] QB 455 (CA) [*Barr*].
[38] *Lawrence*, *supra* note 1 at para 156.
[39] *Ibid* at para 165.
[40] *Barr*, *supra* note 37 at para 46, quoted by Lord Neuberger in *Lawrence*, *supra* note 1 at para 92.

Although concluding that courts could look at planning permission to see whether it was sufficiently specific to be of evidentiary value, his Lordship stressed that it could *not* be determinative, and that the mere fact of it having been granted would not normally help a defendant.[41] In this respect, again expressing views with which the majority of his colleagues concurred,[42] Lord Neuberger disapproved the reasoning (although not necessarily the result)[43] in *Gillingham*, where planning permission for the strategic development of a large area was deemed to have changed the character of the neighbourhood.

Following a detailed examination of the relevant cases, Lord Carnwath echoed his conclusion in *Barr* that, presumptively, private rights should not be "overridden by administrative decisions without compensation".[44] However, he accepted that in exceptional cases planning permission might amount to a policy decision fundamentally to change a pattern of uses in an area, and in this respect he disagreed with Lord Neuberger and approved the approach taken in *Gillingham*.[45]

Based on their analysis of this issue, their Lordships held that while the Court of Appeal had been correct in concluding that the relevant planning permissions in this case could be taken into account, it had been wrong to treat them as determinative. There was thus no reason to interfere with Judge Seymour's conclusion that the activities constituted a nuisance.[46]

E. *Remedies*

Having established that the defendants were liable in private nuisance, Lord Neuberger and each of his colleagues—this being the only issue on which all five judges delivered separate judgments—turned to the question of remedies.

Lord Neuberger noted that, in nuisance cases, the usual remedy (in addition to damages for past nuisance) would be an injunction to restrain the defendant from committing such a nuisance in future.[47] In *Shelfer v City of London Electric Lighting Co*, the Court of Appeal had established that damages should be awarded only where the injury to the claimant's legal rights was small, where it was capable of being estimated in money terms and adequately compensated by a small money payment, and where the granting of an injunction would be oppressive to the defendant.[48] However, the court's power to award damages in lieu of an injunction involved "a classic exercise of discretion", which, given the fact-sensitive nature of each case, "should not, as a matter of principle, be fettered",[49] particularly in the way

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[41] *Lawrence*, *ibid* at paras 94-96.

[42] See *ibid* at para 154 (Lord Sumption), at para 162 (Lord Mance), at para 169 (Lord Clarke).

[43] *Ibid* at paras 86-88, 99. Lord Neuberger preferred the alternative ground for the decision, based on discretion.

[44] *Ibid* at para 222.

[45] *Lawrence*, *ibid* at para 223.

[46] *Ibid* at paras 136-139 (Lord Neuberger), at paras 232, 233 (Lord Carnwath).

[47] *Ibid* at para 101.

[48] [1895] 1 Ch 287 at 322, 323 (CA) (AL Smith LJ) [*Shelfer*], referred to by Lord Neuberger in *Lawrence*, *supra* note 1 at para 104.

[49] *Lawrence*, *ibid* at para 120.

suggested by later decisions such as *Regan v Paul Properties Ltd*[50] and *Watson v Croft Promosport Ltd*.[51]

Other considerations—such as the fact that an injunction might force the defendant's business to cease—would also be relevant, as would the possibility of the defendant's employees losing their jobs (although the latter would not necessarily be sufficient to justify refusal of an injunction).[52] The existence of planning permission authorising an activity which must necessarily cause a nuisance by noise might also suggest that an award of damages would be more appropriate than an injunction, particularly where "the planning authority had been reasonably and fairly influenced by the public benefit of the activity".[53] On the other hand, an injunction might be the better remedy where many other people in the neighbourhood were also badly affected by the nuisance.[54] In all cases, courts would have to weigh up competing factors, although it would be advisable "to give as much guidance as possible" to ensure that "while the discretion is not fettered, its manner of exercise is as predictable as possible."[55] For this reason, it should be assumed that an injunction would normally be granted unless a defendant could show that damages were the more appropriate remedy. Where damages *were* awarded, while these might "also include the loss of the claimant's ability to enforce her rights",[56] the courts should be mindful of the strongly held view that damages in nuisance cases "should never, or only rarely, be assessed by reference to the benefit to the defendant in no injunction being granted."[57]

