Case No: 7MF00451

IN THE DERBY COUNTY COURT

Sitting at
60 Canal Street
Nottingham NG1 7EJ

3rd November 2008

BEFORE:

HIS HONOUR JUDGE MITHANI

- - - - - - - - - - - - - - - - - - -

BETWEEN:

Claimants

(1) HENNING STEENBERG
(2) MARILY LOUDEN

- and -

(1) ENTERPRISE INNS Defendants
(2) ANDREW CLIFFORD

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MR J HYAM appeared on behalf of the CLAIMANTS

MR JOHN DE WALL appeared on behalf of the FIRST DEFENDANT

MR AARON WALDER appeared on behalf of the SECOND DEFENDANT

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Judgment as approved by the Judge

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53 Folios
3767 Words

JUDGE MITHANI:

1. This is a claim by the claimants, Henning Steenberg and Marilyn Louden, against Enterprise Inns plc, the first defendant, and Andrew Clifford, the second defendant, in the tort of private nuisance.

2. The claimants are the joint owners and occupiers of residential property at 144 Church Lane, Backthorpe, Nottinghamshire ("the claimants' property"). The first defendant is the lessor of the Red Lion Public House ("the public house"). The second defendant is the lessee of the public house. The claimants' property is directly adjacent to the public house.

3. The claimants allege that since May 2002, they have suffered noise and odours emanating from the public house caused by the operations undertaken by the second defendant at the public house. They allege that the noise and odours have materially interfered with the use and enjoyment of their property.

4. The Particulars of Claim allege that the first defendant has condoned the operations and the causing of the noise and odours at the public house and is, therefore, liable for them to the claimants. The position was slightly differently put in the written submissions prepared by Mr Hyam, counsel for the claimants. There, he asserted that the first defendant was liable for the acts which are alleged to amount to the nuisance because it authorised their commission. In the course of his opening remarks, and in line with the replies that the claimants served to a request for further and better particulars dated 13th February 2008, he indicated that the basis of the claimants' claim against the first defendant was, in reality, that it 'permitted' them.

5. The claimants seek injunctive relief and damages in the proceedings.

6. The original claim of the claimants included various other allegations. These are no longer pursued. The only allegations that the claimants now pursue are allegations of odours and noise emanating from the kitchen of the public house. The only issues that fall for determination by me are, therefore, first, whether the second defendant is liable for the odours and/or noise emanating from the kitchen of the public house; and, second, whether the first defendant (as lessor) is also liable on the ground that it has authorised or permitted the commission of the acts which are alleged to amount to the nuisance.

7. It is appropriate that I refer to the allegations made by the claimants upon which they presently rely as set out in the Particulars of Claim. At paragraph 3 of the Particulars of Claim at page 1.14 of the bundle, the claimants allege that:

> "The defendants have wrongfully caused or permitted excessive noise arising from the kitchen of the Red Lion and in particular through the open windows of the kitchen, which are situated close to the claimants' front door. This includes loud verbal commands and communication between staff, singing and shouting, general conversation and banter. The expressions are often offensive. There is also the noise of kitchen

> tools, utensils, pots, pans and crockery constantly in use. This particular noise frequently exceeds recommended noise levels."

Then at paragraph 4:

> "The defendants have wrongfully caused or permitted excessive low and mid-frequency noise arising from the use of compressors situated outside the main kitchen building. This is at times a constant noise and at other times intermittent. It results in a significant increase in ambient noise levels. This noise is at a level leading to the prediction of complaints when assessed in accordance with BS4142."
>
> The first claimant states at paragraph 12 of his witness statement dated 14th June 2008 that this noise:
>
> "alone would not cause a particularly significant problem but it does add to the general state of nuisance affairs arising from the pub."

Paragraph 5:

> "The defendants have wrongfully caused or permitted excessive and offensive cooking odours from the kitchen of the Red Lion which smell like burnt/rancid fat, fish and chip frying, frying of steak and garlic mushrooms, such odours being offensive and intolerable."

