Journal of Planning & Environment Law

2012

Wind farm noise and private nuisance: a return to common sense

Susan Ring

Barbara Webb

Subject: Planning. **Other related subjects:** Environment. Nuisance

Keywords: Defences; Noise; Planning permission; Private nuisance; Reasonable user; Wind farms

Case: Barr v Biffa Waste Services Ltd [2012] EWCA Civ 312; [2012] 3 All E.R. 380 (CA (Civ Div))

***J.P.L. 892** This article is a response to "Wind farm noise and private nuisance: issues arising in Davis v Tinsley" by William Norris QC in an earlier issue of the Journal of Planning Environment Law.[1]

In accordance with the settlement agreement the authors of this article will make no comment about the *Davis* case,[2] nor hypothesise about what might, or might not, have been found by the court if certain facts had, or had not, been proven. We have, however, set out in an annex to this article, what we consider to be the salient facts.

Otherwise the authors seek to cover some of the key issues for consideration in wind turbine noise nuisance cases.

Why are residents complaining about noise?

There is no statutory minimum separation distance between turbines and dwellings in the United Kingdom. England deals on a case by case basis; Scotland has guidance suggesting 2km and Wales suggests 500m.[3]

We are aware of a turbine 85 metres to hub height and 125.2m to the tip of the turbine blade that was erected with planning permission in England within 65m of a dwelling, i.e. within fall-over distance.

Residents' concerns have prompted two Private Members' bills on minimum separation distances, but these bills do not seem to be progressing.

Noise from turbines

First, we will try to give a flavour of the wind turbine noise that residents complain about. There is a whole range of noise effects, at a range of frequencies, from a gentle swishing to a loud background road roar, a ripping/lashing, a hum, and a regular pulsating thump and/or "whoompf" with an additional low-frequency content, particularly in the hours from about 20:00 to 7:00, which residents report as penetrating through their bedroom and closed windows and either preventing them from sleeping or awakening them and stopping them going back to sleep. This is generally in the context of a rural environment with very low background noise, particularly at night. The authors of this article are aware of wind farms across the country causing such noise nuisance complaints.

***J.P.L. 893** This is not just a UK problem--noise problems from wind turbines are reported worldwide. For example, the *Australian Federal Senate Wind Farms Report* June 2011 records this from a witness with 30 wind turbines within 2km of his home, the nearest 600m away:

"The types of noises that we experience depend on wind direction. The noises range from a doof-doof noise, like you would hear from a subwoofer at a party down the street, to a constant jet rumble. We can also hear the generator noise, like a fridge when it fires up--that electrical sound--and at times a

whooshing noise, like a stick being swung through the air quickly. These noises are not just for a minute or two but can go on all night, not to mention the day. On average, we would say that we have interrupted sleep at least three to four nights a week and on some occasions up to five ...I have tried to escape from the continuous noise by relocating to one of the four bedrooms in the house, only to be awakened by the noise from other turbines. My wife actually goes to sleep with ear plugs in. This continuous interruption to and lack of sleep has enormous impact on our lives, our business and our future. Last week the noise could be heard over the television inside the house."

The thump/whoompf used to be called by the wind industry "*enhanced* amplitude modulation of aerodynamic noise", but they have now taken to describing it in somewhat Orwellian terms as "*other* amplitude modulation".

The complexity of wind turbine noise issues is highlighted by the fact that there are bi-annual international conferences on wind turbines and noise, the last taking place in 2011 in Rome.

The wind industry in the United Kingdom is also exercised about noise: Renewable UK (the trade body for the wind industry and now other renewables) held a conference in October 2011 on *Wind Turbine Amplitude Modulation: Research to Improve Understanding as to its Cause and Effect.*

Barr v Biffa Waste Services Ltd[4]

The law of private nuisance has become clouded within past years following imaginative and indeed expensive defences such as those aired by Mr Norris in his article, i.e. threshold of acceptability and reasonable user.

