Neutral Citation Number: [2022] EWHC 1909 (QB)

Case No: QA-2022-MAN-000002

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM MANCHESTER MAGISTRATES' COURT
IN THE MATTER OF PROCEEDINGS UNDER
SECTION 82 OF THE ENVIRONMENTAL PROTECTION ACT 1990

Liverpool Civil and Family Court.
35, Vernon Street, Liverpool L2 2BX

Date: 25/07/2022

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

Dr Merren Jones **Dr Stephen Covey-Crump** **David Howe**	**Appellants**
- and -	
Chapel-en-le-Frith Parish Council	**Respondent**

- -
- -

Piers Riley-Smith (instructed by **Richard Buxton Solicitors**) for the **Appellant**
No Attendance or Representation for the **Respondent**

Hearing date: 8 July 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. This is an appeal by way of case stated against the decision of District Judge (Magistrates' Courts) McGarva to dismiss the appellants' application for an abatement order in respect of an alleged statutory noise nuisance.
2. The appellants all live close to a Multi Use Games Area ("MUGA") and the skate park both of which are located in the Chapel-en-le Frith Memorial Skate park in Derbyshire and responsibility for which lies with the respondent.
3. They allege that the noise emanating from the activities carried out on the MUGA and the skate park is such as to amount to a statutory nuisance. It includes:
   - ball strikes, kicks and bounces from the MUGA;
   - impact noise of skateboards and other equipment on the metal ramps and installations in the skate park;
   - noise from shouting from users of the MUGA and the skate park; and
   - noise from music played in the MUGA and the skate park.
4. In finding against the appellants, the District Judge held that there was a sharp legal distinction to be drawn between, on the one hand, noise which was generated as a result of the "intended use" of the MUGA and skate park and, on the other, "anti-social use" (such as the playing of loud music and the continued use of the facilities after they were intended to be closed). He concluded that the latter did not fall to be taken into account in his assessment as to whether the allegation of nuisance had been made out.
5. He also found that the appellants had been rendered hypersensitive by the anti-social behaviour elements of what had been going on at the MUGA and the skate park but for which they would not have been so adversely affected by the noise arising from their intended use.
6. The appellants challenge these findings on the basis that they are founded upon a misunderstanding of the law.

THE LAW

7. Section 79 of the Environmental Protection Act 1990 ("the 1990 Act") provides insofar as is material:

> "(1) … the following matters constitute "statutory nuisances" for the purposes of this Part, that is to say—
>
> ....
>
> (g) noise emitted from premises so as to be prejudicial to health or a nuisance…"

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

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

10. Under s.82(4):

> "Proceedings for an order under subsection (2) above shall be brought—
>
> (a) … against the person responsible for the nuisance;…
>
> (c) where the person responsible for the nuisance cannot be found, against the owner or occupier of the premises."

11. In ***R v Carrick DC*** [1996] Env. L.R. 273 it was held in the context of statutory nuisance:

> "In principle "nuisance" has its common law meaning, either a public or a private nuisance."

12. The question therefore arises as to whether the noises generated by the anti-social behaviour complained of by the appellants falls within the scope of this regime. This issue is reflected in the first two of the three cases stated by the District Judge:

> "1. Was I wrong not to deal with the issue of whether the noise was injurious to health given that I found that it was the antisocial behaviour rather than the intended use of the MUGA and skate park which led to sleeplessness?

> 2. Was I wrong to distinguish between noise generated by the intended use of the premises and noise emanating from antisocial behaviour associated with the premises?"

13. With respect to the second main issue, concerning hypersensitivity, the authority of greatest relevance is of some vintage. In ***Gaunt v. Fynney*** (1872) 8 Ch App 8 the plaintiffs lived next to a property in which machinery, which included a boiler, was operated. On one occasion, a sudden noise had alarmed members of the plaintiffs' household and, since that time, the plaintiffs were convinced that the boiler was dangerous. As a result, the noises which it made thereafter became a permanent source of irritation and uneasiness to them. Against this background, the court held:

> "…a nervous, or anxious, or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance, originating within himself, sounds which at other times would have been passively heard and not regarded."