8. The background giving rise to the claim does not require any detailed mention by me. The problems between the claimants and the second defendant go back a long way in time. In the summer of 1993, the second defendant installed a large commercial extractor fan on the roof of the public house, which the claimants alleged interfered with the use of their property. They alleged that the extractor fan caused, among other things, excessive noise to emanate from the public house into their property. They also alleged that cooking smells, which they described as being 'offensive and intolerable', spread into their property from the public house as a result of the cooking operations that were carried out at the kitchen of the public house.

9. The dispute that arose between the claimants and the second defendant could not be resolved and accordingly in January 1999, the claimants issued proceedings in nuisance ("the first claim") against the second defendant and Whitbread plc, who were the first defendant's predecessors in title. The claimants' claim in the first claim included a claim for an injunction and damages to compensate the claimants for their anxiety and inconvenience, including the loss of amenity value to the claimants' property as a result of the nuisance, and damages of £40,000 in respect of the diminution of the capital value of the property.

10. In the latter part of 1999 in accordance with the grant of planning permission, dated 1st July 1999, a new odour filtration system was erected at the public house. That appeared to resolve the complaints that the claimants had about the noise and odours emanating from the public house. Accordingly, on 18th

January 2001, the first claim was compromised by a Tomlin Order. Part 1 of the schedule to the Tomlin Order provided that the claimants be paid £10,000:

> "in full and final settlement of all claims by either party, howsoever arising of which either party was aware at the date hereof save as hereinafter described."

11. The claims that were excluded from the compromise were set out in sub paragraphs 2.1 to 2.4 of paragraph 2 of the schedule. It is agreed by the parties that none of the excluded claims referred to in paragraphs 2.1, 2.2 and 2.4 forms part of the current proceedings. There is a dispute between the parties as to whether the present claim includes a claim under paragraph 2.3. The claimants say it does. The defendants say it does not.

12. I can deal with that dispute shortly. Paragraph 2.3 excluded from the compromise any claim:

> "in respect of the planning permission granted on 1st July 1999, Number 98/0650, any rights of the claimant in respect of enforcement of any future breach which may arise from the planning conditions."

13. It is no part of the claimants' pleaded case that the defendants are in breach of that planning permission. The claim by the claimants is made in nuisance only. No mention in the Particulars of Claim is even made of that planning permission, let alone any mention of a claim arising from any alleged breach of it. It is correct that some documents included in the bundle refer to possible breaches of the planning permission by the second defendant, but this is simply made in support of the claimants' claim in nuisance. It forms no part of the claimants' substantive claim against the defendants. It follows that there is no substance in the assertion that the present claim survives as a result of the operation of paragraph 2.3. It plainly does not.

14. It is submitted on behalf of the defendants that the issues raised by the claimants in the present proceedings were either expressly raised in the first claim or were matters of which they were then aware. In the circumstances, it is asserted by the defendants that the claimants' cause of action has been determined on the merits by the judgment made by consent in the first claim, and that accordingly, the present claim should be dismissed.

15. The defendants rely upon the doctrine of ‘action estoppel’ in support of this assertion. Halsbury's Laws of England, Volume 16(2), paragraph 978, and the commentary at footnote 2, set out the principles that apply. The learned editors of that work say:

> "In all cases where the cause of action is really the same, and has been determined on the merits, and not on some ground (such as the non-expiration of the term of credit) which has ceased to operate when the second action or claim is brought, the plea of *res judicata* should succeed. The doctrine applies to all matters which existed at the time of the giving of the judgment and which the party had an opportunity

> of bringing before the court. If, however, there is a matter subsequent which could not be brought before the court at the time, the party is not estopped from raising it."

Footnote 2 to the passage that I have just read out states:

> "It is often said that the final judgment must be 'on the merits'. The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it had jurisdiction to adjudicate on an issue raised in the cause of action to which the particular set of facts give rise and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any co-ordinate jurisdiction, although it may be subject to appeal to a court of higher jurisdiction": DSV Silo-und Verwaltungsgesellschaft mbH v Owners of the Sennar, The Sennar [1985] 1 WLR 490 at 494, HL, per Lord Diplock.
>
> "No express finding is necessary provided the point arose as a separate issue for decision and was decided between the parties."