However, since Mr Norris's article was published, the Court of Appeal has now given judgment in *Barr v Biffa Waste Services Ltd.* Although not relating to wind turbines, this judgment has done much to clarify the law relating to private nuisance and "de-muddy" the waters from many of the arguments proposed.[5] Although in the High Court, Coulson J. took up many of the arguments raised by those defending nuisance claims, the Court of Appeal has thankfully returned us to a more sensible state of affairs with the key thrust of Carnwath L.J.'s judgment being:

"Without disrespect to those efforts, I continue to believe that the applicable law of nuisance is relatively straightforward, and that the 19th century principles for the most part remain valid."[6]

Those 19th century principles reflect what the law of nuisance is supposed to be about--individuals carrying out what is likely to be a lawful activity but in a way that interferes with the amenity of their neighbour. Nuisance can arise from sounds and smells that in any other context would not be a problem. For example, your neighbour cutting her lawn once a week is acceptable, but to do so every day at 2:00am would arguably be a nuisance. Even the staunchest opponents of wind turbines do not try to argue that they will always be a nuisance. Nor do their proponents try to suggest that they will never be a nuisance. ***J.P.L. 894** In coming to consider cases of nuisance it is a matter of fact and degree and assessment will be necessary in each individual case.

Statutory nuisance

Why resort to private nuisance in wind turbine cases? Wind farm operators and indeed local authorities when considering noise conditions to attach to a planning permission often refer to statutory nuisance proceedings as a fall-back measure should things go awry. Sadly it is the authors' experience that the complexity of the science behind noise from wind turbines and the scale and cost of the implications of any action by a local authority, in combination with the best practical means defence, combines to thwart any satisfactory resolution by statutory nuisance.

Reasonable user?

Mr Norris has suggested that the courts require "give and take" between neighbours and he puts forward a complex analysis of what is reasonable behaviour on the part of wind farm operators, and of the relationship between those who complain about noise and wind farm operators in a particular scenario.

Sadly this does not meet with the purposes of the law of nuisance and Mr Norris is doing what many others have tried to do before him, which is to add so many elements for consideration by the courts that the key consideration is side-lined. If the law of private nuisance is to meet its aims of protecting the amenity of individuals' property, it must focus on the effect on the amenity of those individuals, not the activities that lead up to that.

Coulson J., in the High Court in *Barr v Biffa* appeared to offer support for Mr Norris's contentions. However, this was resoundingly put aside in the Court of Appeal. Having helpfully set out the history of the development of reasonable user arguments, including reference to arguments such as those proposed by Mr Norris which stem from extracting select phrases from previous judgments, Carnwath L.J. concluded:[7]

"In my view, these complications are unsupported by authority, and misconceived. 'Reasonable user' should be judged by the well-settled tests. The matter is stated simply and accurately by Tony Weir (whose death last December was a sad loss to all who knew him or learnt from him):

'Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot by being unduly sensitive, constrain one's neighbour's freedoms), but what objectively a normal person would find it reasonable to have to put up with"'(*Weir An Introduction to Tort Law* p.160).

Is compliance with a planning consent a defence to nuisance?

Planning consent for wind turbines gives permission for the erection and operation of those wind turbines. However, that planning permission does not mean that the turbine may be operated regardless of the impact on its neighbours. It would, we argue, be uncontentious that should a wind turbine start to throw ice on neighbouring properties (which has occurred with one of our clients), regardless of compliance with a planning permission, that operation would no longer be lawful. The same principles apply with noise. If that noise is beyond "what objectively a normal person would find it reasonable to have to put up with" a nuisance exists.

This is entirely supported by Lord Hoffmann's comments in *Transco Plc v Stockport MBC,*[8] reinforced by Carnwath L.J. at [97] of *Barr v Biffa*. Lord Hoffmann said of common law nuisance in *Transco* at [26]:

***J.P.L. 895** "Liability in nuisance is strict in the sense that one has no right to carry on an activity which unreasonably interferes with a neighbour's use of land merely because one is doing it with reasonable care. If it cannot be done without causing unreasonable interference, it cannot be done at all."