Of the four other judges, Lord Sumption expressed the most radical views. Acknowledging that individual judges would usually lack the relevant information or authority to make an informed assessment about the public interest (or indeed any matter not directly before the court), his Lordship considered that the real question was whether the current principles governing injunctions were consistent with the public interest.[58] In this respect, he concluded that *Shelfer* was out of date and that there was "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… where it is likely that conflicting interests are engaged other than the parties' interests."[59] Moreover, there were "particularly strong reasons"[60] for refusing injunctions where planning permission was involved.

Lord Carnwath agreed that the courts should move away from *Shelfer*, especially where an injunction would adversely affect employees of a defendant's business.[61] Like Lord Sumption, he considered that public interest considerations could be served

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[50] [2007] Ch 135 (CA).
[51] [2009] 3 All ER 249 (CA).
[52] *Lawrence*, *supra* note 1 at para 124.
[53] *Ibid* at para 125.
[54] *Ibid* at para 124.
[55] *Ibid* at para 121.
[56] *Ibid* at para 128.
[57] *Ibid* at para 131.
[58] *Ibid* at para 158.
[59] *Ibid* at para 161.
[60] *Ibid* at para 157.
[61] *Ibid* at para 239.

by more flexibility in awarding damages[62]—although both he and Lord Mance disagreed with Lord Sumption's view that the existence of planning permission could give rise to a presumption that an injunction should not be granted,[63] and Lord Mance indicated that, given the value placed on the undisturbed enjoyment of one's home, it could *not* be concluded that damages would ordinarily be a sufficient remedy in nuisance cases.[64] Both Lord Carnwath and Lord Clarke expressed caution about laying down any rigid rules about the award of damages, given the late stage at which the remedies point had been raised.[65] However, in cases where damages *were* to be awarded, while Lord Carnwath shared Lord Neuberger's uncertainty as to whether they could extend beyond the damage actually suffered,[66] Lord Clarke (who agreed that flexibility was particularly desirable in planning permission cases) was more positive about the arguments for awarding "gain-based damages" to give a reasonable price for the defendant's licence to commit the relevant nuisance.[67]

The Court concluded that an award of damages would be possible in this case (in which respect their Lordships accepted that the issue had not been raised until this stage because the lower courts would have been bound by *Shelfer*). The fairest solution was thus to restore the order granting injunctive relief, albeit with liberty for the defendants to seek to have it discharged and an award of damages made in lieu.[68]

IV. Discussion

While the actual decision in *Lawrence* might not be particularly controversial, some of the reasoning certainly is. Indeed, of the five issues addressed by the Supreme Court, only its analysis of the first—that of the 20 years' prescription—is unlikely to raise any eyebrows. Acquiring a prescriptive right will, as the decision in *Lawrence* illustrates, remain a tall order and a rare occurrence, and it is appropriate that a defendant who wishes to establish prescriptive rights should show that he has actually committed a nuisance, and not merely carried out an activity, without objection for more than 20 years. But if he can do this, he should not be deprived of the right to continue simply because of short periods of inactivity.

With respect to the other issues, however, there is much more to question. First, while paying lip-service to the notion that coming to the nuisance was a long-abandoned concept, and while acknowledging that Lord Denning's (widely criticised) judgment in *Miller*[69] had not been embraced by his fellow judges, Lord Neuberger effectively resurrected it by suggesting that where a claimant changed the use of land he should be unable to complain about the defendant's activities. Given

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[62] *Ibid* at para 240. In this respect, Lord Carnwath examined authorities from various jurisdictions, concluding that while the courts in Australia and New Zealand had generally followed *Shelfer*, a more flexible approach had been adopted in Canada and the United States (*ibid* at paras 241-243).

