IN THE WEST HAMPSHRIE MAGISTRATES' COURT

BETWEEN:

ALISON SELLARS
MR IAN SELLARS

AND

ALDERSHOT MODEL CLUB

Introduction – "Mole End" and "The Aldershot Model Club"

1. In or about August 2010 a Mr and Mrs Ian Sellars completed upon a house purchase now known as 'Mole End', Long Copse, Wildmoor Lane, Hook, Hampshire, RG27 0HD although formally known as Long Copse Cottage. Since that time up until now Mole End has been their home. Ian Sellars was to explain that the property was to be an 'idyllic rural retreat'. I suspect that the latter term originates from the estate agent's particulars which describes the property as 'an idyllic rural retreat set in the heart of the Hampshire countryside'. I shall refer to Mole End as 'the property' during the course of this judgement.

2. The property is a substantial dwelling comprising a set of farm cottages most probably, and subject to conversion to form one large country home having an attractive flint exterior. It has been made the subject of extensive modernisation and improvement in the recent past including the addition of garden rooms to the front and rear, and the construction of large patio areas also to the front and rear in order to create outdoor living space. The property is set in some two acres of rough and formal garden and is approached via a five bar metal gate along an unmade half mile long track. The house owns neither the gate nor the drive the freehold of which is apparently in the ownership of a neighbouring property known as Ellis Farm, although the property

enjoys and easement over the drive so to permit access by car and foot.

3. So it was that Mr and Mrs Sellars moved in to occupy their home. The story with which I am concerned begins in the spring of 2011 when Mrs Sellars began to notice the noise of model aircraft in the vicinity of her garden. She is unable to be precise about when she first became aware of the noise, and states that she probably noticed the same in 2010; but it was certainly in the following Spring when she walked over to the club in order to enquire about what this activity concerned. She spoke to a man whom she described as being rude and abrupt, although it was about this time when she first came across Mr Peter Carter, the Chairman over the previous six years of what is known as the Aldershot Model Club which was formed in 1974 and for many years since 1986 had operated on land situated at and known as Blacklands Farm, Newnham Lane, Old Basing, Basingstoke RG24 7AU. The land is the subject of rental which the Club pays £4200 per annum at £350 per month. I shall refer to the Aldershot Model Club as The Club during the course of this judgement.

4. Returning to the narrative Mr Carter apologised for the rude and abrupt manner of the man to whom Mrs Sellars had earlier spoken and there then followed over many months a series of meetings, enquiries, investigations, the involvement of the Local Authority, the instruction of acoustic experts and ultimately the issue of legal proceedings which have culminated in the issue of a private summons with which this Court has been occupied over the course of a five day hearing. At the conclusion of the hearing the Court invited written submissions from each party, copies of which the Court has seen.

5. The Club, who are the respondents to the application made by Mr and Mrs Sellars has the benefit of what is described as a ‘take off and landing strip’ on Blacklands Farm. It is closely mown by a specialist lawn mower and adjoins a notional area referred to as a ‘flying zone’

over which models fly subject to control from the nearby landing strip. The strip itself is approximately 500 metres from the property, a short walk over the garden, a style, a bridge and a field. The Club has the benefit of a small caravan cum clubhouse utilised for recreational purposes and model storage.

6. I attach to this judgement at Annex A, a situational map setting out the position of the property and the landing strip respectively. The map also demarcates and depicts the notional flying zone presented as an elipse thereupon. It may be seen that the designated flying zone intersects in small measure with a notional 200 metre no fly zone imposed by the Club and as part of its rules which is intended to assist residents of the property. I shall turn in greater detail to this aspect of the case later during the course of this judgement.

7. The Club is an unincorporated Association and is affiliated to the National Association of Model Aircraft Clubs whilst some 890 such clubs exist in the United Kingdom having a total membership of approximately 39,000. The Club with which this Court is concerned flies a variety of model aircraft of different types, sizes and engine capacities. Some are hand built, although this is less common in latter years whilst many, and more commonly, are purchased. The types of model are so various that no sensible classification can be attempted. Photographic examples of the type of aircraft flown feature in the evidential bundles [see Applicant's bundle PP144, 146-148 and 150]. In broad terms Mr Carter estimates that 64% have internal combustive powered engines and 36% electric engines. The majority are radio controlled by the use of a hand held transmitter.

