IN THE CITY OF WESTMINSTER MAGISTRATES COURT

Lynn McCaw

v

Middlesex SARL

1) The defendant faces a single summons, issued following a complaint laid by Lynn McCaw (a private prosecutor), which states:-

"This information is laid by Lynn McCaw being a person aggrieved by the existence of an statutory nuisance in respect of dust, noise, and fumes emanating from premises under the control of the accused and in respect of which the informant has served notice under S.82.(6) of the Environmental Protection Act 1990 in writing of intention to bring proceedings in respect of the said nuisance, the accused have failed to stop or ameliorate the said nuisance in the form of dust, noise and fumes which form the primary basis of the said allegation.

Contrary to Section 82(1) Environmental Protection Act 1990 (Henceforth referred to as the EPA 1990)

2) The defendant is a Limited Company governed by the laws of the Duchy of Luxemburg. It owns the site of 100-106 Middlesex Street, London E1 and is developing it.

The prosecution arises out of the demolition and construction works being carried out at 100-106 Middlesex Street. This is a substantial development with a value of £100 million.

3) Lynn McCaw is the owner and occupier of flat 302 Brody House, Strype Street, London EC1. The north elevation of Brody House, and some of the flats in the western elevation, look directly over the site at 100-106 Middlesex Street. Ms McCaw's flat faces directly on to that site.

4) On 23rd March 2006 the defendant submitted a planning application to allow for the development of 100-106 Middlesex Street. The residents of Brody House made various objections to that application but those objections were withdrawn pursuant to an agreement dated 3 October 2006 by which the defendant made some concessions in relation to the planning application and agreed to engage in an on-going dialogue in relation to the progression of the project.

   Conditional permission for the development was given by the London Borough of Tower Hamlets on 5 December 2006. Demolition and construction work began in about March 2007, this is on-going and likely to be so until August 2010.

5) The defendant's initially instructed a company called "Laing" to carry out the works, but later removed them and replaced them with "J F Hunt" (who were responsible for the bulk of the demolition work) but later replaced them with a company called "ISG" who began work on the site on 24 September 2007 and who remain on site.

6) Before laying a complaint for an order under S82(2) the prosecutor must comply with S.82(6) of the EPA 1990 which states

"Before proceedings for an order under sub section (2) against any person, the person aggrieved by the nuisance shall give to that person such notice in writing of his intention to bring the proceedings as is applicable to proceedings in respect a nuisance of that description and the notice shall specify the matter complained of."

Under S.82(7)(b) of EPA 1990 – the notice required in this case was 21 days.

I have already ruled, despite the defence submissions, that the S.82(6) notice was given to the defendant on 28 June 2007.

7) Ms McCaw's case is that this notice did not prevent the statutory nuisance continuing and as a consequence she laid her complaint on 28 September 2007.

8) The statutory nuisances complained of are:-

- Fumes contrary to 79 (1) c of EPA 1990
- Dust contrary to 79 (1) d of EPA 1990
- Noise contrary to 79 (1) g of EPA 1990

9) I have heard evidence from 13 witnesses including 1 prosecution expert. I have viewed 3 recordings. I have visited the site, and Ms McCaw's flat, in addition to a number of the other prosecution witnesses' flats.

The Evidence

"The principal witness for the prosecution was Ms McCaw but her evidence was corroborated by a number of other witnesses. The defence did not challenge the individual incidents described.

In the light absence of challenges and the cogency of the evidence of the prosecution witnesses I find the following matters proved to the criminal standard:-

1) The demolition work on the site caused a significant amount of dust which on a daily basis caused significant difficulties for Ms McCaw from the middle of May 2007. The dust accumulated on every surface in her flat including cupboards and shelves.

