

## LEGAL REPORT

# Consent ruled no defence against nuisance claims

A planning permission is not a defence against a private claim for nuisance. However, development may alter an area's nature and character for the purposes of assessing whether a defendant is making reasonable use of a property. If a nuisance is being committed, an injunction should be granted unless it would be oppressive to do so or there are exceptional circumstances.

These issues were considered last month by the Court of Appeal in *Watson and Others v Croft Promo-Sport [2009]*. The defendants owned the Croft motor racing circuit in North Yorkshire. The claimants' homes lay around 300m north of the course. Planning permission had been granted in 1963 and 1998, allowing the use of the circuit for various motor-racing events.

## Noise restriction deal agreed

In 1998, the defendants also entered into a section 106 agreement under which they agreed to certain noise restrictions at the circuit. From 1998 onwards, use of the track increased substantially. In March 2006, the claimants issued proceedings for an injunction restricting the use of the circuit to its core activities and sought damages.

In the High Court last year, Mr Justice Simon remarked that it is "fairly well settled" that a planning authority has no jurisdiction to authorise a nuisance but that the grant of a planning permission may alter the character of an area. The judge found that the planning permissions had not altered the area's essentially rural nature and held that the defendants' use of the circuit did constitute a nuisance. However, he awarded damages instead of an injunction. Both parties appealed.

The defendants submitted that in a private law tort claim, it should not be possible to revisit planning decisions relating to strategic matters of public interest. That applied especially in this case because exhaustive consideration had been given to the consequences of the developments during the planning process, they contended. The section 106 agreement should be the benchmark for considering both the nature and character of the area and reasonable use of the site, they maintained.

The Court of Appeal dismissed this argument. It found no category of planning permission, however strategic in nature, that can affect the private law rights of third parties

unless such an effect is specifically authorised by parliament. In any event, it added, the planning permissions could not properly be described as "strategic".

The court also dismissed the defendants' submissions that the judge had been wrong in law in concluding that the permissions and agreement had not changed the character of the locality. His conclusions as to what constituted reasonable use were not perverse and insufficiently reasoned, the judges determined. Both issues were matters for the discretion of the judge and his conclusions were in the permissible range open to him, they ruled.

## Permission context considered

The appeal judges also pointed out that it was not the grant of planning permission that changed the nature of an area but the implementation of that permission. This should be considered in the context that neither the tortious activities of the defendant nor the intensification of a particular use can change the character of an area, they observed.

The High Court judge had declined to award an injunction because the claimants had delayed in bringing proceedings and been willing to accept compensation for noise above a certain level, suggesting that damages would be an adequate remedy. He also regarded it as relevant that the range of activities carried out at the circuit could only take place in a limited number of locations.

The Court of Appeal found that this failed to follow the line of authority making it clear that judges can only refuse to grant injunctions where it would be oppressive or where exceptional circumstances apply. A claimant's willingness to accept monetary compensation up to a certain level of inconvenience does not mean that damages are an adequate remedy for inconvenience in excess of that level, it held.

Because the defendants' activities were causing substantial injury to the claimants' enjoyment of their homes, the court ruled that it was appropriate to grant an injunction restricting use of the circuit to its core activities. It left it to the parties to come to an agreement over the extent to which the judge's order for damages needed to be amended. ■

*Douglas Wass is a partner and Jonathan Pratt is a solicitor at Macfarlanes LLP.*