[63] *Ibid* at para 167 (Lord Mance), at para 246 (Lord Carnwath).

[64] *Ibid* at para 168.

[65] *Ibid* at paras 238, 239 (Lord Carnwath), at para 171 (Lord Clarke).

[66] *Ibid* at para 248.

[67] *Ibid* at paras 169-173.

[68] *Ibid* at paras 150-152 (Lord Neuberger).

[69] *Supra* note 25.

that many of the major authorities—including *Sturges*[70] and *Miller*—concern rejection of coming to the nuisance in such circumstances, Lord Neuberger's judgment in this respect is both surprising and alarming. If it were to be followed, it could result in defendants being able to determine the uses to which others could put their land without having to compensate them and without having to acquire prescriptive rights, which would be particularly unfair if the claimant's land had not yet been developed. As one commentator has observed, while in property law the doctrine of original possession can accord rights to the first possessor of a piece of property, the same is *not* true in nuisance, where all the property is owned (or subject to legal title), and where it is irrelevant who acquired his property first.[71] It would therefore "… be most unjust to allow a defence of coming to a nuisance. It would allow the defendant unilaterally to gain control over land that is not his property. That would violate commutative justice."[72]

Second, there is—as Lord Neuberger recognised—a certain circularity to the conclusion that a defendant's own activities may be taken into account as part of the established pattern of uses in a neighbourhood unless they cannot be carried out without creating a nuisance.[73] Moreover, Lord Neuberger appears to have regarded the character of the neighbourhood as the essential (possibly even determinative) factor in deciding whether a particular activity amounts to a nuisance. However, while it is true that the character of the neighbourhood is often important when deciding whether there has been a substantial, and thus unreasonable, interference with a claimant's interests, it is just one of the factors to be weighed in the balance. In establishing how much weight to accord to the various factors, courts look to the controlling "principle of reasonable user",[74] with its emphasis on give and take between neighbours. But this concept, while apparently fundamental, is notoriously difficult to apply. Lord Carnwath noted as much when he expressed concern about its use as a test, and acknowledged it to be the subject of academic criticism on the basis that: "it is presented as an explanation of the operation of the law, but it does not, cannot, explain anything."[75]

Third, on the related issue of the role of planning permission in assessing the character of a neighbourhood, the decision involves a degree of fence-sitting. For while their Lordships agreed that private law rights should not be undermined in the absence of specific statutory authority, and that planning permission would generally be of little use when determining whether an activity amounted to a nuisance, they

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[70] *Supra* note 15.

[71] Allan Beever, *The Law of Private Nuisance* (Oxford and Portland, Oregon: Hart Publishing, 2013) at 65-67. Discussion of this and other points also draws on views expressed in an email exchange among members of the Obligations Discussion Group ("ODG") between 28 February and 1 March 2014.

[72] Beever, *ibid* at 67.

[73] See text accompanying note 31.

[74] *Cambridge Water*, *supra* note 2 at 299 (Lord Goff). See also text accompanying note 29.

[75] *Lawrence*, *supra* note 1 at para 179, quoting Beever, *supra* note 71 at 10. See also Tony Weir, *An Introduction to Tort Law*, 2d ed (Oxford: Oxford University Press, 2006) who observes at 160: "Reasonableness is a relevant consideration… but the question is… what objectively a normal person would find… reasonable…" In addition, in cases such as *Lawrence* the notion of "give and take" is of limited relevance, since there is no reciprocity, but merely one party invading the interests of the other (see ODG discussions referred to, *supra* note 71, and specifically the views of Jason Neyers, emailed on 1 March 2014).

nevertheless concluded that courts could look at planning permission to determine its evidentiary value. Moreover, although Lord Neuberger and the majority rejected the *Gillingham*[76] analysis and held that, even in the case of a major strategic development, planning permission could *not* be the determining factor in assessing the character of the neighbourhood, Lord Carnwath indicated that he considered *Gillingham* to be acceptable in such situations—suggesting that debate on this point might not be at an end.