2) The dust arose from the poor execution of the demolition works at 100-106 Middlesex Street being attributable to 5 main factors:-

a) The failure to cover sufficiently dampen down the dust at source on site as a result of using insufficient and inadequate hosing.

b) The failure to cover most of the loads of rubble as they were being carried form the site by lorry.

c) The persistent failure to wash the wheels of all of the lorries with a wheel washer as they left the site.

d) The use of Strype Street for entrance and exit by HGV lorries.

e) The inadequate use of sheeting around the demolition site.

These failures are in breach inter alia of paragraph 5.56, 5.58 and 5.59 of the Environmental Statement and paragraph 21 of the original planning consent.

3) Ms McCaw and her fellow residents, from at least May 2007 suffered significant problems with noise which was oppressive and very unpleasant for almost the entire working day. These problems were severe, persistent and on going.

These problems were due to the following factors:

a) The method used to demolish part of the building with diggers smashing some of it apart.

b) The frequent method of disposing of waste rubble by throwing it to the ground.

c) The use of poorly maintained machinery.

d) The lack of adequate supervision.

These failures were in breach of paragraph 5.54, 5.55 and 14.76 of the Environmental Statement.

4) I am satisfied so that I am sure that these problems were continuing and certainly persisted on 28 June 2007 when the section 82(6) notice was delivered and, with the exception of the use of the Strype Street by HGV vehicles on 28 September 2007, when Ms McCaw's complaint was laid.

5) I am also satisfied that at the time of these incidents J F Hunt was the principal contractor.

6) I am satisfied so that I am sure that throughout this period there were monthly residents' liaison meetings with the defendant's representatives and that these problems were brought to the defendant's attention without any significant change resulting except in relation to the use of the Strype Street entrance.

The prosecution witnesses recognised that the situation had improved following the completion of most of the demolition work in September 2007, in particular they recognised a reduction in the amount of noise and dust to which they were subjected.

The prosecution evidence of the on-going impact of the development at the beginning of the trial was less compelling. There was evidence that the residents continued to suffer disturbance caused by noise and dust. However, some witnesses made no such complaints focusing on concerns about the use of the building when it is finished, vandalism within the site unconnected with the works sexually explicit comments made to some female residents, and the fact that workers on the site could see into residents' flats.

Those witnesses gave evidence of the impact of events on particular days.

The prosecution called Mr Stigwood, an acoustics expert to give evidence. He is not an expert in demolition or construction equipment and methods. His evidence identified inadequacies in the current management of the site, the methods and machinery used generally, and specifically in relation to the reduction of the impact of noise, dust, fines and vibrations. His conclusion was that the defendant had not taken all reasonable practicable steps to minimise the impact of its activities.

I found Mr Stigwood to be an honest witness. However, in my judgement his approach was not to identify reasonable practicable steps which the defendant could have but was the counsel of perfection.

I found some of his suggestions, such as the erection of a scaffold screen around Brody House and the shrouding of the exhausts of some machinery, to be impractical and potentially dangerous. Further, insufficient consideration had been given to the implications to the health and safety of the operatives of machinery and the likely effect on the overall length of the development (with the consequential extended inconvenience to the residents of Brody House).

The only witness for the defence was Mr Jenner, Senior Project Manager of ISG. Mr Jenner was a most impressive witness, upon whose evidence I can rely. In the light of his evidence I find the following matters proved:-

1) ISG were awarded the contract to be the main contractors of the site by the defendant.

2) ISG began work on the site on 24 September 2008.

3) ISG's approach was to change the culture of the site. The change took time but resulted in a steady improvement in the way in which the site is managed.

4) ISG are aware of the sensitivity of the site given its proximity to Brody House and the need to take all practicable steps to minimise the noise, dust and fumes caused by the building operations.

5) Since their involvement, incidents have occurred which have impacted on the residents of Brody House in general and Lynn McCaw in particular. However, those incidents have been isolated and unpredictable. When they have occurred an investigation has been undertaken to establish its cause and steps put in place to prevent its recurrence.

6) Further work will be undertaken on the site which is likely to result in noise, fumes and dust which will probably impact upon the residents of Brody House. Reasonable practicable steps are in place which should minimise their impact.