16. Alternatively, it is submitted on behalf of the defendants that the claimants' attempt to re-litigate these issues and extract further money from the defendant (for example for diminution in value) is an abuse of process. Halsbury's Laws of England, volume 16(2), deals with this principle at paragraphs 980 onwards. The leading case on the subject is that of Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1. The principles that apply are contained in the speeches of Lord Bingham at 23b-23f and 31a-f and Lord Millett and 58d-60a. It is only necessary that I refer to certain passages at pages 58d-60a of Lord Millett's judgment:

> "In describing the proceedings brought by Mr Johnson as an abuse of the process of the court, the Court of Appeal was seeking to apply the well-known principle which Sir James Wigram V-C formulated in Henderson v Henderson (1843) 3 Hare 100 at pages 114-115."

Then he quotes that passage:

> "I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies except in special cases not only to points upon which the court was actually required by the parties to form an opinion

and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time."

Lord Millett then continues:

"As the passages which I have emphasised indicate, Sir James Wigram V-C did not consider that he was laying down a new principle, but rather that he was explaining the true extent of the existing plea of *res judicata*. Thus, he was careful to limit what he was saying to cases which had proceeded to judgment, and not, as in the present case, to an out-of-court settlement. Later decisions have doubted the correctness of treating the principle as an application of the doctrine of *res judicata* while describing it as an extension of the doctrine or analogous to it. In Barrow v Bankside Members Agency Limited [1996] 1WLR 257, Sir Thomas Bingham MR explained that it is not based on the doctrine in a narrow sense nor on the strict doctrines of issue or cause of action estoppel. As May LJ observed in Manson v Vooght [1999] BPIR 376 at 387, it is not concerned with cases where a court has decided the matter, but rather cases where the court has not decided the matter. But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. While the exact relationship between the principle expounded by Sir James Wigram V-C and the defence of *res judicata* and cause of action and issue estoppel may be obscure, I am inclined to regard it primarily as an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented."

"In one respect, however, the principle goes further than the strict doctrine of *res judicata* or the formulation adopted by Sir James Wigram V-C, for I agree that it is capable of applying even where the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding."

17. It is right that I also refer to the next passage as it echoes some of the points that Mr Hyam made on behalf of the claimants. Lord Millett went on to say:

"However this may be, the difference to which I have drawn attention is of critical importance. It is one thing to refuse to allow a party to re-litigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. The latter (though not the former) is *prima facie* a denial of the citizen's right of access to the court conferred by the common law and guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedom (1953). While, therefore, the doctrine of *res*

> *judicata* in all its branches may properly be regarded as a rule of substantive law applicable in all save in exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression. In Brisbane City Council v Attorney General for Queensland [1979] AC 411 at 425, Lord Wilberforce giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the ruling in Henderson v Henderson is abuse of process and observed that 'it ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.' There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of process in the court for Mr Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the company's action. The question must be determined as at the time Mr Johnson brought the present proceedings and in the light of everything that had then happened. There is, of course, no doubt that Mr Johnson could have brought his action as part of or at the same time the company's action. But it does not at all follow that he should have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of process to the court. As May LJ observed in Manson v Vooght [1999] BPIR 376 at 387, it may in a particular case be sensible to advance claims separately. Insofar as the so-called rule in Henderson v Henderson suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action."

18. The claimants contend that they are not precluded from bringing these proceedings for a number of reasons. First, they say that it is plain from a reading of the pleadings in the first claim that the issue in respect of noise and vibration was noise from the extractor fan which was replaced in 1999. Equally, in respect of smells, the allegation in the first claim was that the second defendant was wrongfully permitting to issue -- from the extractor fan and from an opening in the roof and from the kitchen window -- cooking smells which spread on to the claimants' property. The claimants assert that neither allegation is, to use their words, "the same" as the allegations made in the present proceedings. Nor are the matters which are now complained of matters which could, with reasonable diligence, have been brought before the court in the first claim. They maintain that they were not aware -- at the time of the resolution of the first claim -- of those matters, which they say arise out of the intensified use of the kitchen following the grant of planning permission and the use of a new and different kitchen extractor system.

19. Before I deal with these propositions, I should mention the following preliminary matters. The issue of whether the present claim was compromised by the terms of the Tomlin Order could and should have been dealt with either

summarily or at the very least as a preliminary issue. So should the issue of whether the first defendant is liable to the claimants in the manner that they contend. If they had been dealt with as preliminary issues, there might have been a considerable saving in costs.