Carnwath L.J. in *Barr v Biffa* went on to consider the proposition that the legislation governing the waste operations in this case "expressly accepted" that the site would create odour. He concluded:

"I find it impossible with respect to see how a provision which requires the use of best practicable means to 'prevent or reduce emissions' (as in PPC reg.12) can be read as expressly or impliedly authorising them."

In a wind turbine context, planning permissions do not have such a best practicable means provision, but they are generally accompanied by a noise condition. The wording and enforceability of these noise conditions is a hot topic. Clients have successfully quashed permissions in the past on the grounds of

drafting errors in the noise condition having rendered it unenforceable. Also, the noise condition generally will not address character of the noise such as the thump/whoompf "other" amplitude modulation problem, despite the Court of Appeal having upheld the Den Brook amplitude modulation condition in *Hulme v Secretary of State & RES Developments Ltd.*[9] This is because the wind industry has mounted a concerted campaign against such a condition and local authorities do not generally have the expertise to recognise the utility of such a condition. There is then the further vexed issue of the local authority having the resources and expertise to undertake the complicated noise monitoring required in the event of a complaint; and if they do not do so, the residents are forced to undertake this themselves with the attendant problems of the expensive hire of noise monitoring equipment and expert, and gaining access to the operator's wind speed data, which the operator can in our experience be very reluctant to hand over.

Defendants in the past have tried to argue that compliance with a noise condition provides a defence to a claim in nuisance. However, given that the noise condition will often not address the character of the noise for the reasons stated above, and Carnwath L.J.'s judgment in *Barr v Biffa,* it is our contention that any noise condition cannot now be construed as authorising the nuisance.

Should a threshold be set?

Mr Norris and others before him have suggested a measured standard below which noise from turbines will not be considered nuisance. This threshold ought to be informed, he says, by the public benefit to be derived from wind energy.

Mr Norris's argument in essence is that the Government has decided that wind turbines are necessary and provide a public benefit; if they are a problem, so be it: that is a sacrifice we have to make; so let's establish a threshold which determines what sacrifice is acceptable.

Is there a public benefit that should inform any such threshold?

Putting aside for now whether or not it is possible to come up with a threshold, should the public benefit of wind turbines have any impact on any such threshold? Mr Norris states that:

"because existing and emerging policy and guidance recognises that onshore wind development is bound to take place in rural locations in which, at least in England (assuming one is going to avoid National Parks and the like) it is almost inevitable that there will be existing or prospective neighbours who might be adversely affected by features like noise."

J.P.L. 896 This is essentially the same argument that was put forward in *Barr v Biffa* in which it was argued by Biffa that the statutory scheme and strategy of the Environment Agency resulted in an acceptance that smell would emanate from the site. In a wind turbine context, the argument would be that there is some sort of immunity from nuisance proceedings impliedly granted to wind farm operators and developers because of the overriding public need for wind energy, as recognised by policy and the granting of planning permission, as suggested by Mr Norris.

On policy, there is no fixed strategy for onshore wind turbines. The National Renewables Energy Action Plan and the UK Renewable Energy Roadmap simply propose the use of wind turbines as one of a selection of renewable energy sources. We also note that the Government has not carried out strategic environmental assessment of any plan or programme for onshore wind turbines (contrary to offshore wind turbines).

Carnwath L.J. considered this at [82] of *Barr v Biffa,* in the context of a strategy by the Environment Agency. He said:

"Had any such strategy been proposed, and had the possible consequences been explained, one would have expected there to have been consultation ..."

Carnwath L.J. also goes on at [46(ii)]:

"The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. There is no principle that the common law should 'march with' a statutory scheme covering similar subject matter. Short of express or implied statutory authority to commit a nuisance... there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights."