<u>The Issues</u>

The parties agree that there are 3 issues in this case:-

1) Did a statutory nuisance exist at the time when the complaint was laid on 28 September 2007.

2) If so, is the defendant the person responsible pursuant to <u>Section 82(4)a) of the Environmental Protection Act 1990.</u>

3) Am I satisfied that:-

"The alleged nuisance exists or that although abated it is likely to recur on the same premises." (S82 (2) EPA 1990).

The Law

a) Nuisance

Nuisance in the context of statutory nuisance means unacceptable interference with property, personal comfort or amenity of neighbours or nearby community.

The interference need not be continuous, or necessarily continual. I must have regard to whether the interference is substantial or undue, not only in its duration but also in its character and quality.

At Common Law two factors were found to be relevant to the question of nuisance as high lighted by Pill LT in Murdoch v Glacier Metal Co Ltd [1998] ENV LR 732.
"The test to be applied in considering whether there was a nuisance was, the parties agree, accurately stated by the learned Recorder. He said " ... the issue is whether according to the standards of the average person and taking into account the character of the neighbourhood the noise [etc.] amounted to a nuisance."

The standard of the average person is objective.

b) Nuisance and Demolition Works

The general position of the law in relation to the nuisance and demolition/construction operations is as set out in Keating on Building Contracts 8th Edition 2006 at 10-41:

"Building operations often substantially interfere with adjoining owners' enjoyment of their property because of noise, dust and perhaps vibration. Such matters in some circumstances might be held to be a nuisance and form grounds for an injunction prohibiting their continuance or an action for damages or both. If this were the result of ordinary building operations the business of life could not be carried on for old buildings could not be pulled down and new erected in their place. But the law takes a commonsense view of the matter and, if operations such as demolition and building are reasonably carried on and all proper and reasonable steps are taken to ensure that no undue inconvenience is caused to neighbours, whether from noise, dust or other reasons, the neighbours must put up with it".

c) "Person Responsible"

See Matania v National Provincial Bank Ltd. [1963] 2 All ER 633 at 646.

Now there remains one other matter, and an important one, which Mr Morris has argued before us with great force and with which I have to deal.

There is no doubt in this case that Messrs Adamson are independent contractors, and being independent contractors save for exceptional circumstances, in the ordinary way those employing them would not be liable for their wrongful acts in negligence or in nuisance. That is made, I think, quite clear without any question in the recent case of Honeywill & Stein Ltd v Larkin Bross Ltd. *In the judgement of this court it say this at page 196:*

"It is well established as for a general rule of English Law that an employer is not liable for the acts of his independent contractor in the same way as he is for the acts of his servants or agents, even though these acts are done in carrying out the work for his benefit under the contract.'

That is there stated as the general principle, and Mr Morris says that the circumstances of this case are such as to bring these facts within that general principle. He says also that Messrs Adamson, even if they had committed a nuisance had been acquitted in the court below that they are not respondents here and that the Elevenist Syndicate, who are respondents here on the cross-appeal, cannot be made liable for the acts of the independent contractor.

The case of Honeywill & Stein Ltd v Larkin Bros Ltd, *which is the largest pronouncement of this court on this point and sums up, and perhaps to some extend extends or at any rate makes more clear, what is, I think, implicitly contained in such cases as* Dalton v Angus *and* Black v Christchurch Finance Co *goes on to say that there are exceptions to this rule and the exceptions are stated to be these (p197):*

"It is clear the ultimate employer is not responsible for the acts of an independent contractor merely because what is to be done will involve danger to others if negligently done. This incidence of this liability is limited to certain defined classes, and for the purpose of this case it is only necessary to consider that part of this rule of liability which has reference to extra-hazardous acts, that is, acts which in their very nature, involve in the eyes of the law special danger to other".