20. The trial was given a three day time estimate. I was invited by both defendants on the first day of the trial to deal with the issue of the claimants' ability to bring the present claim and by the first defendant to determine whether it could be held liable to the claimants in these proceedings as preliminary issues. I felt unable to for three reasons. First, because I did not have enough pre-reading time; I had only been through the bundles very briefly. Second, because much of the earlier part of the day had been taken up by a site inspection, which the parties considered it would be appropriate for me to undertake before hearing the evidence. And third, because I felt on the information I had -- and I make no criticism of the parties for this -- that it would be possible for me to finish the trial, which would include giving judgment, in three days and I was anxious to avoid the witnesses and the expert having to return in order for the evidence to be completed. As it happened, by close of play on the first day, it was only possible for me to hear the evidence of the lay witnesses upon whom the claimants relied and part of the evidence of the first claimant. I had the opportunity in the evening of the first day to go through the papers properly, and considered that it would be appropriate for me to deal with the entitlement of the claimants to bring the present claim as a preliminary issue because the matters in dispute between them and the defendants on that issue were straightforward.

21. It also seemed to me unlikely that the trial would be finished on time. I considered that at least another day and possibly two days would be required for the trial to be completed. In the circumstances, I indicated that I would deal with the claimants' ability to bring the claim as a preliminary issue. The suggestion met with the approval of the defendants, but was opposed by the claimants. I did not consider that the claimants would be disadvantaged with the course of action I suggested because the first claimant could complete his evidence on all the issues that arose between the parties and even if the expert started giving evidence after the claimants had completed giving their evidence, it was unlikely that his evidence would be completed that day. I, therefore, released the expert. I was right. The first claimant only finished his evidence at around 3.30 pm that day and even if the expert had started giving evidence shortly after that, it is likely that he would have had to return the following day.

22. Accordingly, I dealt with the entitlement of the claimants to bring the present claim as a preliminary issue in the exercise of my case management powers under CPR 3.1. I considered that if I found against the claimants, it would save two days of trial time. If I found in their favour, the trial could proceed, though it would be necessary for other dates to be found to complete it but that would have been necessary in any event. Despite their assertions to the contrary, I could not see how the claimants could claim to be prejudiced by the course of action I decided to adopt.

23. I now turn to the issue that falls to be determined by me. The starting point is the consent order. It is cast in extremely wide terms. The payment of £10,000 is expressed to be in

"full and final settlement of all claims by either party howsoever arising of which either party was aware at the date hereof, save as hereinafter described".

24. I am not sure that 'action estoppel' is the right description for the position that the defendants advance. The cause of action in the first claim was not determined on the merits and I am not sure that an 'action estoppel', properly called, arises in the circumstances. The proper analysis of the position seems to me to be rather simpler. The schedule to the terms of the Tomlin Order sets out the agreement reached between the parties. The terms of the schedule are like the terms of any other written contract. The advantage of concluding a settlement in the form of a Tomlin Order as opposed to an ordinary written contractual document is that the Tomlin Order permits the parties to enforce the terms of the agreement within the existing proceedings rather than have to bring a fresh claim for breach of contract.

25. It follows that the terms of the schedule need to be construed in the same way as the terms of any other contract. If the effect of the scheduled terms is that the present claim was compromised, then the claim cannot proceed. It must be struck out or dismissed. Whether this is because the continuation of the claim amounts to an action estoppel or abuse of process or because it discloses no reasonable cause of action does not matter. The claim should be stopped.

26. The suggestion on the part of the claimants that the action should not be struck out or dismissed because the source of the acts and admissions that are alleged to cause the nuisance is different is plainly incorrect. Paragraph 1 of the schedule to the Tomlin Order makes no reference to the compromise of claims by reference to how they are alleged to occur. It states the precise opposite. It provides that all claims "howsoever arising" are compromised. Apart from paragraph 2 of the order, which has no application in the present case for the reasons I have already given, the only claims that survive the consent order are claims of which the claimants were not aware at the time the approved order, signed on behalf of the parties, was submitted to the court for sealing. It follows that any claims of which the claimants were aware, whether in nuisance or otherwise, are compromised.