8. I have heard during the course of the evidence from some six Club Officers including the Chairman, Mr Carter and the Custodian of the Rule Book, a Mr Terry Weeks. I have listened to their evidence and evidence of the Club members with care. In broad terms they are an impressive and skilled group of people. All are very great enthusiasts in

and about their sport. I am particularly impressed by the scope of their knowledge in the subject; many of whom come from backgrounds in professional flying, service careers, and/or engineering disciplines. I say straight away that their pursuit of model flying is not only praiseworthy and legitimate in its own right but the personnel involved, I am sure have no wish to cause an annoyance or nuisance to anyone let alone adjoining neighbours to their Club. Noise generated by the models is of course incidental to the flying activity from which it emanates: that fact is unavoidable. The question raised by this application is whether or not the flying, and the noise thereby generated in the context here represents a statutory nuisance. The specific intention of the Club itself or its membership is beside this specific point.

9. Club membership has fluctuated over the years and now stands at about 83 members, having reached a peak of some 155 members eight or nine years ago.

10. Club Rules – Flying takes place according to a strict rules regime and which fall into two broad categories. Firstly, at a strategic level as part of its affiliation with the British Model Flying Association as a governing body by which it applies a Code of Practice.[1] Secondly, and more particularly, the Club operates a thorough and detailed training regime for new members as well as a continuing programme of training for existing members. I understand from the evidence that Mr Terry Weeks is the Chief Instructor. One of the features of his interesting evidence was the high profile within the training regime which 'noise induction' has in its programme and its relevance to model flying. I shall turn in due course to deal with the aetiology of the complaint from Mr and Mrs Sellars but I should mention at this stage that the Rules were made subject to modification so to introduce into the Club Rules a 200 metre

[1] See for e.g. Articles 137 and 138 of the Air Navigation Order; and the Department of Environment Noise Code of Practice Articles (4)(5) and (6). This is relevant when a Court of summary jurisdiction is required to determine the existence or otherwise of a statutory nuisance.

no fly zone from the landing strip or in other words the imposition of a 'balloon' over the property into which model aircraft were prohibited to fly. The limit is denoted on the site by a makeshift mark erected on a wooden post. The no fly zone also features within Annex A to which I have already referred. Mr Weeks was to stress that the 200 metre rule has itself been made the subject of modification in that it was extended to 230 metres, and in order to be co-operative in the face of the Sellars' complaint the 'balloon' was moved to 300 metres. Mr Weeks stresses that the 230 metre rule was in force prior to the Sellars' moving into their home, and he adds that the Rules, and indeed the practice, reflect the principle that aircraft do not fly over the Sellars' home or for that matter other property.

The Countryside and the Locus in Quo

11. Notwithstanding the references to the property being 'an idyllic rural retreat' a wide issue has arisen and raised on behalf of the Club that the countryside around the property and Blacklands Farm is not such a 'rural retreat' as is the contention here. The point so raised is relevant to contextual issues and in particular to the background against which the noise complaint is set.

12. Close to the property, although not within its purview, is a large industrial incinerator housed in a substantial factory like building. There is no evidence that noise is generated from its activity whatever else may emanate therefrom. Road noise is also another factor.

13. Of greater relevance is the proximity of a number of airfields to the property, a point given much stress by the Club. There are seven such locations:-

    (i) Tylney Hall: 1.2 miles from the property;
    (ii) RAF Odiham: 5 miles from the property;
    (iii) Blackbushe: 7 miles from the property;

(iv) Lasham: 7.4 miles from the property;

(v) Farnborough: 10.5 miles from the property;

(vi) Popham: 11.8 miles from the property;

