Odour nuisance

Barr v Biffa Waste Services Ltd [2012] EWCA Civ 312

Background

The facts of the case could not have been either more simple or straightforward. The defendant waste company operated a landfill site which accommodated pre-treated waste. The claimants, who lived in the vicinity of the site, had been affected by odours which emanated from the site for a period of five years. The claimants brought an action in nuisance against the defendant. By way of a defence, the defendant claimed, firstly, that if in fact the smell from the site did rank as a nuisance, it could avail itself of the defence of statutory authority, and, secondly, by virtue of the fact that the defendant complied both with the terms of its permit which had been issued by the Environment Agency pursuant to the Pollution Prevention and Control (England and Wales) Regulations 2000, and also with the conditions which were attached to the defendant's license under Part 2 of the Environmental Protection Act 1990, the use of the land whence the nuisance arose was reasonable, and, therefore, did not rank as a nuisance in law. At first instance, Coulson J held that whereas the defendant could not avail itself of statutory authority, the odour did not rank as a nuisance since it emanated from the reasonable user of land in question by virtue of the defendant's having complied with its permit (2011) 148 SPEL 141. In the view of His Lordship it was necessary that the common law should 'march in step' with the relevant statutory regime. Such an approach was also in conformity with that which had been taken by the courts in relation to the effect of planning permission in determining the nature of the relevant locality. Coulson J gave a detailed general overview of both EU and also UK legislation which governed the disposal of waste. His Lordship concluded that both the weight and also the extent of such legislation was such that it would be unsatisfactory, to say the least, if the common law did not act in tandem with detailed environmental legislation. His Lordship went on to say that the defendants provided a, 'public service' which, in turn, was provided pursuant to permission which was both 'needed' and also required under a supervisory regulatory regime. To hold Biffa liable in nuisance would make a nonsense of the careful balancing rights (ie between Biffa and the claimants) if Biffa could comply with the detailed terms of the permit, receive glowing reports from the Environment Agency, only to find themselves repeatedly liable in nuisance. The common law required to be flexible in order to survive. In the last analyses, in the instant case, the duties which the defendant owed to the occupiers were four-square with the defendant's obligations in terms of compliance with the relevant permit. The claimants appealed.

Decision

The Court of Appeal upheld the appeal. The leading judgement was given by Carnwath LJ. For his Lordship the, 'prolonged and very expensive battle between the parties,' really involved a 'clash between two potentially irreconcilable principles.' That is to say, on the one hand, the claimants contended that they had inalienable common law rights which were not

affected by the relevant environmental and landfill legislation, including the detailed terms of Biffa's permit. On the other hand, Biffa contended that it would be both unfair and unrealistic if the cascade of legislation and the terms of their permit were ignored. Carnwath LJ outlined the law which fell to be applied to the facts of the case. It was a question of degree whether the interference was sufficiently serious to constitute a nuisance. There also had to be a real interference with the comfort or convenience of living according to the standards of the average man. The character of the neighbourhood had also to be taken into account. Public utility of the activity in question was not a defence. Finally, importantly, there was no absolute standard which could be applied in order to ascertain if the adverse state of affairs ranked as a nuisance. Judged by these principles the case against the defendant was clear-cut. Carnwath LJ then addressed the issue as to whether the detailed statutory regime which governed the operation of the landfill site had any impact on the application of the common law. In the last analysis, was Coulson J correct in asserting that the common law required to be flexible in order to survive? To this question Carnwath LJ answered an emphatic 'no'! For his Lordship 19th century principles concerning the law of nuisance remained valid. There was simply no principle to the effect that the common law should march with a statutory scheme which covered similar matter. In the last analysis, a statutory scheme for regulating landfill sites could not cut down private rights. Neither was the permit, 'strategic' in nature. Nor did the permit change the essential 'character' of the neighbourhood which had long included tipping. The trial judge had set a threshold of one odour complaint day each week (52 each year) regardless of intensity, duration and locality. In other words, if a particular claimant's odour complaint days for a given year exceeded 52 the threshold had been exceeded and a *prima facie* case in nuisance had been made out by reason of the fact that the user of the defendant's land was unreasonable. However, in the opinion of Carnwath LJ there was no general rule which either required or justified the setting of a threshold in nuisance cases. In his Lordship's view, the appropriate test which ought to be applied was simply what a normal person would find reasonable to have to put with. His Lordship then went on to address the somewhat controversial issue of the relevance of planning permission to the question of whether the user of the defendant's land had been reasonable. At first instance, Coulson J had endorsed the view that a strategic planning decision was capable of changing the character of the locality, the upshot of which was that an adverse state of affairs which would otherwise have ranked as a nuisance in law ceased to be so. By analogy, the granting of a tipping permit was clearly strategic and had rendered the use of the tip reasonable. However, in the instant case, the granting of the permit to allow the defendant to dispose of waste, was not strategic. There simply was no pre-determined strategy on the part of the Environment Agency, let alone the planning authority, to transform the area into one for the tipping of pre-treated waste. There was no parallel between the planning permissions which had been granted in the *Gillingham Docks* case and the present case. In the last analysis, the character of the land in question was not affected by the grant of the waste permit. Of importance was the fact that there was no detailed consultation of the likely adverse