27. It is appropriate for me to deal with the precise nature of the claim of the claimants in these proceedings. I have read out the relevant part of the Particulars of Claim in these proceedings which set out the nature of claim and the allegations that are relied upon in support of it. It is necessary that I refer briefly to the other matters upon which the claimants rely. In response to a Part 18 request served upon the claimants by the second defendant in which the claimants were requested to supply details of how it was alleged that the noise complained of was wrongfully caused by the second defendant, the claimants replied at paragraph 3 of the Further and Better Particulars:

> "The second defendant has wrongly caused or permitted excessive noise arising from the kitchen of the Red Lion by either causing such noise or by allowing such noise to continue after being advised that such noise was occurring on the premises."

28. Similarly, in response to requests made by the second defendant as to how it was alleged that the second defendant had wrongfully permitted excessive and offensive cooking odours to emanate from his kitchen, the claimants' response, at paragraph 5 of the Further and Better Particulars, was:

> "The second defendant has wrongfully caused or permitted excessive cooking odours to emanate from the kitchen of the Red Lion by allowing such odours to continue after being advised that such odours are occurring on its premises. This can be more fully particularised in a report of the claimants' expert"

29. The replies given by the claimants were woefully inadequate. They could and should have been able to give some information to the defendants that demonstrated why the allegations they were relying upon were not within their knowledge in 2001. They were unable to because, in reality, the nature and circumstances of this claim are in substance identical to the circumstances that obtained in January 2001 when the first claim was compromised.

30. The reason why the claimants consider that they are entitled to complain about the excessive and offensive odours is set out at paragraph 13 of the first claimant's witness statement, dated 14th June 2008 where he states:

> "Specific occasions of odour nuisance are noted in the record sheets. Further occasions are detailed in correspondence between various parties."

31. Then he sets out various letters upon which he relies. It is only necessary that I refer to what he says in his letter to the Laurel Pub Company dated 21st June 2002 at sub-paragraph (a) because much of what he says subsequently is in substance similar -- and adds little -- to what he says at sub-paragraph (a) :

> "Cooking odours – I stated that we were not satisfied that the filters were being changed with sufficient frequency. Often, we were being subjected to cooking smells almost as bad as those that existed before the installation of the new extraction system. Either the system was no longer performing as it should or one or more of the different levels of filters was not being cleaned/changed as necessary."

32. Mr Mike Stigwood, upon whose expert evidence the claimants rely, provides further information concerning this. At paragraphs 1.6 to 1.11 of his report, he says:

> "The odour emissions arise due to a combination of design and operational matters. If the menu type is to be maintained then high

> standards of odour arrestment are required. The discharge is too low to allow dispersal of odours and gases as a solution.
>
> The carbon filter system cannot be expected to operate effectively as it is highly unlikely the air stream temperatures can be maintained below 40 degrees centigrade during cooking processes. This is essential for the operation of the filters and to prevent them re-admitting stale odours.
>
> Alternative and effective odour treatment systems which can be retrospectively fitted without consequence to the operation of the ventilation system are available. The operational costs of ozone treatment would be much lower than the cost of replacing the carbon filters.
>
> If frying, grilling, griddling and chargrilling operations are to be undertaken, then a more efficient ventilation system is required which prevents fugitive emissions and which subsequently removes malodours from emissions. Alternatively, a point of discharge requires increasing in height and distance from 144 Church Lane.
>
> I recommend the kitchen operates without the use of a chargrill, with an improved extract and supply ventilation system incorporating various heat control based on power demand. Further, I recommend that additional odour treatment is incorporated in the form of ozone injection into the gas stream. This may require some extension of the flue and duct to ensure adequate contact time."

Then he goes on to say:

> "I recommend the upgraded system is designed to operate with windows closed and these are sealed shut to prevent unnecessary impact."

33. All of the sources of the nuisance about which the claimants claim in the present action were in existence at the time the consent order was concluded. They and their potential to cause the odours in respect of which complaint is now made by the claimants were within the claimants' actual knowledge. He admitted as much in the course of giving evidence. The matters that Mr Stigwood identifies as the causes for the odours were in existence in January 2001. Indeed, the first claimant’s complaint about the odours is difficult to understand given what he says in his letter dated 21st June 2002 to the Laurel Pub Company that the cooking smells to which he and the second claimant were being subjected were “almost as bad as those that existed before the installation of the new extraction system".