(vii) Bramley Training Area

14. I have heard much evidence about airfields generally and the effect which they have collectively upon the environment in general and the locality in particular. I heard from a Mr Oliver Freytag who was called on behalf of The Club. Since 2005 he has been the Environment Manager at Lasham Airfield. He pointed out that Lasham is the largest gliding centre in Europe, sometimes conducting 125 tows a day and utilising Piper Aircraft in the main of which a high pitched buzzing noise is characteristic. I have also heard from a Mr John Essery who like Mr Freytag has no connection with The Club and who has no interest in the flying of model aircraft. Mr Essery was called to provide detail of flight patterns appertaining to RAF Odiham the largest Chinook helicopter bases in Western Europe and which operates some 60 such aircraft as well as Lynx helicopters for special operations. The pertinence of this evidence is, as I understand the point, to place the property in a wider context of aircraft noise generally. When analysed as a whole, it is suggested that, contrary to the case deployed on behalf of the householders: this is not an especially quiet area. In the closing submissions of The Club it is submitted 'the noise emitted from model aircraft does not constitute a statutory nuisance and one of the reasons for this is because of the air traffic around the Applicant's property' [see paragraph 10, page 3]. This presupposes of course, that aircraft are flying continually, but this, on the evidence, is manifestly not the case.

15. How do persons who live in the surrounding area manage to live with the activities of The Club? This is an issue about which there is considerable conflicting evidence. Apart from Mr and Mrs Sellars I've heard from members of their family, including their daughter, a Mrs Bodiam. The latter suggests that the noise is unbearable and is

disruptive to her parents' lives. I have heard from friends and members of a local rambling group including a Toni Shaw and a Mr Donald Cameron. They, as one might expect having been called by the property owners, adopt the position of Mr and Mrs Sellars: that the noise generated is intrusive, disruptive and difficult to live with. This view is supported by a neighbour of longstanding, a Fiona Fouracre a farmer at nearby Hale Farm. Others are not so disturbed by the noise. A Mr Trevor Davies, a resident on Blacklands Farm of some standing in terms of years, is undisturbed by the noise. What weight, therefore, do I attach to this evidence? Noise, and its evaluation is partly objective, but also partly subjective. What is offensive to one person is inoffensive to another. At the end of the day it is probably a matter of fact and degree in any case, but in order to determine this question I have to adopt an objective test when I consider this issue of statutory nuisance. This is correctly submitted by The Club in their closing submissions at paragraph 6, page 3.

16. Mr and Mrs Sellars also provided evidence as to how the existence of the model aircraft noise, as well as other noise, has impacted upon their lives and their occupation of their home. Naturally, they are persons who are likely to be more directly affected by the noise in question, but their judgement is likely to remain a subjective assessment and must be regarded in that light.

Progress of the Complaint and Its Investigation

17. Following Mrs Sellars first noticing the existence of model aircraft and their attendant noise in the Spring of 2011 and first reported to The Club on 26 June of that year, as might be expected, enquiries were made by them in order to enquire as to the circumstances which surrounded their purchase in August 2010 since neither householder was even aware of the existence of The Club and its activity. I have seen a letter from Messrs Bates Solicitors, dated 21 August 2011 which confirms that notwithstanding Local Authority searches, a

common land search, a drainage and water search, a plan search and an environmental search, none revealed that a model aeroplane club was operating in the neighbouring area.

18. It transpired that The Club did not have permission to so operate and this led in turn to an application being made by The Club pursuant to Section. 191 Town and Country Planning Act 1990 [as amended] for a Certificate of Lawfulness as to the use of land from which The Club operates whereby The Club were able to fly a maximum of 5 powered model aircraft at any one time between 10 am until dusk Monday – Saturday and 10-00 am until 7 pm or dusk on Sundays and Bank Holidays. That application was granted on 3 February 2012 and which was in turn, the subject of an appeal by way of judicial review finalised on the 21 November 2013 before a Mr C M G Ockelton and brought by Mr and Mrs Sellars. The review was successful in part and was allowed upon ground one of the claim. This concerns a finding that the Local Authority here, Basingstoke and Deane Borough Council, had made no attempt to identify an appropriate planning unit but merely confined the consideration of the application to an assessment of the evidence of use within what is termed 'the red line area' [i.e. part of one of the fields of Blacklands Farm] used by The Club. The result was for the original decision of 3 February 2012 to be remitted for proper consideration.

19. Although the foregoing was, on one view, a success for the Sellars', any victory that may be proclaimed was on one view merely pyrrhic, since the noise as they assert continued notwithstanding and despite efforts to compromise and seek a resolution thereof. I have seen a large body of email and other correspondence upon this subject. The evidence bundle containing this material is exceedingly difficult to follow, it is not in date order although appears to cover a period from 6 July 2011 – 25 February 2014 and involves the Sellars', The Club and the Local Authority in terms of email complaint and various responses thereto.

