Trinity Term
[2014] UKSC 46
On appeal from: [2012] EWCA Civ 26

JUDGMENT

Coventry and others (Respondents) *v* Lawrence and another (Appellants) (No 2)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Carnwath

JUDGMENT GIVEN ON

23 July 2014

Heard on 12 May 2014

Appellant
Stephen Hockman QC
William Upton
(Instructed by Richard Buxton Environmental and Public Law)

1st Respondent
Robert McCracken QC
Sebastian Kokelaar
(Instructed by Pooley Bendall Watson)

2nd Respondent
Edward Denehan
Giselle McGowan
(Instructed by Hewitsons LLP)

LORD NEUBERGER (with whom Lord Clarke and Lord Sumption Agree)

Introductory

1. This judgment is concerned with a number of points which arise from this Court's decision in *Coventry v Lawrence* [2014] UKSC 13, [2014] 2 WLR 433. By that decision, we held that the occupiers of a Stadium, David Coventry trading as RDC Promotions, and a Track, Moto-Land UK Limited, were liable in nuisance to the appellants, Katherine Lawrence and Raymond Shields, who were the owners and occupiers of a residential bungalow, Fenland, some 850 yards away. The nuisance arose from the use of the Stadium for speedway racing and other motorcar racing, and the use of the Track for motorcycle racing and similar activities.

2. A summary of the factual and procedural history is set out in paras 7-27 of our earlier judgment. The appellants brought their proceedings not only against Mr Coventry and Moto-Land ("the respondents"), but also against their respective landlords, Terence Waters and Anthony Morley and a predecessor landlord ("the Landlords"). The effect of our decision was to reverse the Court of Appeal and to restore the trial judge's order of 4 March 2011, which was based on his finding that the respondents were liable in nuisance but the Landlords were not so liable. By the time of the trial, Fenland was unoccupied owing to a fire, and it remains in its fire-damaged state to this day.

3. The order made by the Judge included (i) an injunction against the respondents limiting the levels of noise which could be emitted from the Stadium and the Track "to take effect on 1 January 2012 or, if [earlier, when] Fenland is again made fit for occupation", (ii) permission to the parties "to apply to vary the terms of this injunction not earlier than 1 October 2011", (iii) awards of damages of some £10,350 against each of the two respondents, (iv) a provision dismissing the claims against the landlords, and (v) a direction that the respondents pay 60% of the appellants' costs, to be subject to detailed assessment.

4. Subject to further arguments, the effect of our earlier decision is to restore the orders for an injunction and for damages referred to in items (i) and (iii) above, and also the order for costs recorded in item (v). Four further or consequential issues now arise, and they are as follows. First, in relation to item (i), should the injunction be suspended until Fenland is rebuilt? The second issue, which arises out of item (ii), is when the parties should be able to apply to the judge. The third issue, which is raised by item (iv), is whether the Landlords are also liable to the appellants in nuisance. The fourth issue, which concerns item (v), is whether the order for costs against the respondents infringes article 6 of the European Convention on Human Rights ("the Convention"). The first two issues are of no general application, the third issue is of some significance, and the fourth issue concerns a matter which is important.

The two minor issues

5. On the first minor issue, the respondents contend that the injunction should be suspended until Fenland is rebuilt and fit to be occupied again as a residence, whereas the appellants argue that, as the Judge decided, there should be a specific "long-stop" date, by which the injunction should take effect irrespective of the physical state of Fenland. On the face of it, at any rate, it seems to me that there is no reason why the injunction should start to bite so long as Fenland remains unoccupiable. The purpose of the injunction is to prevent activities at the Stadium and on the Track interfering with the ordinary residential use and enjoyment of Fenland. So long as such use and enjoyment is not possible, it is hard to see what justification there can be for maintaining the injunction: it would cause damage to the respondents with no concomitant benefit to the appellants.

6. There are arguments the other way, but they are unpersuasive. Thus, the Judge imposed a long-stop date, but (i) there is no apparent justification for it, and (ii) the date has long passed anyway, so this Court is free to exercise its own discretionary power. It is also said that there is reason to believe that the fire may have been started by one of the many people in the locality who support the continuation of the respondents' activities. That is no more than a suspicion, and the Judge was unable to decide whether the fire had occurred accidentally or had been started deliberately. He did find that an earlier attack on Fenland with a forklift truck had been "to exact revenge upon [the appellants] for the difficulties their complaints had caused to the activities at the Stadium or at the Track", although there was no proof as to who was responsible. In my view, unless it could be shown that the fact that injunction was still suspended in some way prevented Fenland being restored, I do not see why it should take effect before Fenland is restored.

7. It was also argued that the effect of this decision would be that the respondents "could postpone indefinitely the date when the injunction will take effect". However, it is not the respondents, but the appellants, who, by putting off the restoration of Fenland (as they are of course quite entitled to do) can indefinitely postpone the coming into force of the injunction. As the injunction is for the benefit of the residential use and occupation of Fenland, that is scarcely a surprising state of affairs.

8. Turning to the second minor issue, I do not consider that there should be a delay before the parties are able to apply to vary the injunction. The Judge thought that there should a delay, apparently to enable either party to argue that the terms of the injunction were not satisfactory in practice. The appellants contend that, given that this was a matter for the Judge, this Court should adopt the same approach. However, the Judge's approach was inherently flawed as, under his order, the injunction would not have come into effect under item (i) above before either party could have made an application under item (ii).

9. Even more importantly, at least one reason which the respondents will very probably have in applying to the court is to argue that the court should discharge the

injunction on the ground that damages would be an adequate remedy. As explained in para 149-151 of our earlier judgment, in the light of the state of the authorities before we gave our judgment, this argument was understandably not regarded as having much prospect of success, and therefore was not run by the respondents below. However, it now has a prospect of success, and, as is stated in para 152 of the earlier judgment, it should be considered on its merits if it is indeed raised. There is therefore now a good reason, which did not exist when the Judge's order was being considered, for the respondents to be able to apply without having to wait.