34. The position concerning the issue of noise is also the same. Paragraph 10 of the first claimant's witness statement sets out the complaints that the claimants have with regard to noise. He says this:

> "The findings of Mr Stigwood further explains the nature of the problem - see for example his preliminary findings in August 2003 that: 'Noise impact arises whenever there is activity within the kitchen and, with one exception, when the windows (either or both) are open. The exception is the impact noise… In summary, noise arises from the following principal sources: (a) Normal conversation. This is clearly audible over a large area and is only masked during louder events such as cars passing; (b) Raised voices. This ranges from raised conversation (raised to overcome kitchen noise), shouting of orders and instructions; (c) clatters, bangs and crashes, particularly metallic sounds; (d) thumping and banging (purpose unknown, but possibly meat tenderising). This can occur several times a night and on several nights a week; (e) incessant telephone ringing (minor). Additional points: (1) Noise impact arises almost continuously for many hours at a time. Any attempt at peaceful enjoyment is disrupted; (2) There is little respite as incidents occur when residents want to use their gardens for restful activities and relaxation. However, its sporadic occurrence also means it is not readily noted by a casual observer..."

35. But all these matters were present or occurring in 2001. The claimants do not assert that they were not. The reasons why complaints are now made about the noise emanating from the kitchen are set out in Mr Stigwood's report at paragraph 1.3. There he states:

> "Noise appears to have increased due to an apparent intensification in use, changes in the menu and cooking methods and the fact that windows communicating directly with the commercial kitchen are open. The latter are adjacent to the boundary of 144 Church Lane, Bagthorpe. The layout is such that only this one property is affected. I would not expect complaints from occupants of other dwellings as it is highly unlikely that they would suffer unreasonable intrusion in the same way. This is a factor of the layout and proximity. In these circumstances, it is reasonable to design the catering operation in a manner to prevent unreasonable intrusion."

36. At paragraphs 2 to 4 of his witness statement dated 20th September 2008, the first defendant sets out the activities that he says take place in the kitchen. He gives the dimensions of the dining area and the layout of the public house and he gives information about the kitchen size. Then he goes on to say:

> "The kitchen equipment consists of one oven, two microwaves, one grill, two small deep fat fryers and one convection microwave/over table top. At the busiest times, the maximum covers can be 45 in total and on average lunch 20 covers. Attached at exhibit AC2 is a sample menu."

37. At paragraph 3, he says:

> "In terms of staff, the kitchen staff are a maximum of two people - one chef/cook and one assistant. There is no licence maximum capacity at

> the Red Lion, but I would certainly envisage that at the busiest period you would have 70 to 75 people in the premises and split as I say maximum of 45 diners at any one time and 30 people drinking in the bar area. In terms of opening hours, we serve Monday to Thursday, lunchtime 12.00 until 2.00 pm and evenings 5.30 until 8.30 pm. Fridays and Saturdays we serve until 8.45, but on a Sunday we do 12.00 noon until 7.45. Sunday is nearly all family roasts and all our food is prepared from fresh goods. Friday and Saturday evenings are the busiest times, but there is no set pattern. As we are simply a village pub, we do not have set entertainment, football matches, karaoke or anything like that. It is literally people who come for one or two drinks and a meal or a snack."

38. Then at paragraph 4:

> "The kitchen has operated in exactly the same way since approximately 1984. The ventilation system is a kitchen extract system and was commissioned by Troup Bywaters and Anders. The bulk of the system ductwork was retained from the original systems. Troup Bywaters have confirmed that they did upgrade the extract fan and relocated the fan from the pitched roof into a plant room area, which greatly improved performance of the system for the neighbour in both noise and odours. I attach to my statement a copy of an email from Steve Bell in which he confirmed that the air supply was left as it was in 1999 and only modified in the plant area. That email confirmed that I keep a log of the maintenance carried out on the system and I attach herewith at exhibit AC3 duct test sheets carried out by David Ford Mechanical Electrical showing that the maintenance and servicing requirements have been adhered to by me and the staff at the Red Lion."