20. I have noted in particular email correspondence between the occupiers of the property and local airfields including Blackbushe, Lasham and Odiham already identified. Complaint is made by The Club in their closing submissions that this material is hearsay and no reliance should be placed thereupon. At paragraph 19 of The Club's closing submission [page 6 et seq] the point is reinforced thus 'the Court allowed the applicant's to rely upon hearsay evidence'. To correct what as I regard as an error, this is not the case. The material was contained in a bundle of correspondence and submitted to the Court for reading. The ordinary practice with which I am familiar is that where a party wishes to object to the inclusion of material within a bundle, the objecting party should notify the other side who seek its inclusion and the material should be excised from the bundle pending a Court ruling. For reasons I am unaware this was not done. In any event I regard the material as being no more than background evidence and I place no reliance thereupon. However, as shall be seen, this was not the only piece of hearsay about which complaint is made in the case.

21. There is one aspect of the succession of complaints and negotiations which require particular consideration. On the 24 August 2011 a meeting was held at Basingstoke and Deane Council Offices attended by, inter alia Mr and Mrs Sellars and their daughter, Mr Peter Carter, and a Mark Jones and James Marsh on behalf of the Council. At the meeting Mr Carter apparently made the comment to Mrs Sellars', words to the effect: 'I expected you to complain'. This comment is said to relate to the belief by The Club that Mrs Sellars had a reputation for unjustified complaining and her complaint about this Club is just one example. I took this to be directed to the point that the Sellars' complaint about model aircraft is unjustified at best and vexatious at worst. The point was reinforced in evidence by the decision to call a Steven Prideaux, a Club Member since 1998 and who was coincidentally a former neighbour of Mrs Sellars at the Sellars' former home, which was, apparently one of three properties off a shared drive.

It is said that there were disputes and arguments with the Sellars' at their former home and Mr Prideaux related this story to Mr Carter.

22. I am surprised that a decision was made by The Club to call this evidence at all. In the first place whatever disputes may have been evident at the Sellars' former home, they can have no bearing upon the issues I have to decide in this case: a statutory nuisance arising from model aircraft in this location. Secondly, I have no evidence as to the nature of the disputes alleged and am not prepared to speculate about them. For all I know Mrs Sellars' complaint or complaints, if indeed she made such, may have been justified. Thirdly, the evidence of Mr Prideaux in this regard is entirely hearsay, especially as he admitted in cross examination that he had no direct dealings with the Sellars' and Mrs Sellars in particular and his account is based only upon what he had heard. This may well have been third or fourth hand hearsay. I discount this evidence in its entirety.

23. The upshot of the meeting, which at some points became very heated, endeavoured to effect a compromise, the fact of which came to nothing and a private summons was issued by Mr and Mrs Sellars.

Evidence

24. I have heard the following oral evidence which I breakdown into its constituent parts:-

(i) The householders and complainants:
   (a) Ian Sellars
   (b) Alison Sellars

(ii) Club Officers:
   (a) Mike Alcock [Treasurer]
   (b) Terry Weeks [Custodian Of The Rule Book]
   (c) Peter Carter [Chairman]

(d) Dr Legge [Newsletter Secretary and Manager of Testing Equipment]
(e) Steven Prideaux [Environment Enforcement Officer]

(iii) Interested Parties: those having direct or indirect experience of the location and have commented upon noise issues:
(a) Toni Shaw [Rambling Group]
(b) Joanne Dakin [Rambling Group]
(c) Donald Cameron [Rambling Group/Friend of Sellars']
(d) Christopher Pearce [Member of Sellars' family]
(e) Mrs Bodiam [Daughter of Sellars']
(f) Fiona Fouracre [Farmer at Hale Farm]
(g) Trevor Davies [Resident of Brooklands Farm]
(h) Oliver Freytag [Environmental Manager, Lasham]
(i) John Essery [Local Flying Patterns: Odiham]

(iv) Expert Evidence:
(a) Adrian Ray [Acoustics Engineer called by The Sellars']
(b) Adrian James [Acoustics Engineer called by The Club]

(v) The Local Authority:
(a) Mark Jones
(b) David Gilbert

(vi) A Site View on 13 August 2014

25. I have also read a large quantity of documentary material contained within an agreed bundle.

The Legal Framework

26. **Statute Law**

(i) Environmental Protection Act 1990 ['The Act']

Section 79(1), subject to ss (1A) to (6A) provides that the following matters constitute statutory nuisances for the purpose of this part, that is to say –

(a). … …

(b). … …

(c). … …

(d). … …

(e). … …

(f). … …

(g) noise emitted from premises so as to be prejudicial to health or a nuisance.