Here of course, we are not concerned with danger such as might found an action for negligence. We are here concerned with annoyance such as may found an action for nuisance, but the principles in my opinion are the same as regards the liability of a person who employes an independent contractor, that is to say, that if the act done is one which in its very nature involves a special danger of nuisance being complained of, then it is one which falls within the exception for which the employer of the contractor will be responsible if there is a failure to take the necessary precautions that the nuisance shall not arise. Now, what are the facts of the present case? They are these. It is really not in dispute that as regards the place where this work was to be done the noise and the dust were inevitable.

That is the evidence of both the plaintiff and the defendants, and it is the conclusion of the learned judge. The only question which I see is whether in that state where the productions of noise and dust is inevitable, sufficient precautions were taken to prevent that noise and dust affecting Mr Matania. In every case, whether it be a case of ordinary employment of a contractor or whether it be a case of a hazardous operation, the problem must arise whether a precaution would or would not prevent the results of an operation. To say that a precaution will prevent the result of an operation does not by itself take the case outside the rule that a person may be responsible, where the act is a hazardous one, for the acts of his contractor. Where the act is hazardous, to presume that every hazardous act would result in the danger or the nuisance would be to say that the act was inevitable in its consequences, regardless of any question of precaution or not, but that is not the right way of looking at it. In the case to which I referred, the case of Honeywill & Stein v Larkin Bros Ltd *it was not inevitable that the fire, which was brought in to the theatre, would have necessarily under proper precautions set the theatre on fire, but it was a hazardous operation to bring the fire into the theatre. So it was hazardous as regards the possible nuisance to Mr Matania to bring the noise and dust immediately below his apartment. What is said is with sufficient and proper precaution the result of that hazardous operation could have been avoided without detriment to him. The case of* Honeywill & Stein v Larkin Bros Ltd *follows, as I have said, the case of* Dalton v Angus *which in its turn had approved the earlier case of* Bower v Peate.

I do not think it necessary myself to consider these cases, because I think the principle has been sufficiently stated so recently in this court that it is enough to say that I am of opinion that this was a hazardous operation within the meaning of the exceptions stated in Honeywill & Stein Ltd v Larkin Bros Ltd, *that the principle which is there dealing with a case of negligence applies equally to the tort of nuisance, and that, therefore this being a case of this kind, I think that the Elevenist Syndicate are responsible for the fact that neither they nor the contractors, Messrs Adamson, took those reasonable precautions which could have been taken to prevent this injury to the plaintiff."*

d) Likely to Recur

If there is not, at the date of the hearing, a statutory nuisance but evidence that there has been a statutory nuisance in the past, is a statutory nuisance *likely to recur.* On this point past evidence of past statutory nuisance is highly relevant – since it is the evidence base for likelihood of recurrence. This may be seen by reference to the statutory scheme as explained by Moses J in *R v Dudley Magistrates' Court ex p Hollis* [1999] 1 WLR 642:

Section 82(2) creates a criminal offence in circumstances where a statutory nuisance exists at the time of the hearing or where, although abated, it is likely to recur: see Botross v Hammersmith and Fulham London Borough Council (1995) 93 LGR 268 and Reg v Liverpool Crown Court, Ex parte Cooke [1997] 1 WLR 700, 703D-E.

Even if a statutory nuisance existed up to the day before the hearing, no offence has been committed, so long as the statutory nuisance is not likely to recur. Consequently, the court has no power to make any of the orders specified in that subsection, and, importantly, has no power to make an order of compensation pursuant to section 35 of the Powers of Criminal Courts Act 1973. The only circumstances which the court can take action are where section 82(12) applies and an order can be made under that subsection. But such an order can only be made if the statutory nuisance existed at the date of the making of the complaint. Thus, even though a statutory nuisance has occurred and has persisted up to the time the written notice under section 82(6) is sent, the court has no power to make an order, even an order as to costs. The offence is therefore, not typical of a criminal offence, which will normally be committed by the action or omission of a defendant on a date prior to the hearing before the court. However, lax the conduct of those responsible for the nuisance, as identified under section 82(4), however great the justification for the aggravated person issuing the notice, those responsible will escape not only criminal liability but also a liability for costs, provided that they abate the nuisance in as way which will prevent its recurrence before the notice has expired. A person aggrieved by a statutory nuisance is likely to incur substantial expenditure when he take steps to have the nuisance from which he is suffering abated. He may well have to retain an expert in order to specify his complaint in the statutory notice under section 82(6). At that stage he cannot know whether the work will have been completed by the time of the hearing, partly because he will not know the date when the hearing is to take place. Nor will he know whether or when any assurances as to the work to be undertaken will be honoured.