And:

"if there is a problem in meeting the need within the existing legal framework, its solution must rest with the legislature ..."[10]

The same principles must surely apply to the planning system. In order to claim public benefit as a defence to nuisance, the wind industry would have to point to an express immunity from nuisance proceedings. There is no such express immunity as far as the authors are aware.

Further, if a sacrifice is to be made, then there should be compensation for the person making the sacrifice. At the moment, it is "win-win" for the developer and landowner due to large public subsidies for onshore wind turbines; but "lose-lose" for a resident who has been asked to sacrifice their amenity and the value of their property without any compensation. Contrast wind turbines with road or airport developments, where the land compensation regime provides compensation for land that is depreciated by physical factors caused by public works, with any dispute about compensation being referred to the Lands Tribunal.

Can we come up with a threshold?

Putting aside for now how any element of public benefit can or should be factored into such a threshold, is it possible to set a threshold? A number of questions fall to be answered in considering this point. Mr Norris appears to suggest that we can suitably measure noise from turbines and from that come up with an acceptable threshold. Yet he does not go on to explain how this would be done.

What would we be measuring? It is accepted that noise from wind turbines comes in all sorts of forms, thumps, hums and whooshes. Coming up with a decibel level that may not be exceeded will not cover all ***J.P.L. 897*** the noise that is objectionable, e.g. a hum that is audible but is difficult to measure; a pulsing thump at night etc which is within the decibel levels but disturbs sleep.

This was another point considered by the Court of Appeal in *Barr v Biffa*:

"I find no support at all in those cases for a general approach of setting a 'threshold' for evaluating past nuisance. They turned on their own facts and in particular on the nature of the nuisance. The threshold was set primarily for the purpose of control in the future, rather than assessing whether there had been a nuisance in the past or judging reasonable user. In neither was there any dispute that the court could set such limits; the issue was as to the number of days or events and the permissible levels. Noise nuisance arising from an organised activity such as motor-racing is susceptible to such control. The racing days would be defined with precision as could the maximum noise levels ...the present case is quite different. There was no question of Biffa being willing or able to limit their smelly activities to particular days in advance. The smells arising from the Westmill site were transient and unpredictable in timing, and intensity."

The same problems we would argue apply with wind turbines. Whilst it is clearly sensible for local authorities and planning inspectors to impose noise conditions on planning permissions, it would be manifestly unfair to say that the noise condition imposed the threshold, because the noise condition is set in advance and generally deals with mere decibel levels, not the character of the noise such as the

night time thump and whoompf. To assess whether there is nuisance, one needs to experience the noise on the ground and at the correct time of day. It is not sufficient, as in our experience often occurs, for local authorities and developers to make a site visit to a wind farm at 10 am with a northerly wind direction, if the nuisance is generally experienced at 4 am in a westerly direction.

It would also be dangerous to set a threshold when the scientific community does not properly understand why a noise occurs, how to measure it and how to prevent it.[11] This would lead to exactly the situation Carnwath L.J. warned of in that it would deprive claimants of "their right to have their individual cases assessed on their merits".[12]

Conclusion

The judgment in *Barr v Biffa* should stand as clear notice to defendants not to cloud the issues:

"This case is a sad illustration of what can happen when apparently unlimited resources, financial and intellectual, are thrown at an apparently simple dispute such as one about nuisance by escaping smells. The fundamental principles of law were settled by the end of the 19th century and have remained resilient and effective since then. Isolated statements in individual cases, at whatever level, are of limited value unless they have been absorbed into the stream of accepted authority. Parliament may alter by statute, or the higher courts by reinterpretation of the old cases. But there is a salutary presumption that neither does so without making their intention clear. Parliament may also enact parallel systems of regulatory control; but, unless it is says otherwise, the common law rights and duties remain unaffected."