(ii) Sections 79(1A) to 6(A) of the Act do not apply, and in particular ss.(6). This states that ss(1)(g) above does not apply to noise caused by aircraft other than model aircraft.

(iii) Section 80 of the Act empowers a Local Authority, upon it being satisfied that a statutory nuisance exists must serve an abatement notice on the person said to be responsible for the nuisance, or upon the owner or occupier of premises from which the nuisance emanates.

(iv) Section 82(1) of the Act focuses on the position of the ordinary person. Upon a complaint being made to a Court of summary jurisdiction that a person is aggrieved by the existence of a statutory nuisance and upon it being satisfied as to the existence of the complaint alleged, the Court must

make an order requiring abatement of the nuisance [see section 82 (2)(a) and (b)].

27. **Case law**

There is no statutory definition of noise. It should be remembered that historically the kind of conduct which forms the subject matter of this case namely noise, was the subject of what was described at common law as a public nuisance [see Arch. Current edition para 31-33]. Noise is capable of constituting a nuisance whilst the assessment of such noise is not merely confined to its apparent volume level but is assessed by objective measurement [see Clerk and Lindsell on Torts, 20th Edition para 20-09. This is a complex question and which may depend upon frequency, tonality, duration, time and the subjective perception of the person/persons whom it concerns. Context and location may also be important to the question and the nature of the area from which the noise emanates is an additional factor in the exercise.

28. Some guidance may be derived from the old law. A nuisance which is said to unduly interfere with a neighbour in the comfortable and convenient enjoyment of his land, as is the contention here, must be such as to be a real interference with the comfort or convenience of living according to the standards of the average man. An interference which alone causes harm to something or someone of abnormal sensitiveness does not of itself constitute a nuisance [see Robinson –v- Kilvert (1889) 41 Ch.D.88. Discomfort as a consequence of the nuisance alleged must be substantial, not merely by reference to the claimant but must be of such a degree that it would be substantial to any person occupying the claimants premises and an inconvenience which materially interferes with the ordinary comfort of human

existence according to '… plain and sober and simple notions among people.' (see Walter –v- Selfe (1851) 4 De G and SM. 315 at 322.

29. I have briefly touched upon the issue of location and which as the evidence discloses has come to occupy a high profile in this action. The classic statement of the law in this regard and with specific reference to noise remains that enunciated by Thesiger LJ in the well known case of Sturges –v- Bridgeman (1879) 11 Ch.D 852. His Lordship stated the law thus: 'whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but by reference to its circumstances: what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong.' [per Thesiger LJ at p856]. In more modern times a nuisance in law has been held to be an interference with a reasonable enjoyment of land [see Coventry –v- Lawrence [2014] UKSC 13].

30. It is important to note that coming to a nuisance is no defence which is available to persons who carry on a particular nuisance in response to a complaint brought by those effected [see Bliss –v- Hall [1838] 4 Bing. NC183: Clerk and Lind sell on Torts ante paras. 20-109-20-110].

31. An action in nuisance, particularly at a summary level, is designed to enable ordinary people to pursue a remedy for a complaint on the merits of the action and it is desirable to avoid over technical requirements [see East Staffs BC –v- Fairless [1999] Env. LR 525 at 534.

32. **Expert Evidence**

I have had the benefit of hearing from two expert witnesses called by the respective parties. The first was a Mr Adrian Ray B.Sc, MIOA called on behalf of the householders and a Mr Adrian James B.Sc, FIOA called on behalf of The Club. The experts, well qualified in their field of expertise are instructed to assist the court as part of their overriding duty to the court. The court is grateful to both of them for the diligent manner in which they have discharged their respective duties and for the clarity of their written and oral submissions. As a matter of law, I am not obliged to follow their recommendations. This would be difficult and impossible to follow since both adopt diametrically opposed views as to the existence or otherwise of a statutory nuisance as alleged. Their function, as with all experts, is to assist the court with matters which are outside its ordinary experience and where I reject an opinion, or on the contrary accept an opinion I am obliged to provide reasons for so doing [see Flannery –v- Halifax Estate Agents [2000] 1 WLR 377 CA].