It must be recalled that the defendant to section 82 proceedings may be a private landlord and not a local authority, accustomed to keeping its promises. Yet if the work is completed by the time the period of notice expires he will recover nothing, not even his costs."

e) Burden of Proof

The burden of proof is on the prosecution to the criminal standard of reasonable doubt.

RULING

1 Was there a statutory nuisance on 28 September 2007?

The area surrounding the development site contains residential properties, shops and businesses. Brody House is a residential block that is immediately adjacent to, and overlooks the site. The Environmental Statement recognises the likely impact on, inter alia, the residents of Brody House, from the development.

The extent of the development and construction in this case would inevitably interfere with the residents' enjoyment of their property, because of the nature of the works. If the necessary development is not to be prohibited, some inconvenience must be accepted. However, I am satisfied so that I am sure that a state of affairs existed on 28 September 2007, which had moved from inconvenience to nuisance.

I have come to this conclusion, aware of the fact that demolition, by its very nature is dirty, noisy and disruptive. The failures which I have set out above in paragraphs (1-4) under the heading evidence, clearly amount to the statutory nuisances of noise, fumes and dust according to the standards of the average person taking into account the character of the neighbourhood.

The flagrant breach of the Traffic Management Plan, The Environmental Protection Plan and planning conditions leaves me in no doubt that there was a failure to take "reasonable steps to ensure that no undue inconvenience was caused….."

I am satisfied so that I am sure that Lynn McCaw was aggrieved by the statutory nuisances of noise, fumes and dust on 28 September 2007 when the complaint was laid.

2 Is Middlesex SARL the person responsible for the nuisance, pursuant to S82(4)a) of EPA 1990?

I am satisfied so that I am sure that Middlesex SARL is the owner of the site and the developer of it. It has contracted with other parties to carryout the work, but nonetheless retains an important supervisory role including the power to set out, enforce and vary contract terms. That this defendant retained control is clearly demonstrated by their Solicitor's response to the original section 82(6) EPA notice. In the light of that control, and the immense difficulties which would be caused to those seeking relief if a more restrictive approach were adopted, and applying the case of <u>Matania v National Provincial Bank Ltd,</u> I am satisfied so that I am sure that the defendant is the person responsible for the nuisance.

3 Does the nuisance still exist or is it likely to recur?

A sea change has occurred since 28 September 2007. J F Hunt have been replaced by ISG who have taken their responsibilities seriously to ensure that no undue inconvenience is caused to their neighbours.

I accept that there have been unconnected incidents which have caused and continue to cause inconvenience to Lynn McCaw and the other residents of Brody House. However, those incidents were unpredictable and where they have occurred plans have been put in place to prevent their recurrence.

Further inconvenience will undoubtedly be caused but clear reasonable plans are in place to minimise that inconvenience.

I have taken into account the nature of the area, the right of the residents to peacefully enjoy their homes and the need for a modern society to allow development which may interfere with these rights.

I find that no statutory nuisance is currently occurring or did so at the commencement of the trial. I am also satisfied that a recurrence of the nuisance is unlikely. In the light of my ruling I do not make an order pursuant to S82(2) of EPA 1990. I do however, award the prosecution their costs pursuant to S82(12).

Michael Snow
City of Westminster Magistrates' Court
24 **September 2008**