The first main issue: the liability of the Landlords in nuisance

10. The first main issue concerns the extent to which the Landlords should be held liable for nuisance which is caused by their tenants, the respondents. At trial, the Landlords do not seem to have made much of the argument that they were in a different position from the respondents. It appears that it was the Judge who took the point that the terms of the leases under which the respondents occupied the Stadium and the Track ("the Leases") contained covenants against nuisance, and that the law as set out in *Clerk & Lindsell on Torts*, 20th edition, para 20-81, indicated that landlords are not liable for nuisance created by their tenants, unless the nuisance was close to inevitable as a result of the letting. On that basis, relying primarily on the terms of the Leases, he dismissed the claims against the Landlords. That decision was upheld by the Court of Appeal on the ground that there was no nuisance, and therefore no consideration was given to the question whether the Judge's reasons for rejecting the claims against the Landlords were justified. However, now that we have held that the respondents are liable in nuisance, the question which arises is whether the Judge was right in holding that their Landlords were nonetheless not liable. I should perhaps add that the appellants' cross-appeal on this issue to the Court of Appeal related simply to Terence Waters ("Mr Waters") and his son James, although claims had been made unsuccessfully against one other defendant under this head.

11. The law relating to the liability of a landlord for his tenant's nuisance is tolerably clear in terms of principle. Lord Millett explained in *Southwark London Borough Council v Mills* [2001] 1 AC 1, 22A, that, where activities constitute a nuisance, the general principle is that "the … persons directly responsible for the activities in question are liable; but so too is anyone who authorised them". As he then said, when it comes to the specific issue of landlords' liability for their tenant's nuisance, "[i]t is not enough for them to be aware of the nuisance and take no steps to prevent it". In order to be liable for authorising a nuisance, the landlords "must either participate directly in the commission of the nuisance, or they must be taken to have authorised it by letting the property".

12. In *Smith v Scott* [1973] Ch 314, referred to with approval by Lord Hoffmann in *Mills* at p 15D-E, Sir John Pennycuick V-C considered at p 321C-D the appropriate test to be applied in order to decide whether landlords had authorised a nuisance by letting a property from which the tenant caused the nuisance. He described "the authorities … [as] not altogether satisfactory", but decided that they suggested that it must be a "virtual

certainty", or there must be "a very high degree of probability", that a letting will result in a nuisance before the landlords can be held liable for the nuisance. As Pickford LJ put it in a case cited with approval by Lord Millett in *Mills* at p 22A, *Malzy v Eichholz* [1916] 2 KB 308, 319, "[a]uthority to conduct a business is not an authority to conduct it as to create a nuisance, unless the business cannot be conducted without a nuisance", a view shared by Lord Cozens-Hardy MR at pp 315-316.

13. When it comes to landlords being liable for their tenant's nuisance by participating in the nuisance, as a result of acts or omissions subsequent to the grant of the lease, the law was considered authoritatively in *Malzy*. Lord Cozens-Hardy at p 316 had no hesitation in rejecting as "an extraordinary proposition" the contention that landlords could be rendered liable by accepting rent and refraining from taking any proceedings against their tenant, once they knew that their tenant was creating a nuisance. As he put it at p 315, by reference to an earlier, unreported case, "there must be such circumstances as to found an inference that the landlord actively participated in the [relevant] use of the [property]", and he referred a little later to the need for "actual participation by [the landlord] or his agents".

14. It was suggested that two decisions of the Court of Appeal, *Sampson v Hodson-Pressinger* [1981] 3 All ER 710 and *Chartered Trust Plc v Davies* [1997] 2 EGLR 83, demonstrated that the law has developed since *Malzy*, so that it is now less easy for landlords to escape liability for their tenant's nuisance than it was 100 years ago. We were not referred to any social, economic, technological or moral developments over the past century in order to justify a change in the law on this topic; indeed, as already mentioned, *Smith* (where Sir John Pennycuick relied on 19th century cases) and *Malzy* (which was decided a century ago) were both cited with approval in the House of Lords less than 15 years ago. *Sampson* was discussed in *Mills* at p 16B-D by Lord Hoffmann, whose implied doubts about the decision I share. If, which I would leave open, the defendant landlords in *Sampson* were rightly held liable for nuisance in that case to the plaintiff tenant, it could only have been on the basis that the ordinary residential user of the neighbouring flat which they had let would inevitably have involved a nuisance as a result of the use of that flat's balcony. In *Chartered*, although the nuisance resulted from the tenant's use of the property, the actual nuisance was caused by people assembling in the common parts, impeding access to the plaintiff's property. Since the landlords were in possession and control of the common parts, where the nuisance was occurring, the decision may well have been justified on orthodox grounds, although, again, I would not want to be taken as approving (or indeed disapproving) the decision that there was a valid claim against the landlords in nuisance in that case.

15. In the present case, there can be no question of the Landlords being liable to the appellants for the nuisance on the ground that it was an inevitable, or nearly certain, consequence of the letting to respondent tenants of their respective demised premises, the Stadium and the Track. The intended uses of those properties were well known to the Landlords at the time of the lettings and those uses have in fact resulted in nuisance, but that is not enough to render the Landlords liable in nuisance as a result of the letting. It is clear from what the Judge said in his judgment and from the terms of the injunction he granted that those uses could be, and could have been, carried on without causing a

nuisance to the appellants. It also appears that, in the past, the use of the Stadium and the Track may well not have given rise to any nuisance. Accordingly, the Landlords cannot be liable in nuisance as a result of having let the Stadium and Track to the respondents.

16. In reaching the same conclusion, the Judge was primarily impressed by the inclusion of covenants against nuisance in the Leases. Unfortunately, as is common ground, he misinterpreted the relevant clause in the Motoland lease. Even if the landlords would have been assisted by a clause prohibiting nuisance, this was not such a clause. On the contrary the prohibition was "subject to" the tenant being allowed to use the premises for the permitted motor-cycle use. This might be taken, if anything, as an indication that the landlords had accepted the risk that the permitted use might cause a nuisance, and deprived themselves of power through the lease to do anything about it.