33. **Site View**

On the 14 August 2014 I conducted a view of the property and the site occupied by The Club and its Clubhouse. I heard argument as to whether or not as a matter of principle I should conduct such a view, and, if so, what form of view it should take. In particular, if I were to embark upon such a course when should it take place and should I bear physical witness to the aircraft in operation?

34. In consideration of the request I considered the following legal points:-

(i) The Court has an inherent jurisdiction to adjourn the Court to enable it to view any place, premises or thing during a trial [see Phipson on Evidence 18th edition para. 1-23].

(ii) As a general rule and at a summary level a view should not be carried out without the parties being present [Parry –v- Boyle (1986) 83 Cr.App. R. 310 DC].

(iii) Although the practice of a view derives from the old and established rule appertaining to 'real evidence' there is a danger of a court embarking upon such a course and making a judgement based upon its own view, or, as I would add, upon its own hearing. It has been held that a judge is not entitled to put a view of his own in place of evidence [see London General Omnibus Co Ltd –v- Lavell [1901] 1 CH. 135. CA per Lord Alverstone CJ at p.139].It was for this reason that I was reluctant to visit the site and hear a staged demonstration of a sample of the models in flight. It seemed to me that such a course was fraught with the risk of hearing a false representation and that the issue of noise level in particular needed to be determined by expert evidence based upon measurement which I could then set in context as a whole in contrast to my own perception of noise level. I was prepared to embark upon a view of the site, comprising the property and The Club in the company of the clerk of the Court, Mrs Charlotte Rodie and in the presence of Mr and Mrs Sellars and Officers of The Club so to derive a better understanding of the nature of the location itself but not to hear samples of models in flight.

Noise: Evidential Assessment and Analysis

35. (i) Witnesses to the Noise

The evidence from those who had experienced and had described the noise included the householders and other lay witnesses [Fiona Fouracre; Tony Shaw; Joanne Dakin; Don Camens; Christopher Pearce; Amy Bodiam, called on behalf of the householders and Trevor Davis called on behalf of The Club. Other witnesses were called who were able to describe the noise in detail [Rhys Gilbert; John Essery; Terry Weeks, Oliver Freytag; Peter Carter and Mike Alcock].

It is not suggested that the householders are anything other than sincere in their assertions that the aircraft noise intrudes into their lives and into their home. Indeed, when judging this aspect of the case only Trevor Davis, a neighbour who lives on Blacklands Farm, indicated that he had not been disturbed by the sound of model aircraft flying near to his home and he is aware of no complaints in this regard. Something of a context was provided by other witnesses, such as Mr Freytag, that model planes are merely like 'the rustle of trees, nothing louder'. As submitted by the householders the burden of the respondent Club's case is predicated not so much upon the fact that the noise is not a nuisance but more upon measures which The Club have taken to suppress the noise in question, for example, compliance with the Code of Practice, attempts to compromise, and the application of a 200 metre no fly zone extending to 300 metres at various points. In my judgement the balance of the case from the perception of those who were witness to it is overwhelmingly in favour of a finding that the noise is capable of being a statutory nuisance.

(ii) Sound Recordings

There arose an issue about the admissibility of such material which also included video recordings and the weight that the Court should attach it to them. A particular point arose as to whether the recordings were truly representative given the directionality of the microphone and whether I should hear them at all, a point taken by The Club. This assertion is based upon the fact that over a period of time the readings were taken, not by the householders' expert but by the householders themselves. The point is repeated in the defendant's closing

submissions at paragraph 41 (i) to 41(vi). This I found to be a bold submission. Upon enquiry and hearing the preliminary objection to this evidence, it transpired that Counsel for The Club had herself not heard the recordings either. I found this somewhat strange since she was taking an objection before the Court concerning evidence which she herself had not even considered. It seemed to me, in any event that I needed to hear the evidence before making a preliminary ruling about it. In any event, at a summary level there is little point in embarking upon a voir dire and I considered that the court should hear the material and attach what weight it thinks right having heard it and having given due weight to the defence submissions. My view in this regard is reinforced by the fact that I've had the benefit of hearing from two experts who have heard and seen the recordings and were in a good position to comment upon them. Further, the expert relied upon by the householders, Mr Ray, gave evidence that from his own direct observations, whilst the recordings were not identical to that heard by the human ear, the recordings were broadly representative.