Against this background, the plaintiffs' claim in nuisance failed.

14. The issue of hypersensitivity arises in the third question raised by way of case stated:

> "Can antisocial behaviour which includes noise that derives from the nuisance causing premises prevent a finding of statutory nuisance on the basis that such antisocial behaviour has resulted in the complainants being found to be hypersensitive due to the antisocial behaviour?"

THE CENTRAL DISTINCTION

15. In paragraph 45 of his judgment the District Judge held:

> "There is in my view a distinction between noise amounting to anti-social behaviour which is consequential to the presence of the MUGA alone and noise which comes from the intended use of the MUGA which is playing ball games. I do not think the parish council should be held responsible for anti-social behaviour."

16. The District Judge reiterated this approach in paragraph 2 of his case stated:

> "Having made those findings of fact I concluded that I should distinguish between noise created by the use of the skate park and MUGA for their intended uses; i.e. skateboarding and playing football and the use of the areas for anti-social behaviour. I concluded that the parish council should not be

> responsible for noise which emanated from acts of antisocial behaviour including the use of the MUGA and skate park after dark. The skate park as with any public open space can be a magnet for antisocial behaviour; the removal of the skate park or MUGA would not necessarily remove the antisocial behaviour. It is important to bear in mind a finding of nuisance confers criminal liability and can give rise to a fine; the Parish council should not be responsible for acts outside its control. It was contended by the complainants that I should not draw that distinction. Effectively the complainants are contending that section 82 confers absolute liability."

17. Although the District Judge thus articulated his reasons for concluding that it would be a generally good thing that "anti-social noise" should be distinguished from "intended use noise", he did not clearly explain the legal basis upon which this distinction fell be to made. It is therefore necessary to explore whether such a legal foundation can be established.
18. Furthermore, the respondent to this appeal chose, as they had every right to do, not to appear on this appeal. Although they had earlier indicted that a skeleton argument would be provided, it, unfortunately, never materialised. Accordingly, this Court has been driven to do its best to consider the merits of what may have been contended on behalf of the respondent without the benefit of its input.
19. It is also to be noted that the "intended noise"/"anti-social noise" distinction drawn by the District Judge was not one which had been relied upon or referred to by either party before him. It was, I am informed, entirely the product of his own creative input.
20. In this context, I am grateful to Mr Riley-Smith acting on behalf of the appellants for the care with which he has sought, in fulfilment of his duty of candour, to articulate what contentions may have been raised on behalf of the respondents to this appeal had they chosen to make an appearance.

PUBLIC NUISANCE AND ANTI-SOCIAL BEHAVIOUR

21. The respondent made the point in its skeleton below that some of the matters about which the appellants were complaining did not fall within the scope of section 79(1)(g) of the 1990 Act because they comprised anti-social behaviour which was unrelated to the emission of noise. These included, for example: the throwing of eggs; verbal abuse and acts of trespass. Such conduct fell within the scope of the anti-social behaviour regime provided under the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act").
22. The appellants have readily conceded the strength of this point and do not seek to argue that anti-social behaviour not involving the emission of noise falls to be considered by the court.

23. However, the District Judge went further than this holding, as he did, that even anti-social behaviour which *did* involve the emission of noise was excluded from his consideration.
24. The conduct covered by the 1990 Act and the 2014 Act are not mutually exclusive. Section 2 of the 2014 Act provides:

> "(1) In this Part "anti-social behaviour" means—
>
> (a) conduct that has caused, or is likely to cause, harassment, alarm or distress to any person,
>
> (b) conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises, or
>
> (c) conduct capable of causing housing-related nuisance or annoyance to any person."

25. The point is made in the publication *Home Office Anti-social behaviour powers: Statutory guidance for frontline professionals (June 2022)* which explains in respect of Community Protection Notices under section 43 of the 2014 Act the relationship between the two regimes:

> "**Community Protection Notices and statutory nuisance**: Issuing a Community Protection Notice does not discharge the council from its duty to issue an Abatement Notice where the behaviour constitutes a statutory nuisance for the purposes of Part 3 of the Environmental Protection Act 1990. A statutory nuisance is one of the matters listed in section 79(1) of that Act which, given all the circumstances, is judged to be 'prejudicial to health or a nuisance'…
>
> While a Community Protection Notice can be issued for behaviour that may constitute a statutory nuisance, the interaction between the two powers should be considered. It remains a principle of law that a specific power should be used in preference to a general one."