17. I doubt in any event that such covenants could take matters further either way. If, at the time that the Leases were granted, it was inevitable, or close to inevitable, that the proposed or permitted uses would result in nuisance, then I do not think that the Landlords could have escaped liability by simply taking, or having taken, a covenant against nuisance (even assuming that the covenant, properly construed, would have served to prevent nuisance from the proposed or permitted uses in such circumstances). If, as was held in *Malzy*, landlords do not become liable for their tenant's nuisance simply by failing to enforce a covenant which would put an end to the nuisance, it must follow that, if landlords would otherwise be liable for their tenant's nuisance, they should not escape liability simply by including such a covenant in the lease. Conversely, in a case such as the present where the proposed uses would not necessarily result in nuisance, I do not consider that the Landlords' position would have been weaker if the Leases had contained no covenant against nuisance. As Lord Cozens-Hardy MR put it in *Malzy* at p 319 it is wrong to "render [the landlord] a sort of trustee of [such a] covenant for the benefit of [a neighbour]".

18. Accordingly, if the claim in nuisance against the Landlords is to succeed, it must be based on their "active" or "direct" participation to use the adjectives employed by Lord Cozens-Hardy in *Malzy* and by Lord Millett in *Mills.* The judge appears to have ignored this alternative. Although he referred to the allegations of "orchestration" by Terence Waters, he regarded them as potentially relevant only to a separate claim of harassment, which had not been pleaded. Accordingly he made no, or limited, findings on this issue. That failure is attributable to the fact that the Landlords did not raise at trial the argument that they should not be liable for nuisance if the respondents were so liable, and, as mentioned above, it was the Judge who raised the point, and he went on to decide it on the misconceived basis described in para 16 above. In this Court, the appellants expressly disclaimed the right to contend that it was not open to the Landlords to rely on the argument that they had not authorised or participated in the nuisance despite not having taken the point properly at first instance. While I appreciate the concern shared by Lord Mance and Lord Carnwath in finding for the Landlords in these circumstances, I consider that we have to do our best to arrive at the right result in the light of the evidence and the findings which the Judge made.

19. This creates a difficulty for this court. Although there is little authority on the issue, the question whether a landlord has directly participated in a nuisance must be largely one of fact for the trial judge, rather than law. The difficulty is compounded by the lack of pleadings on the point, attributable no doubt to the late stage at which it emerged. In other circumstances it might be appropriate to remit the matter for further findings on this issue. However, this was not sought by any of the parties, for understandable reasons, given the exorbitant expenditure of time and money already incurred. Accordingly we must do our best on the available material to decide whether the Landlords directly participated in the respondents' nuisance-creating activities.

20. It is clear in my view that the issue whether a landlord directly participated in his tenant's nuisance must turn principally on what happened subsequent to the grant of the Leases, although that may take colour from the nature and circumstances of the grant and what preceded it. In this case, Lord Carnwath considers that it is significant that (i) Mr Waters (and his son James) had been using the Stadium before the grant of the lease of it in 2005 and had tried to revive its commercial use in 2008, and (ii) Mr Waters initially developed the Track and used it from 1992 until the grant of the lease. I consider that information is of very marginal relevance to the question whether they directly or actively participated in the nuisance while the Stadium was let. At the most it may fairly be said to render it a little more probable that they participated, but in my view that is as far as it is likely to go in this case.

21. In this case, the appellants rely on a number of factors to establish their case that Mr Waters participated in the nuisance. In particular, they rely on the fact that Mr Waters (i) did nothing as landlord to try to persuade his tenant to reduce the noise, (ii) erected a hay-bale wall around Fenland to discourage complaints and to keep down the noise, (iii) co-ordinated all dealings with the local authority on noise issues, leading for the respondents in discussions, (iv) appealed against the noise abatement notice served by the local authority in respect of the noise emanating from the Stadium and the Track, and (v) co-ordinated the response to the appellants' complaints about the noise, and often responded himself. I shall concentrate on the case against Mr Waters, as, if it fails, the case against his son James must fail, as the grounds for holding him–liable are weaker.

22. As to point (i), the fact that a landlord does nothing to stop or discourage a tenant from causing a nuisance cannot amount to "participating" in the nuisance (to use the expression employed by Lord Millett and Lord Cozens-Hardy). As a matter of principle, even if a person has the power to prevent the nuisance, inaction or failure to act cannot, on its own, amount to authorising the nuisance. As already discussed, that is strongly supported by the reasoning in *Malzy*.

23. I also consider point (ii) to be of very limited force. Absent very unusual circumstances, the fact that a landlord takes steps to mitigate a nuisance can scarcely give rise to the inference that he has authorised it. It is somewhat ironic that the appellants argue that Mr Waters should be liable for the nuisance because he did not take steps to prevent it, and then argue that the fact that he took steps to reduce the

nuisance supports the contention that he is liable for it. Constructing the wall on land adjacent to Fenland could, it is fair to say, be regarded as a somewhat aggressive act. Indeed, the Judge said that he "should have been inclined to regard [it] as an aggravating feature to be reflected in an award of damages, had [Mr Waters] been found to be liable in nuisance", but, as he immediately went on to observe, "that does not mean that Mr Waters thereby participated in the nuisance".

24. Points (iii), (iv) and (v), which are all based on Mr Waters' leading part in fighting off the risk of nuisance abatement by the local authority and claims in common law, have somewhat more force, but, even taken together, they do not persuade me that Mr Waters participated in the nuisance. Any landlord, whose premises were being lawfully used for motor car and motorbike racing, would naturally wish to avoid, or else to minimise, any restriction on the emission of noise from the premises, whether by the local authority or by the court. Any such restriction would be very likely adversely to affect the value of his reversionary interest, as it would risk curtailing the racing activities on the premises, and therefore the commercial attraction of the premises, which in turn could be expected to depreciate the capital and rental values of the premises. On that ground alone, I find it hard to accept that, by trying to fight off allegations of nuisance against his tenants, a landlord can be said to be participating or authorising the nuisance.

25. So far as point (iii) is concerned, a noise abatement notice was served by the local authority in December 2007, and it included a requirement for certain attenuation works, which were eventually carried out in January 2009. It is clear that, particularly during 2007, Mr Waters spoke against the service of an abatement notice and any further steps to curtail the activities at the Stadium and Track, at a number of meetings between the owners and operators of the Stadium and the Track and representatives of the local authority, and that in 2008 he made further representations about the need for any noise attenuation works. However, it has to be borne in mind that he was a local councillor and therefore had a legitimate interest in that capacity so far as the activities at the Stadium and the Track were concerned. Those activities commanded quite a lot of local support, as well as local opposition, and the fact that he spoke in support of them at such meetings is of less assistance to the appellants' case than if he had not been a councillor.