Objection was taken by The Club upon the footing that the samples were not obtained in 'a controlled situation/environment in which they can have as near certainty as possible as to the reliability of the sample'. This submission is entirely misplaced. In my judgement it is wholly unrealistic to equate the context here with a laboratory. It is not. Further, is it reasonable to expect any householder to pay for a sound engineer to be in attendance for a period of five days or is there an alternative? In my view it was a sensible and economical way of guageing the problem to employ Mr Ray to hire and to install the sound equipment and instruct the householders to operate the same from various locations. I further find that the approach and criticism of The Club also offends against the principle laid down in the East Staffordshire case [ante at para 31].

Recordings for the householder commenced on Tuesday 22 May 2012 utilising a Norsonic 140 instrument. Mr Ray set up and calibrated the same and the equipment was used until Sunday 27 May 2012. It is noted that very little flying activity took place between Friday 25 and 26 May owing to what is described as windy conditions. Mr Ray has set out his observations as follows:-

(a) Observations of noise: 22 May 2012. These are attached at Annex B.
(b) Recorded sound: 24 May 2012. These are attached at Annex C.
(c) Recorded sound: 27 May 2012. These are attached at Annex D and Annex E.

Mr James measured noise levels on the afternoon of 29 August 2013 utilising a Norsonic 118 instrument. It is of significance, that whilst it is acknowledged that the soundings and samples were taken himself he was only on site for a period of 50 minutes. This point is emphasised by the supplementary submission of the householders contained in Mr Buxton's letter of 3 October 2014. It is an error contained within the defence submission at paragraph 43(ii) that Mr James remained at the property for 'several hours'. Nonetheless Mr James has produced a comparison table of different types of noise source which indicates that when compared to other noise sources such as passenger aircraft or helicopters the noise generated by model aircraft is much lower [see analysis attached at Annex F]. It may well be, as submitted by Mr James that the noise as recorded is well below WHO guidance values and is not prejudicial to health and that other generated noise sources are either more significant, such as Chinook helicopters or otherwise audible such as conversation or birdsong, yet the task of this

court is to determine ***this*** noise in ***this*** context, in ***these*** surroundings and whether or not ***these*** householders should be obliged to endure it. Comparison with birdsong is inapposite since it is a natural sound in any event, whilst the noise from Chinooks is specifically excepted from being considered a nuisance by statute and WHO guidelines are not determinant.

(iii) Expert Evidence

Adrian Ray was called on behalf of the householders. His two reports are dated 8 June 2012 and 16 February 2014 whilst Mr James compiled two reports dated 23 January 2014 and 1 May 2014. Both experts met at the location and prepared a joint statement dated 20 April 2014.

I entirely accept that given cost and time limitations it is impractical to expect an engineer/expert to remain on site for long periods of time. That being said, the longer the period spent on site is more likely to result in the obtaining of more accurate data. It is clear that the evidential base proffered on behalf of the householder is greater than that of Mr James in that it effected measurement over a longer period of time and utilised diaries compiled by the householders, a subject to which I shall later turn.

Of greater significance, however, is the fact that it appeared from the evidence of Dr Legge, a committee member of The Club that he was involved with The Club's expert on 29 August 2013. It appears that a model aircraft was flown in order to produce maximum noise so to effect a worst case scenario. The court is concerned to note that within the methodology section of Mr James' report [para 4.1] no mention of this fact is recorded within the report at all. The report states as follows:-

> ‘4.1 Methodology
>
> I measured noise levels on the afternoon on the 29 August 2013 in the applicant’s garden. I used a Norsonic type 118 sound level meter which was calibrated immediately before and after the measurements using a Norsonic type 1251 microphone calibrator. Further details of equipment and methodology are given in Appendix A’.

Appendix A is silent upon the point that Dr Legge was involved as I’ve already indicated, a fact which I would expect to have been mentioned in an expert report where methodologies to obtain evidence are critical. Dr Legge, I recall, gave evidence that he has a doctorate in physics from Southampton University and is, therefore familiar with methodologies in this regard. He agreed that this was a significant point of concern. In my judgement the failure to mention the employment of Dr Legge was a serious deficiency in the expert evidence called on behalf of The Club.