39. At paragraph 7:

> "I would like to try and explain that the Red Lion is a local pub that has not changed from being a pub that serves good quality food. In terms of turnover, I have prepared a comparison of net sales from 2003 to 2004, the latest being up to 2006 to 2007 period based upon my accounts. Net food sales as you can see over the past three years have only risen from £283,936 to £295,277. The turnover for food sales can be seen at Exhibit AC4. An explanation is provided that the year ending 30th September, total net sales were reduced by 1.79% and fractionally more growth in net bar sales than food. I wish to try and demonstrate that in no way has the pub changed or increased to be any sort of restaurant. It is important however to the Red Lion and the community that food be served. My staff and I have strived to maintain this over the last 30 years."

40. The first claimant cannot directly refute what the second defendant says in the passages in his witness statement that I have just read out. However, he questions the reliability of that information. He maintains that kitchen

activities have intensified over time because he sees more customers go to the public house and the noises he hears from the kitchen suggest that there are more than just the chef and his assistant working in it. He also contends that he has not been provided with all the accounting information he needs – though I am not sure that he has made any request for the accounting information that he asserts is still lacking - and is unable, therefore, to make any observations about the statements made by the second defendant in paragraph 7 of his witness statement.

41. I am simply unable to understand how the first claimant can make that assertion or the assertion that the menu or cooking operations have changed over the relevant period of time. It is based on pure speculation. Counsel for the claimants suggested that until the second defendant was cross-examined, the position could not be ascertained properly or with any certainty. I am not sure how that proposition can be correct. The claimants bring this claim against the defendants. It is for them to prove the allegation they make against the defendants. They cannot argue that they have no evidence to prove the allegations, but that the evidence will become available once they embark upon the cross-examination of the defendants. There is simply no basis in that assertion. The defendants do not have to give evidence if they do not wish to.

42. I agree with the defendants that the substance of the operations at the kitchen have remained the same over the relevant period. In any event, there is no basis for a claim merely because the activities in the kitchen have intensified or because there has apparently been a change in the menu or cooking methods over that period of time. There is no provision in paragraph 1 of the schedule to the order that states that the claimants are entitled to maintain a claim in such circumstances. The schedule neither provides that the claimants can make a claim in such circumstances, nor includes a warranty or representation on the part of the claimants that they will not increase the activities in the kitchen or change the menu or cooking methods. The indication by the first claimant that he believed that he was entitled to bring a claim in such circumstances is, therefore, plainly wrong.

43. Nor is there any substance in the assertion of the claimants that they are entitled to require the second defendant to close the kitchen windows. There is no dispute that the kitchen windows were kept open in 2001 before the consent order was made and that the claimants were aware of it and no basis, therefore, for suggesting that any noise emanating from the windows being kept open can found a claim against the defendants.

44. Quite apart from what I have said, I agree with the defendants that the claimants were fully aware of all the matters which they now say give rise to a fresh claim against the defendants and should have raised them in the first claim. I agree with the defendants that this raises an issue estoppel along the lines indicated by the House of Lords in Johnson v Gore Wood and to allow the claim to continue in those circumstances would amount to an abuse of process.

45. However, the position can be analysed in even simpler terms. The claimants' claim in the first claim was for nuisance arising from noise and odours emanating from the public house. They sought an injunction to restrain the nuisance and damages *inter alia* for the diminution in the capital value of the property. They compromised the claim. They could have sought the injunction either by having their claim adjudicated by the court or obtaining the consent of the defendants to the first claim to submit to the injunction. They did not. Instead, they agreed to accept a monetary sum. If they had sought to continue their claim and been successful in it, it is likely that the court would have granted them the injunction. However, it is possible that it would not and that it would simply have awarded them damages in lieu as happened, for example, in Jaggard v Sawyer [1995] 1WLR 265. If that had occurred, the claim in nuisance would effectively have been bought off by the award of damages and the defendants would have been entitled to continue the nuisance. The claimants did not continue the claim. They settled it. However, the consent order had the same effect as an award of damages in lieu of an injunction. The defendants in that action bought off the claimants' claim in nuisance and all other claims of which they were aware at the date of the order, save those excluded by paragraph 2 of the schedule to the order. It is common ground between the parties that the fact that the compromise was concluded by Whitbread plc as opposed to the first defendant has no material bearing on the position of the defendants in the present proceedings.