26. Nonetheless, while Mr Waters' position as a councillor can fairly justify much of his involvement, I find it hard to accept that it can explain everything that he said at such meetings in support of the local authority taking no steps to curtail the activities at the Stadium or Track. In my view, however, the fact that a landlord seeks to persuade a local authority not to take action in relation to alleged noise or other nuisance emanating from his tenant's activities does not involve his authorising or participating in the nuisance caused by those activities. It is worth recalling that the notion of authorising or participating in a nuisance is not limited to landlords: as Lord Millett pointed out in *Mills*, the notion of authorising and participating in a nuisance is a general principle of tortious liability Any person with an interest in the activities continuing, such as a local inhabitant, a participant, a spectator, or a person with an economic interest (eg someone employed at the Stadium or Track, with a car or bike manufacturing or repair business, or with a betting operation), might seek to persuade the local authority against taking

action aimed at curtailing the activities. Such a person would not thereby be authorising or participating in the nuisance, so as to become liable for it. It would therefore be illogical if a landlord could be held liable because he takes such a course because of his economic interests. The fact that he joins with his tenant, even taking the lead, in making representations to the local authority cannot of itself undermine this analysis. The most it can do is to reinforce other factors which support the contention that he has authorised or participated in the nuisance.

27. The fact that Mr Waters was a party to the appeal against the abatement notice when it was served in December 2007, point (iv), is not a powerful point. If he had been served with the notice, he was perfectly entitled to appeal against it. Even if he was not bound to appeal against it, indeed even if he was not served with it, a landlord may well wish to ensure that his reversionary interest in the property concerned is not damaged by such a notice.

28. Point (v), that Mr Waters was primarily responsible for replying to the complaints made by the appellants' solicitors in 2007 and 2009, is again explicable by reference to his interest as landlord in not having the use of the premises impeded. Further, given that he had much of the relevant information available to him as a councillor, and as a result of his discussions with the local authority, it is unsurprising that the detailed responses came from him. In any event, it appears that he was unaware that, as landlord, he was unlikely to be held liable for common law nuisance in any event, a point I return to in para 31 below.

29. On behalf of the Landlords, Mr Denehan and Ms McGowan (neither of whom appeared at first instance) said that, during the time that nuisance is alleged by the appellants, the Landlords had no involvement in the activities carried on at the Stadium and the Track, they were not in possession of the Stadium or the Track, they enjoyed no share of the profits made from the activities at the Stadium and the Track, and their actions cannot be said to have been causative of the nuisance in any way. Those points are well founded, save that by playing a substantial part in seeking to fight off the local authority's noise concerns, Mr Waters may well have indirectly caused a degree of nuisance, as he may have delayed service of the noise abatement notice, and he may have caused the noise levels to have been at a higher level than they would otherwise have been. But that is quite insufficient to amount to authorising or participating in the nuisance.

30. For the reasons which I have given, none of the five points relied on by the appellants make good the contention that Mr Waters authorised or participated in the nuisance. While I agree with Lord Carnwath that they show that Mr Waters went further than most landlords would have done, I do not consider that, as a matter of ordinary language, any of the grounds relied on can be said to involve Mr Waters actively or directly participating in the respondents' nuisance. I acknowledge that it is, at least in principle, possible that five points which, when taken separately cannot justify a certain conclusion, could, when taken together, justify that conclusion. Nonetheless, in relation to the five points relied on in this case, the reasons why each is not strong enough to

enable the appellants to fix liability on Mr Waters are such that I do not see how they could fix such liability between them.

31. Before turning to the final issue, it is right to say that, although I would uphold the dismissal of the appellants' claim against the Landlords, my current view is that there should be no order for costs as between the appellants and the Landlords. The legal basis on which the Landlords have succeeded in this Court is not merely different from that on which they succeeded before the Judge: it is a basis which was not pleaded or developed in argument before the Judge. While the appellants expressly disclaimed any objection to the Landlords resting their case on this basis in this Court, it seems to me, at least at the moment, that the right course to take on costs as between the appellants and the Landlords is to let them lie where they fall. At one extreme, the Landlords could say that they should have their costs because they have fought off the appellants' claim against them. At the other extreme, the appellants could say that they should have all their costs until the Landlords formally raised the point on which they have succeeded. Further, this could be said to be one of those unusual cases where the successful party brought the proceedings on himself (in the form of unusually confrontational behaviour – for instance as mentioned in para 19 above).

The second main issue: the level of costs

32. The final issue arises out of the Judge's order for costs, namely that the respondents should pay 60% of the appellants' costs. The appellants' costs at first instance consisted of three components, as permitted by the Courts and Legal Services Act 1990 as amended by sections 27-31 in Part II of the Access to Justice Act 1999. The first was the "base costs", ie what their lawyers charged on the traditional basis, which was, in crude terms, calculated on an hourly rate and the costs of disbursements. The second component was the success fee (or uplift) to which the lawyers were entitled, because they were providing their services on a conditional fee (or no win no fee) basis. The third component was the so-called ATE premium, a sum which is payable to an insurer who agreed to underwrite the appellants' potential liability to the respondents for their costs if the respondents had won. The appellants' base costs amounted to £398,000; the success fee, which (we will assume) was at the maximum permitted level of 100%, amounted to £319,000-odd (as the uplift does not apply to every item of costs), and the ATE premium was apparently about £350,000.

33. Accordingly, if the respondents had been liable for the whole of the appellants' costs up to the date the Judge made the order, they would have had to pay the appellants around £1,067,000. As it is they are liable for over £640,000.

34. These figures are very disturbing.

35. They give rise to grave concern even if one ignores the success fee and ATE premium. The fact that it can cost two citizens £400,000 in legal fees and disbursements to establish and enforce their right to live in peace in their home is on any view highly

regrettable. The point is reinforced when one takes into account the value of their home, which is less than £300,000 (coupled with the effect of the nuisance on that value, £74,000 at the most) and the fact that there will have been very significant further "base costs" incurred as a result of four-day appeals in the Court of Appeal and this Court. The point can equally forcefully be made from the point of view of the respondents. As relatively small business operators, they are not only having to fund their own costs, which presumably would be of the same order, but in addition they are going to have to pay some £240,000 towards the appellants' costs. It is true that the respondents lost, but they were seeking to defend their businesses and they plainly had a reasonable case, as is evidenced by the fact that they won in the Court of Appeal.