26. It follows that there is no legal basis for drawing a distinction *per se* between noise emitted as a result of anti-social behaviour and "intended use" noise.

INTENDED USE

27. The District Judge sought to define the limits of the respondent's duties and responsibilities to the noise emitted as a result of the intended use of the MUGA and skate park.
28. Under the common law, responsibility for a nuisance is not necessarily limited to the direct perpetrator of any activity giving rise to the undue

interference. A failure to act may sometimes give rise to liability in nuisance at common law. As Lord Neuberger observed in ***Coventry & others v Lawrence and another*** [2014] UKSC 13 at paragraph 3:

> "A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land."[1]

29. The leading case on liability in nuisance for failing to act is ***Sedleigh-Denfield v O'Callaghan*** [1940] AC 880. In which Lord Wright held at page 904:

> "If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, readymade as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it."

30. A recent example of liability in nuisance caused by noise arising through omission to act can be found in ***Cocking v Eacott*** [2016] Q.B. 1080. In that case, the defendant was the owner of a house in which she allowed her daughter to live. The defendant, herself, lived elsewhere. The constant barking of her daughter's dogs prompted the claimant, who lived next door, to sue the defendant in nuisance. The Court of Appeal concluded that the defendant was liable holding at paragraph 25:

> "An occupier... will normally be responsible for a nuisance even if he did not directly cause it, because he is in control and possession of the property. The cases show that an owner may be regarded as an occupier of property for these purposes even if he has allowed others to live or undertake activities on his land. In the Sedleigh-Denfield case [1940] AC 880, 903, 905 Lord Wright made clear that the liability attaches to an occupier because he has possession and control over the property. There was a debate before us as to whether the principle to be extracted from the Sedleigh-Denfield case was either (i) that an occupier is liable if he continues or adopts the nuisance by

[1] I note, in passing, that the need for any given claimant to have an interest in land is not a prerequisite to establishing a statutory nuisance as opposed to a common law.

> failing to abate it without undue delay after he became aware of it or with reasonable care should have become aware of it (as Lord Wright said, at pp 904–905), or (ii) that an occupier is liable if he continues the nuisance by failing to take any reasonable means to abate it after he became aware of it or should have done so (which was how Viscount Maugham, at p 894, and Lord Romer, at p 913, put the matter). In fact, both Lord Atkin, at p 899, and Lord Porter, at p 919, formulated their propositions in a similar way to Lord Wright, so I think that Mr MacBean's submission that the obligation on an occupier was limited to taking "reasonable means" to abate the nuisance was ill-founded. Rather, Ackner LJ was right in the Page Motors case 80 LGR 337, 345–346 to cite only Lord Wright's formulation, since he was in the majority."

There was no suggestion that the defendant could have escaped liability on the basis that she had not intended that her daughter should keep a dog which barked excessively.

31. The statutory regime is similar to the common law approach in that section 82(4)(c) of the 1990 Act provides for proceedings for an abatement order being brought "where the person responsible for the nuisance cannot be found, against the owner or occupier of the premises." The common law may, however, be broader in its application to the extent to which it is not necessary (but may nonetheless be a highly material factor) to establish that the person responsible for the nuisance cannot be found. (see, for example ***Lambert v Barratt Homes Ltd and another*** [2010] EWCA Civ 681).
32. The first stage of the statutory process requires the magistrates' court to determine whether the nuisance exists. If there is a nuisance then only those parties falling within the scope of section 82(3) of the 1990 Act are liable to be required to abate the nuisance. Once the magistrates' court is satisfied that a nuisance exists the wording of section 82(2) requires the court to make an order. There is no discretion to decline to make an order.
33. However, it is open to the court to postpone making an abatement order to give the parties an opportunity to assist the court in determining what steps are needed to achieve the objectives of s82(2) (see ***Milne and others v Stuartfield Windpower Limited*** [2019] SC ABE 25). This because abatement in the case of noise nuisance does not automatically involve a requirement to cease all noise at all times. As was recently pointed out in ***Frank A Smart & Son Ltd v Aberdeenshire Council*** [2022] WL 00309248:

> "…we note the inherent flexibility in the words "abate" and "nuisance". The notice does not, as the appellant fears, force shutting down of the turbines on the basis that it is the only

> guaranteed method of stopping the noise. Not all noise amounts to a nuisance. Abatement does not necessarily require elimination."