implications of the permit in terms of odour nor was there any balancing of the conflicting interests of the residents and the public interest. In the last analysis, there was no change in the character of the relevant land.

Carnwath LJ then gave a meticulously detailed analysis of Coulson J's reasoning in relation to the influence of the statutory regime on the development of the common law and why the former's views differed from the latter. Coulson J had held that notwithstanding the fact that the defendants could not avail itself of the defence of statutory authority in a nuisance action, in effect, the same result could be achieved by linking the statutory framework to the interpretation of the reasonableness principle. For Carwath LJ this was central the reasoning of Coulson J. In essence, the latter had adopted the view that it was contrary to common sense that an activity should not be permitted by one set of specific rules which were derived from detailed legislation yet, at the same time, give rise to liability to a third party by reference to the much more general set of principles which were derived from the common law. For the former, this was the least satisfactory part of the judgement which depended both on a misreading of Lord Goff's speech in *Cambridge Water,* a misunderstanding of both the statutory framework, a misinterpretation of the statutory framework and also a misinterpretation of the permit. In the *Cambridge Water* case Lord Goff, in referring to the increasing number of legislative measures, both national and international which had been taken for the protection of the environment, had expressed the view that there was less need for the courts to develop a common law principle to achieve the same end. However, in the opinion of Carnwath LJ, Lord Goff was referring to the *future* development of the common law, not the re-writing of well-settled principles of the law of nuisance. In the last analysis, Lord Goff's speech provided no support for a general principle that the common law required to be modified either to 'march in step with' or 'to operate in tandem with and sometimes to take a backseat to,' or to yield to environmental legislation.

As far as the setting of an appropriate threshold by means of which one could judge whether the odour in question ranked as a nuisance was concerned, the trial judge had been influenced by several noise cases (*Kennaway v Thomson and Croft v Promo Sports*) which, in the view of Carnwath LJ, had turned on their own particular facts. Furthermore, the threshold in these cases was set for the purpose of control in the future rather than as a means of ascertaining whether the adverse state of affairs ranked as a nuisance in law. In the last analysis, there simply was no precedent which required the claimants to specify a precise limit of acceptable smell.

Conclusions

The decision of the Court of Appeal is to be welcomed, indeed. The approach which was taken by the trial judge, in ascertaining whether the conduct of the defendants was reasonable and, therefore, not a nuisance, was revolutionary and,

indeed, downright eccentric. Really, there was no authority to the effect that the common law should march in step with the plethora of environmental legislation in such a way that private rights should automatically be eclipsed by statutory law. This seems almost like a statement of the obvious, given the fact that a statutory regime for regulating environmental nuisance has been in place since the 1840s.

Finally, one outstanding question which in the author's view requires to be decided by the Supreme Court, is the extent to which planning permission can alter the character of land for the purposes of the law of nuisance. At first instance, in *Barr*, Coulson J had based his decision on the effect of statute on the reasonableness of the user of the defendant's land by drawing on the decided cases on the effect of planning permission on the law of nuisance, where it has been held that planning permission can change the character of relevant land.

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