36. One of the main, and laudable, aims of the proposals made by Lord Woolf in his report *Access to Justice* (1996), which led to the enactment of the Civil Procedure Act 1997, and the introduction of the Civil Procedure Rules the following year, was to try and achieve a better relationship between the costs and benefits of litigation. As the figures in this case show, and as is reflected in many other cases, that target has not merely proved elusive, but it is often missed by a very wide margin indeed. It is, of course, easy to criticise, and, having been Master of the Rolls until 2013, I am as aware as anyone how hard it is to ensure that a case, particularly one that does not involve a very large sum of money but is potentially complex in terms of fact, law and expertise, such as the present case, is both properly and proportionately litigated. It is also right to acknowledge that the reforms proposed by Sir Rupert Jackson in 2010, which do not apply to this case, have been largely introduced and are being absorbed. Nonetheless, even without the effect of Part II of the 1999 Act, to which I must shortly turn, it would be wrong for this Court not to express its grave concern about the base costs in this case, and express the hope that those responsible for civil justice in England and Wales are considering what further steps can be taken to ensure better access to justice. It is only fair to emphasise that this concern relates to the current system and that it is not intended to imply any criticism of the lawyers in this case.

37. The amount of the base costs in this case is however dwarfed by the total potentially recoverable costs, which are nearly three times as much. The figures illustrate the malign influence of the amendments made to the 1990 Act by Part II of the 1999 Act, and as implemented through CPR rule 44 and CPR44 PD – now fortunately repealed and replaced by the provisions of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, following Sir Rupert Jackson's *Review of Civil Litigation Costs* (2010), referred to above. As Sir Rupert pointed out in his *Review*, and as is explained in *Zuckerman on Civil Procedure Principles and Practice* (3rd ed 2013), the system introduced in 1999 had a number of unique and regrettable features, four of which are worth mentioning for present purposes. First, claimants had no interest whatever in the level of base costs, success fee or ATE premium which they agreed with their lawyers, as, if they lost they had to pay nothing, and if they won the costs would all be paid by the defendants, who, on the other hand, had no say about the costs (other than retrospectively on an assessment). Secondly, in many cases, unsuccessful defendants found themselves paying, in addition to the whole of their own costs, three times the claimants' "real" costs. Thirdly, while proportionality had a part to play when assessing the recoverability of base costs (albeit a limited part – see *Home Office v Lownds* [2002] 1 WLR 2450), it was excluded from consideration

in relation to the recovery of success fee or ATE premium (which were simply required to be reasonable) – see CPR44 PD, paras 11.7-11.10. Fourthly, the stronger the defendants' case, the greater their liability for costs would be if they lost, as the size of the success fee and the ATE premium should have reflected the claimants' prospects of success.

38. Even accepting that they have no complaint about their liability for 60% of the appellants' base costs, the respondents are understandably aggrieved by the consequences of the Judge's order that they pay 60% of the appellants' costs, because it means that they have to pay (i) 60% of the 100% success fee, and (ii) 60% of the ATE premium. Mr McCracken QC contends on their behalf that this is a grievance which can be accorded legal recognition through article 6 of the European Convention on Human Rights and/or article 1 of the First Protocol to the Convention ("A1P1"). His argument is that, by virtue of section 6 of the Human Rights Act 1998 the court, as a public body, must exercise its discretion when awarding costs in accordance with the Convention, save where otherwise required by primary legislation (such as the 1990 and 1999 Acts), and that secondary legislation (such as the CPR and Practice Directions) must be disapplied where it requires otherwise. Relying on the judgments of the Strasbourg Court in *MGN Limited v United Kingdom* (2011) 53 EHRR 5 and *Dombo Beheer BV v Netherlands* (1994) 18 EHRR 213, he contends that article 6 would be infringed if the court required the respondents to pay 60% of the success fee and the ATE premium. As to A1P1, he relies on the reasoning of the Strasbourg court in *James v United Kingdom* (1986) 8 EHRR 123.

39. In *MGN v UK* at para 217, the Strasbourg Court said that "the depth and nature of the flaws in the system" introduced by the 1999 Act and the provisions of the CPR referred to above were "such that the Court can conclude that [it] exceeded even the broad margin of appreciation to be accorded to the State in respect of general measures pursuing social and economic interests". That provides some support for the respondents' case. However, the observation and the decision itself were made in connection with an alleged infringement of article 10, where the claimant was rich enough not to need to take advantage of a conditional fee agreement. In the present case, by contrast, article 10 does not apply and it is apparent that the appellants needed the protection of a conditional fee agreement and recoverable ATE premium in order to be able to bring their claim. *Dombo Beheer* was a case concerned with article 6, and the Strasbourg court said that it was "clear that the requirement of 'equality of arms', in the sense of a 'fair balance' between the parties applies in principle" to "cases concerning civil rights and obligations". However, it is by no means clear that that general observation would necessarily support the respondents' argument. In *James v UK* at para 50, the Strasbourg court said that, when someone is deprived of property, there must be "a reasonable relationship of proportionality between the means employed and the aim sought to be realised", and that "a 'fair balance' …. must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". I am unconvinced that this takes matters any further than the argument based on article 6.

40. In *Callery v Gray* [2002] 1 WLR 2000, the House of Lords effectively confirmed that, subject to reasonableness, success fees and ATE premiums were recoverable, and in *Campbell v MGN Ltd (No 2)* [2005] 1 WLR 3394, the House of Lords held that the 1999 Act costs recovery regime did not infringe article 10. However, as I have mentioned, the Strasbourg court took a different view in the latter case. In those circumstances, it must, in my view, follow that the issue of whether the 1999 Act costs regime, and in particular a claimant's right to recover any success fee and ATE premium from an unsuccessful defendant, infringes the Convention, is one which it is open to this Court to reconsider.