I note in passing that Scottish law is, in substance, identical to that in England and Wales with respect to the operation of the statutory scheme.

34. In my view, the District Judge fell into error by excluding from his consideration all "anti-social noise" from the outset. Neither the statutory regime nor the common law of nuisance proceeds on the basis that liability in nuisance is circumscribed by the use to which premises were intended to be put rather than those to which they came actually to be put.
35. The first question to be answered was, therefore, whether the noise emanating from the MUGA and the skate park amounted to a nuisance with respect to the appellants. The appellants contend that the respondent did not dispute that it was responsible for the nuisance before the District Judge. But even if that concession had not been made, the respondent was clearly the owner and occupier of the MUGA and the skate park. If it were a necessary pre-condition to establish "responsibility" on the part of the defendant for the nuisance then s. 82(4)(c) of the 1990 Act would be meaningless because it is premised on the assumption that proceedings may be brought against the owner or occupier of the premises only when the person responsible cannot be found i.e. the owner or occupier is not, himself, responsible.
36. The District Judge concluded that the "intended use" noise did not amount to a nuisance but he made no finding as to whether the noise as a whole amounted to a nuisance. It follows that, in my view, he fell into error and left unanswered a question which ought to have been answered before he proceeded to reach his conclusions on the case.
37. As to the issue of hypersensitivity, I am satisfied that the question to be addressed was what, objectively, a normal person would find it reasonable to put up with. The hypersensitivity of any given claimant is not a defence in the event that it would also be unreasonable, in any event, to expect a person of normal resilience to tolerate it. Furthermore, it would normally be wrong to hold that where an actionable nuisance is, in itself, foreseeably causative of hypersensitivity in previously robust individuals that the party liable in respect of the nuisance is thereafter absolved from its consequences. Since the District Judge excluded from the scope of his consideration all anti-social noise, his attribution of hypersensitivity to anti-social behaviour including noise was not, without more, an answer to the appellants' complaints.

ANSWERS TO THE QUESTIONS RAISED BY THE DISTRICT JUDGE

38. The answers to the questions raised by the District Judge are to be answered thus:

    1. Was I wrong not to deal with the issue of whether the noise was injurious to health given that I found that it was the antisocial behaviour rather than the intended use of the MUGA and the skate park which led to sleeplessness?

       Yes. Consideration should have been given to the impact upon health of all noise emanating from the MUGA and the Skate park regardless as to whether it fell to be as a result of intended use or anti-social behaviour.

    2. Was I wrong to distinguish between noise generated by the intended use of the premises and noise emanating from antisocial behaviour associated with the premises?"

       Yes. This is not a distinction which falls to be made under the statutory regime.

    3. Can antisocial behaviour which includes noise that derives from the nuisance causing premises prevent a finding of statutory nuisance on the basis that such antisocial behaviour has resulted in the complainants being found to be hypersensitive due to the antisocial behaviour?

       Not in the circumstances of this case. Since it was impermissible to distinguish between intended and anti-social noise, it was also impermissible to treat anti-social noise, in part, as a cause of hypersensitivity such as to negate a finding of nuisance. In any event, the existence of hypersensitivity is not a defence where even a person of normal resilience would have found the noise to be unreasonable.

REMEDY

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

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

40. At the conclusion of his submissions, Mr Riley-Smith requested that I should reserve my decision on the choice of remedy to allow all parties

time to consider the implications of my findings. I am content with this course. The matter can be relisted for further consideration of the way forward in due course or, if appropriate, be decided on the papers.