Planning permission also reared its head in relation to remedies—the final, and most important, issue addressed by the Supreme Court in *Lawrence*. The emphasis placed by the Court on public interest in general, and planning permission in particular, when determining the appropriate remedy has opened a can of worms. The decision effectively to overrule *Shelfer*[77] could have significant repercussions, particularly if its consequence is to undermine the rights of individuals whose interests conflict with what is perceived to be the public good. It has long been accepted that public benefit is not one of the factors to be taken into account when deciding whether an activity constitutes a nuisance,[78] and hitherto (with the possible exception of strategic planning permission in *Gillingham*-type situations) only statutory authority has protected a defendant from liability on the basis of public interest. Now, however, the Supreme Court has apparently let in by the back door that which could not enter by the front. Even though, as Lord Sumption acknowledged, judges will often lack the proper evidence to make a decision of this kind,[79] we may begin to see courts allowing defendants to continue violating the interests of claimants on the basis that the public interest justifies an award of damages in lieu of an injunction. This could extend far beyond the kind of national defence considerations which have previously justified refusal of injunctions in cases such as *Dennis v Ministry of Defence*,[80] and it would be particularly unfair if the damages awarded were to reflect only the actual diminution in the property's value, with no account being taken of the defendant's gain in continuing the nuisance.

Although the majority of their Lordships were unwilling to go as far as Lord Sumption in considering that damages should effectively be the default remedy in public interest cases, the decision to move away from *Shelfer* nevertheless represents a significant step, particularly since *Lawrence* offers no indication as to how private rights and public interest considerations are to be balanced when deciding whether or not to grant injunctions. Much will now depend on the extent to which the courts are able to formulate workable guidelines to ensure an acceptable level of predictability.

V. Conclusion

Lawrence is an important decision, and one which may have wide-ranging consequences, particularly with respect to the possible revival of coming to the nuisance and the prominence accorded to the public interest when determining the appropriate remedies in successful actions for interference with use and enjoyment of land. It is,

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[76] *Supra* note 35.
[77] *Supra* note 48.
[78] See *eg*, *Kennaway v Thompson* [1981] QB 88 (CA) (*cf Miller*, *supra* note 25).
[79] *Lawrence*, *supra* note 1 at para 158. See also text accompanying note 58.
[80] [2003] EWHC 793, [2003] Env LR 741 (QB).

of course, possible that courts will view the decision with circumspection—the coming to the nuisance point was, after all, *obiter*, and where remedies are concerned, it is likely that, at least initially, the tendency will be to award damages in lieu of injunctions only in exceptional cases. However, at the very least, the decision has re-opened questions which were thought to have been settled.

Only a limited number of private nuisance cases have come before the Singapore courts, and very few have involved the issue of use and enjoyment of land.[81] No contemporary case has discussed coming to the nuisance,[82] and reference to *Shelfer*[83] has been on matters other than the question of when an injunction may be refused.[84] Nevertheless, while decisions by the UK's highest court no longer carry the weight they once did, they remain of persuasive value. So—on the assumption that an appropriate case will at some point arise—we will wait to see how much of the reasoning in *Lawrence* finds favour in this jurisdiction.

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[81] For a rare case involving a claim for interference with use and enjoyment, see *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] SGHC 158. The claim failed since it was brought on behalf of the claimant's employees, who lacked the requisite *locus standi*.

[82] *Sturges*, *supra* note 15, was, however, referred to in *Fragrance Realty Pte Ltd v Rangoon Investment Pte Ltd* [2013] SGHC 70 at para 29 in the context of acquiring a prescriptive right.

[83] *Supra* note 48.

[84] In *Epolar System Enterprise Pte Ltd v Lee Hock Chuan* [2003] SGCA 10 at para 9, *Shelfer* was referred to in the context of determining who had a right to sue.