41. In the light of the facts of this case and the Strasbourg court judgments relied on by Mr McCracken, it may be that the respondents are right in their contention that their liability for costs under the 1990 Act, as amended by Part II of the 1999 Act, and in accordance with the CPR, would be inconsistent with their Convention rights. However, it would be wrong for this Court to decide the point without the Government having had the opportunity to address the Court on the issue.

42. This concern is based on the proposition that a declaration of incompatibility ought not be made by a court without the Government having the opportunity of addressing the court. It appears to me that there is a substantial argument to the effect that it is not merely secondary legislation, namely CPR 44 and CPR44 PD, but also Part II of the 1999 Act, which had the effect of requiring defendants who have been ordered to pay a claimant's costs to pay the uplift and ATE premium in full, subject to the uplift and premium having been reasonable, but irrespective of proportionality. Section 58A(6) of the 1990 Act (added by section 27 of the 1999 Act) provides that an order for costs "may, subject … to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee", and section 29 of the 1999 Act has a similar provision in relation to an ATE premium. It is true that these provisions are not on their face mandatory, but it seems to me to be arguable that the costs charging and recovery system introduced by Part II of the 1999 Act simply would not work unless a claimant's success fee and ATE premium were recoverable in full, irrespective of proportionality, from a defendant who had been ordered to pay the claimant's costs.

43. Accordingly, if the respondents' argument based on article 6 or A1P1 is correct, it may well be that the proper outcome would not be to disregard paras 11.7-11.10 of CPR44 PD, but to grant a declaration of incompatibility, although that would be questionable as the relevant provisions of the 1990 and 1999 Acts have been repealed and replaced by a far less unsatisfactory system in Part 2 of the 2012 Act. Nonetheless, the system enacted in the 1999 Act remains in force in relation to litigation brought pursuant to conditional fee agreements made before April 2013 (see *Simmonds v Castle (Practice Note)* [2013] 1 WLR 1239). Quite apart from that, a determination by a United Kingdom court that the provisions of the 1999 Act infringed article 6 could have very serious consequences for the Government. Although the Strasbourg court would not be bound by the determination, it would, I suspect, be likely to agree or accept that conclusion, so that those litigants who had been "victims" of those provisions could

well have a claim for compensation against the government for infringement of their article 6 rights.

44. However, it would be inappropriate to go further into the contention that article 6 or A1P1 is infringed by the order for costs made against the respondents in this case. It seems to me that, if the respondents wish to maintain that contention, as they are plainly entitled to do, the present appeal should be re-listed for hearing before us, after appropriate notice has been given to the Attorney-General and the Secretary of State for Justice. In relation to that hearing, it is only right to flag up the point that, as Lord Bingham and Lord Hoffmann emphasised in *Callery* at paras 8 and 17 respectively, it is the Court of Appeal which has the primary supervisory and judicial policy-making functions in connection with case-management, procedural and costs issues in the courts of England and Wales; and members of the Court of Appeal have far greater experience than the members of this Court on matters concerning costs. It may therefore be inappropriate for us to decide the point raised by the respondents without the benefit of the Court of Appeal's consideration of, and views on, the issue, particularly as there may be an argument that, although the outcome of the costs system produces an unattractive result in the present case, its compatibility has to be assessed by reference to the generality of cases, so that a few unfortunate results are inevitable. Further, as any claim based on the Convention is fact-sensitive, and because the issue here concerns first instance costs, it may be inappropriate for an appellate court to decide the issue without having the views of the trial Judge.

45. Accordingly, quite how far this Court should go at this subsequent hearing will have to be considered at the time. At one extreme, it may be right simply to decide that all the various points are arguable but should be remitted to the Court of Appeal or a first instance judge. At the other extreme, if we thought it appropriate to do so (particularly if all parties were agreed on that course) we could determine all the issues. And there are clearly a number of intermediate possibilities. Once the interveners are identified, it would be appropriate to consider how the matter is to proceed – either at a short hearing or by way of written submissions. I would expect all those involved (including the Attorney-General and the Secretary of State for Justice, and any other intervener sanctioned by the Court) to try and seek an agreed procedure, and then to contact the Court Registrar in writing explaining what had been agreed and what had not been agreed, so far as the identification of the issues and proposed procedure was concerned. We could then consider that written material, and give appropriate directions.

46. I have, somewhat unusually, dealt with questions of future procedure in this judgment, because I am very concerned indeed about the possibility of a further escalation in the already exorbitant costs in this case. If I was satisfied that there was any satisfactory way of proceeding without incurring the parties in further costs, I would eagerly grasp it, but, sadly, I cannot see any such course.

47. However, it is also right to record that it was suggested in argument that, even if the respondents' article 6 or A1P1 rights were infringed by the present costs order, we

could do nothing about it, as we would be interfering with the A1P1 rights of the appellants' solicitors and counsel. On the basis of the arguments we have heard so far, we are inclined to dismiss that argument, but it may have some prospect of success in so far as it is based on reliance by those solicitors and counsel on the House of Lords' decision in *Campbell v MGN*. Accordingly, it is an argument which the appellants are free to deploy if they are so advised.

48. It remains to deal with the respondents' argument that their liability for costs under the 1999 Act costs recovery regime would infringe article 9 of the Aarhus Convention. Articles 9.3 and 9.4 of that Convention require "members of the public" to enjoy appropriate "access to administrative or judicial procedures" and "adequate and effective remedies", which involves them not being "prohibitively expensive". However, those articles are concerned with those who wish to "challenge acts and omissions … which contravene provisions of [the] national law which relate to the environment". That may well apply to a claimant seeking to prevent a common law nuisance by noise, but I do not see how it can extend to a defendant who is being sued for causing a nuisance by noise.

Conclusion

49. Accordingly, I conclude that:

a) The injunction against nuisance by noise imposed by the Judge against the respondents should be suspended until Fenland is fit to be occupied residentially, subject to the next point;

b) The appellants and the respondents should each have liberty to apply at any time to vary or discharge the injunction, albeit on notice (save in case of urgency);

c) The respondents' claim in nuisance against the Landlords is dismissed, but, albeit that this is a preliminary view, the Landlords should recover no costs;

d) Consideration of the respondents' contention that the Judge's order that the respondents' liability for costs extends to the success fee and the ATE insurance premium infringes their rights under article 6 of the Convention is adjourned for further hearing after notice being given to the Attorney-General and the Secretary of State for Justice, following which the parties (including any authorised interveners) must seek to agree issues and proposed procedure, and the Court will then give directions.