46. Suppose that in the present proceedings, the claimants were awarded the full damages they claimed in lieu of an injunction. Suppose that, in the future, the second defendant increased the activities at the public house resulting in an increase in the level of noise and odours. Would the claimants be entitled to maintain a further claim? If so, would they be entitled to claim an injunction? What damages would they be entitled to claim? If the claimants maintain that they would not be entitled to bring a fresh claim in such circumstances, I question why they claim to be entitled to do so now, given that the terms and effect of the compromise are much wider than the terms and effect of any judgment the court could have given in the first claim. If, on the other hand, the claimants maintain that they would be entitled to bring a fresh claim, I question whether they would be entitled to bring a claim every time there was a slight increase in the activities at the kitchen, resulting in slightly more noise or kitchen odours, for example because there was a slightly higher number of diners visiting the public house.

47. By paying compensation to the claimants, the defendants in the first claim had bought off the claimants' claim in nuisance. The nuisance that the claimants rely upon in the present proceedings is the same, even if the manner in which they say it now arises is different. They cannot bring a claim for that. It follows, in my view, that the claimants are not entitled to complain about that nuisance. They may be entitled to bring a claim in nuisance if it arises from materially different facts and circumstances than those that obtained in January 2001 provided they were not aware of such facts and circumstances. They cannot, however, pursue a claim, the substance of which is identical to the claim that was compromised in 2001. If they were allowed to, it would mean that they would be entitled to maintain a claim every time there was a

minor increase in the noise and smell emanating from the premises. It would be difficult to see how this could be so and specifically how they could claim diminution every time this happened, given that they have already been paid a sum of money representing that head of claim. The manner of the formulation of their claim for damages in the current proceedings is an indication of that. Exactly the same claim for diminution is made in the present proceedings as was made in the first claim. The property is alleged on the present occasion to have reduced in value by £80,000. The claimants have not given any explanation as to how the previous payment of £10,000 has any bearing on their present claim for diminution or how it should be taken into account in the calculation of that claim.

48. The fact is that the payment of £10,000 included any claim that the claimants had for diminution, paid as it was in satisfaction of all claims of the claimants of which they were aware. The claimants' property was blighted in the same way then as it is alleged to be now. They chose to accept £10,000 instead of £40,000. That was their decision – based no doubt on commercial considerations – but its payment represents the diminution in the value of their property – the same loss for which they now claim. If they were asked to explain the extent to which that payment affected their present claim, they would, in my view, have to accept that it represented a claim for which they had already been fully compensated.

49. This is no more than a claim to litigate the same matters and to obtain the same remedies and on the same basis as the first claim. The present claim was bought off in January 2001 and the remedies, particularly the claim in damages now made, was dealt with at that time. The claimants are attempting to recover twice over for the same claim. If this claim were allowed to proceed on the basis the claimants contend, they could continue to make such claims indefinitely based on the slightest change of circumstances from any previous claims they made.

50. The claimants assert that stopping the claim would give carte blanche for the second defendant to continue the nuisance and indeed deliberately increase the level of noise and odours emanating from the public house. Whether or not that is right, I am not sure that will be the position in practice. First, if the second defendant were to behave in that way, his behaviour could give rise to a materially different set of circumstances which the claimants might not be precluded by the terms of the consent order from pursuing. However, second, and more importantly, the statutory authorities might, in such circumstances, think it appropriate to take enforcement or other action against the second defendant. The order is not binding on them. There would be nothing to stop the claimants from complaining to the statutory authorities or from taking action against them if they failed to comply with their statutory functions.

51. It follows, therefore, that the appropriate order that I should make is for the dismissal of the claim against the defendants.

52. It is right, however, that I mention one further matter by way of completeness. I do so simply in the event that there is an appeal against my decision, which

was hinted at in the course of the submissions made by counsel for the claimants. Any views that I have expressed about the evidence that I have read or that I have heard applies to the sole issue that I have determined. They are not intended to go beyond that. They are not intended to be of general application.

The claim is dismissed.