So as lawyers what should we do when faced with a reported case of nuisance? Not it seems delve into thresholds, and the behaviour of the proposed defendant; rather, as Carnwath L.J. makes clear, we should pick up our copy of Clerk and Lindsell and open the chapter on private nuisance and consider the key principles of nuisance, established long ago with a view to answering the key question--in this particular ***J.P.L. 898*** scenario are these wind turbines causing noise of a nature (level and character) that objectively a normal person would find it unreasonable to tolerate?

Annex

(1) Mr Norris refers to the "fact that the developer/operator had designed, built and operated its wind farm in accordance with good practice and on the basis of current planning and scientific guidance". As a matter of record:

(a) The developers substituted the turbines that had been subjected to environmental impact assessment in the planning process, with turbines of very different dimensions--a squat tower with long blades. There was no section 73 application, no revision to the Environmental Statement and no public consultation.

(b) It was not clear whether the layout of the wind farm was in accordance with guidance as it comprised two straight lines of turbines; also whether the turbines were too close together.

(c) The developers were aware of other wind turbines having caused problems prior to the construction of the Deeping St Nicholas wind farm e.g. the Askham Maiwag case (2004).

(d) The developer's original noise expert stated in a proof of evidence relating to another wind turbine that the noise impact assessment in the Deeping St Nicholas Environmental Statement did not follow the ETSU-R-97 methodology in that it failed to separate the amenity and night-time noise data from the potential measurements; also he was concerned that no wind shear potential had been analysed.

(e) No ETSU-R-97 background noise monitoring was undertaken at the Davises' property prior to planning permission despite it being one of the closest properties to the turbines.

(2) Mr Norris says that assuming the facts had been resolved in the defendants' favour, they would have established (inter alia) "the operator responded constructively to the neighbours' repeated complaints but was frustrated in its investigation by the behaviour and attitude of those who were complaining". In fact, as a matter of record:

(f) The Davises complained about the noise from the turbines almost immediately in June 2006; they moved out of their farmhouse in December 2006 for sleeping purposes; they abandoned it altogether in May 2006; they offered the operator the farmhouse as a research base for 6 months but this offer was not taken up; nuisance proceedings were commenced nearly four years later in March 2010.

(g) The Davises did allow Hayes McKenzie to undertake noise monitoring at their property in late 2006, but they became disenchanted for a number of reasons including the fact they were only allowed to see the first part of Mr Hayes' report; the operator and local authority refused to allow them to see the second part of the report and they only obtained it following a FOI request.

(h) The Davises required that any further monitoring by the operator be in the right wind conditions and for a sufficiently long period of time to give proper results and to be co-monitored by their own noise expert. This was apparently unreasonable.

Susan Ring, partner, and Barbara Webb, trainee, of Richard Buxton Solicitors who acted for the Claimants in *Davis v Tinsley et al.*

J.P.L. 2012, 8, 892-898

---

1. William Norris QC, "Wind farm noise and private nuisance: issues arising in Davis v Tinsley" [2012] J.P.L. 230.

2. *Davis v Tinsley et al.*

3. *Wind Farms--Distance from housing Standard* Note SN/SC/5221, House of Commons Library.

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

5. One issue not resolved by *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312 is the impact planning permission may have on the character of an area. However, *Lawrence v Fen Tigers* [2011] EWHC 360 (QB) is currently being appealed in the Supreme Court which may lead to more guidance on this topic. *Barr* and *Lawrence* have been joined and are both waiting for permission to appeal.

6. *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312 at [44].

7. *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312 at [72].

8. *Transco Plc v Stockport MBC* [2003] UKHL 61.

9. *Hulme v Secretary of State & RES Developments Ltd* [2011] EWCA Civ 638.

10. *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312 at [106].

11. *Wind Turbine Amplitude Modulation: Research to Improve Understanding as to its Cause & Effect,* Presentation on October 25, 2011 Hoare Lea (RenewableUK Annual Conference and Exhibition).

12. *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312 at [46].