LORD CARNWATH

50. This judgment is directed principally to the first main issue identified by Lord Neuberger: the liability of the "landlords" in nuisance. I shall comment briefly at the end on the costs issue. On all other matters covered by Lord Neuberger's judgment, I agree with him and have nothing to add.

The authorities

51. Like Lord Neuberger (para 11) I would start from Lord Millett's summary of the law in *Southwark London Borough Council v Mills* [2001] 1 AC 1, 22A, in particular that in order to be liable for authorising a nuisance, the landlords "must either *participate directly* in the commission of the nuisance, or they must be taken to have *authorised it by letting* the property" (emphasis added). In view of the limited discussion or findings of fact on this issue in the lower courts, this is not a suitable case for a detailed examination of the law. However, some brief comments on both alternatives may be helpful for future reference. It is convenient to deal first with the second.

Authorising by letting

52. I agree generally with Lord Neuberger's analysis of the authorities under this head, and the test which he extracts.

53. One additional authority which might have assisted the judge, because of its helpful review of the authorities in a similar factual context, is *Tetley v Chitty* [1986] 1 All ER 663. A local council had granted planning permission to a go-kart club to develop a go-kart track on land owned by the authority, and had granted the club a seven year lease to use it for that express purpose. The council were held liable in nuisance for noise arising from the use of the track. It was common ground that they would not be relieved of potential liability by clauses in the lease obliging the club not to commit a nuisance.

54. Having reviewed the authorities cited to him (which did not apparently include *Malzy v Eichholz*), the judge (McNeill J) accepted that it was not necessary to show that the nuisance was a "necessary consequence" of the use. He had mentioned among other authorities *Smith v Scott* [1973] Ch 314 (to which Lord Neuberger has referred), where the phrases "virtual certainty" or "a very high degree of probability" had been used. Possible alternative tests, on which he found it unnecessary to express a concluded view, were whether the use was "likely to cause a nuisance", or was "the foreseeable result" of the decision to permit the use for go-karting. It was enough that, on the facts of this case, the nuisance was "an ordinary and necessary consequence" or "a natural and necessary consequence" of the use (expressions used in two of the older cases), and that there was accordingly "express or implied consent to do that which on the facts here inevitably would amount to a nuisance" (pp 670-671).

55. Reference might also have been made to authorities from other common law jurisdictions which have adopted the same principles. A close parallel on the facts is the judgment of the Ontario Supreme Court in *Banfai v Formula Fun Centre Inc* [1984] OJ No 3444, 34 CCLT 171(HCJ). The court held that the owner, Hydro, was on the facts liable for nuisance caused by car race course run by its tenant because it arose from use in the way intended when the lease was granted. O'Leary J, adopting the approach of the English authorities as to the landlord exception (including *Smith v Scott*), said:

> "Hydro not only knew that Formula intended to use the land for an amusement ride, it knew and approved of the layout of the track. It knew the size, power and make of the cars to be raced thereon and the hours of the day the track would be in operation.
>
> … the nuisance resulted from Formula operating the track, that is to say, using the land exactly as Hydro knew it intended to use it. By entering into the lease, Hydro authorized Formula to use the land in the manner that caused a nuisance. It follows that the nuisance was 'the natural and necessary result of what the landlord authorized the tenant to do'…" (paras 44-48)

It is of interest that the landlord was held liable even though there seems to have been no finding that it knew or should have known that a nuisance was likely to result from the permitted activity. It was enough that he was aware of the relevant aspects of the intended activity, from which, as found by the court, nuisance had resulted.

56. I agree, however, with Lord Neuberger that, on the limited findings of fact made by the judge in this case, it is not possible to hold the landlords liable on the ground that nuisance was a "necessary" or "highly probable" consequence of the lettings. The less stringent tests suggested by the judge in *Tetley v Chitty* ("likely", "foreseeable") do not seem to be supported by earlier or later authority. I would reject them as insufficiently rigorous for a case where the sole basis for attributing responsibility to the landlord lies in the terms and circumstances of the grant of the lease.

Participation

57. I agree accordingly with Lord Neuberger that the case for the landlords' liability stands or falls on the issue of participation, in the sense used in *Malzy v Eichholz*. In *Malzy* itself, the landlord was held not liable for nuisance caused by the activities of his tenant, because the evidence showed no more than that, with knowledge of the offending use, he had continued to accept rent and had not taken any steps under the lease to bring it to an end. As Lord Cozens-Hardy MR explained (following Lord Collins MR in an unreported case):

> "There must be something much more than that. There must be something which can fairly amount to his doing the act complained of or allowing the act complained of, either by actual participation by himself or his agents or by what Lord Collins called active participation in that which was complained of." (p 315)

Unfortunately, very little help is to be gained from the English authorities as to the practical application of this test, in circumstances where the landlord's involvement in his tenant's activities goes beyond mere receipt of rent and failure to intervene, as in that case.

58. Again some help might have been gained from other common law jurisdictions. A similar concept is found, for example, in the American Restatement. In *Harms v. City of Sibley* 702 N.W.2d 91 (Iowa 2005) pp 104-5, the Supreme Court of Iowa held (applying the American Restatement (Second) of Torts (1979), sections 834, 837) that a lessor may be liable if at the time of the lease he consents to the activity and "he then knows or should know that it will necessarily involve or is already causing the nuisance" or if he "participates to a substantial extent in carrying it on.". On the facts of that case the landlord of a ready-mix plant site was held jointly liable with his tenant for a nuisance caused by the plant, where the evidence showed that the landlord had purchased the property with the intent of building a ready-mix plant, had obtained a building permit for that purposed, and was president of the ready-mix company which operated the plant. In reaching this conclusion, as I understand the judgment, that court did not draw a clear distinction between the two parts of the test, relying both on the landlord's state of knowledge at the time of the lease and his "personal involvement in the property" both before and after.

59. Even in the absence of direct authority, I see nothing in Lord Millett's formulation which requires a rigid division between the two parts of the test. The terms and circumstances of the lease, and the history, may be relevant in considering the significance of the landlord's conduct thereafter. "Participation" is not a term of art nor a precise definition. What is required in my view is a broad, common-sense judgment, based on the facts as a whole, as to whether there was such active involvement by the landlord in the offending activities as to make him jointly responsible in law for their consequences.

60. We are concerned directly with the period from April 2006, when the claimants began to complain of nuisance, having acquired their house in January of that year. However, in considering the position of the landlords it is unrealistic in my view to ignore the earlier history. As far as concerns the stadium, Terence Waters had been the owner of the stadium since it was constructed by him in 1975 until August 2005, when he sold to his son James. The 1985 planning permission for continuation of speedway racing, which is still operative, was and remains personal to him.

61. In September 2005, James granted a lease to a Mr Harris (not a party) which lasted until its surrender in January 2008. During that time the business at the Stadium

was operated under an arrangement with Mr Harris by David Coventry (2nd defendant, trading as RDC Promotions), whose own involvement with the stadium had started in 1993 (judgment para 16). We were told that the application to extend the stadium facilities in 2006 was in James' name. In January 2008 James, in the judge's words (para 28), "tried to revive the commercial activities at the stadium", before selling it to RDC Promotions in April 2008. They have owned and operated it ever since. However, James continued to take the lead in negotiations with the authorities, and it seems that the appeal against the abatement notice served in 2007 was in his name.

62. The moto-cross track was also developed initially by Terence Waters under a 1992 temporary permission personal to him (and a Mr Nunn). Permanent permission was granted in 2002, this time personal to Terence Waters and Moto-land UK Ltd (the 3rd defendant) to whom Mr Waters and his co-owners granted a 10 year lease in September 2003.

63. This history shows a close involvement by Mr Terence Waters, and later his son, in the activities of the stadium and the track dating back to their inception. Although the precise legal basis of their involvement has varied over the years, their central role in the enterprise has not. It is against that background in my view that the issue of "participation" in the relevant period must be judged.

64. Lord Neuberger (para 21) has summarised the factors on which the claimants rely in the present case. I do not understand there to be any material dispute about the factual allegations; the dispute is as to their significance in law. In my view they show clearly that the involvement of Terence and James Waters has gone far beyond the ordinary role of a landlord protecting and enforcing his interests under a lease. It has involved active encouragement of the tenants' use and direct participation in the measures and negotiations to enable it to be continued. That these measures were directed in part to mitigating the problem does not alter the fact of participation nor the consequences for the landlord when the measures proved ineffective. It may be, as Lord Neuberger suggests, that they were motivated at least in part by their concurrent interests as freeholders, or even, in Terence's case, as local councillor. But under the *Malzy* test, as I understand it, the issue is not *why* they participated, but *whether* they did so, and with what effect.

65. James's involvement is more recent than that of his father, and there is a lack of evidence about the precise extent of his involvement in the activities at the stadium before and since the period of his direct occupation in early 2008. However, it seems clear that he took a leading role in the negotiations with the authority to allow the use to continue at its existing level, and in the appeal against the abatement notice, though not served on him. On the material available to us, there is no reason to treat him as a less active participant than his father.

66. For these reasons, in respectful disagreement with Lord Neuberger, I would allow the appeal on this issue, and hold that Terence and James Waters are jointly liable for the nuisance.

Costs

67. I understand that the majority of this court supports Lord Neuberger's view that consideration of this aspect should be adjourned for further hearing, following notice to the Attorney-General and Secretary of State. In those circumstances I prefer to express no view at this stage on the substantive issues, save that I agree with him (para 48) that the Aarhus Convention is of no help to the respondents for the reasons he gives.

LORD MANCE

68. I agree with Lord Neuberger's judgment on all issues, save that concerning the liability of the Third and Fourth Respondents, Messrs Terence and James Waters, as "landlords" in nuisance, discussed by Lord Neuberger in his paras 10 to 31 and by Lord Carnwath in his paras 52 to 67.

69. On that issue, I find myself in sympathy with Lord Carnwath's reasoning and conclusion.

70. I am fortified in this by the course this litigation has taken with regard to the Third and Fourth Respondents' liability. Lord Neuberger says in para 10 that "At trial, the landlords do not seem to have made much of the argument that they were in a different position" from the other defendants at trial. That appears an understatement.

71. All the defendants were represented at trial by the same counsel (though not the same solicitor), and no suggestion at all was made in their opening or closing written submissions that, if there was a nuisance, the Third and Fourth Respondents were not liable for its commission in common with the other defendants held liable in nuisance.

72. The only point made was that, assuming there was a nuisance, any damages awarded should not in the case of the Third and Fourth Respondents include exemplary and aggravated damages (but should be confined to ordinary damages): see especially para 53 of their opening submissions and paras 111 to 166 of their closing submissions.

73. As explained in counsels' submissions before us, it appears to have been the judge who, effectively of his own motion, raised at a very late stage a possible distinction between the Third and Fourth Respondents and other defendants as regards liability for any nuisance. According to para 22 of his judgment, a point to this effect seems to have been explored with counsel in the Appellants final oral submissions, and, in paras 22 to 25 of his judgment, the judge then picked the point up, deciding that the Third and Fourth Respondents had no liability because of the terms of the leases. In doing this, he not only misread one of them, as Lord Neuberger points out in his para 16, but also overlooked the principle that a landlord who "participates" in a nuisance may be liable, irrespective of the terms of the lease.

74. The Court of Appeal judgment is of equally little assistance on the present issue, since the Court concluded that there was no nuisance at all and so did not need to consider any question about the Third and Fourth Respondents' liability.

75. The fact that the Third and Fourth Respondents were prepared to recognise their liability along with other defendants for any nuisance which existed, while denying that it extended to liability for exemplary or aggravated damages, appears to me not insignificant, when the question is whether they sufficiently participated in the nuisance for it to be appropriate to hold them liable for it. They and their counsel are likely to have had a much better feel for the reality of what was going on than we can have. But it also appears to me consistent with the facts and matters relied upon of which we are aware, and on which the Appellants place reliance in this connection.