I have already indicated that criticism was levied at the method used by the householders upon the recommendations of Mr Ray, and in particular the resultant effect of unplugging the equipment by the householders over the course of the recording periods. This criticism was countered by Mr Ray who explained that provided there was no interruption in the power source [it is noted that the equipment was battery operated] the results remained reliable. I accept this evidence and can find no basis for finding that the results were made unreliable as a result of the chosen method of Mr Ray.

I prefer the evidence of Mr Ray who’s opinion was based upon a larger sample of information obtained over a longer period and who’s evidence support the account of the householders

supported by other complaints in the case that a statutory nuisance exists in this case.

(iv) Diaries

The householders over a substantial period of time kept diaries particularising, as far as possible when aircraft were flying, the purpose of which was to amplify the evidential base of the allegations. The legitimacy of relying upon such material was and is the subject of heavy dispute. The defence expert did not consider that diaries should be part of any consideration and particularly so in relation to any reliance placed upon them by an expert.

It was unclear to me why there was an objection to the use of diary evidence. I note that The Club submit in their closing arguments that there appeared to be hostility towards the EHO to the effect that the criticism was unwarranted. Going back to first principles any diary is a personal record. Any such record is as accurate as any maker is able to compile such a document. Mr James considered that the diary should form no part of any consideration whilst Mr Ray considered that diary records are fundamental and considered that the householders' diary were excellent in this regard. The importance, it was stressed was to cover the position, as here, where noise is intermittent and difficult to establish through site visits. In this regard Mark Jones of the Local Authority thought that diary evidence was important, but it is a matter of concern to this court as to why he, Mr Jones failed to consider the Sellars' diary at all.

For my part, I reject the criticism made by The Club about the diaries, in particular because duration is a factor which I must consider in assessing whether a statutory nuisance exists or not and most people, from the point of view of ordinary common

sense, would use a diary record in order to record dates and events. This case is no different.

Certain aspects of the diary evidence appeared to me to be of special importance in this case:

(a) Their overall relevance is clear subject of course to what weight the court should apply to them.

(b) One feature of the case was that The Club had compiled a log particularising flight dates, flight times and participants. Mr James was content to utilise and place weight upon those logs since they were compiled according to a Code of Practice whereas the Sellars' compilation was not. In my judgement this was a distinction without any difference. Whatever opinion one may have of the noise itself there is no suggestion that the diaries had been adulterated or otherwise fraudulently compiled and I consider that it is unfair to permit reliance upon The Club logs but to exclude diaries by the householder.

(c) The diaries are consistent with the nuisance complained of, had been the subject of service on The Club for many months prior to the matter coming for hearing and, save in respect of one entry were undisputed.

(v) <u>The input of the Local Authority</u>

The Club called as part of its case a Mr Mark Jones and Mr Rhys Gilbert, both employees of Basingstoke and Deane Borough Council. They were not relied upon as expert witnesses, but as witnesses of fact given their involvement in the

complaint and the responses of The Club. I have already indicated that the householders had a meeting with the Local Authority at an early stage in this dispute on 24 August 2011. By his email dated 3 August 2011 Mr Mark Jones records the following:- '… because The Club have been operating there for so long they are entitled to be operating in the way they are …'.

There are a number of difficulties with this approach most particularly, as pointed out by the householder, a fundamental error of law. It is indeed the case that the householders are recent residents to the area and this location as against an occupation of longstanding by The Club, since at least 1986. Yet the mere fact that the Sellars' '… came to the nuisance' cannot avail The Club with a defence [see para 30 ante]. The question which the court should ask itself and which the Local Authority should have addressed is: Does a statutory nuisance exist at point in time? Interestingly, according to the notes of the Local Authority and relating to the 24 August 2011 Mr Jones was of the view that a nuisance was apparent and it is an open question, therefore, why the Local Authority failed to act upon its own perception. Further, the approach of the Local Authority plainly overlooks the fact that The Club had operated illegally as of 24 August 2011 and applied for a certificate of lawfulness only granted on 3 February 2012 and which was subsequently overturned by the High Court upon review. Finally, the householders have reasonable cause to question the approach of the Local Authority. In particular, as I have already mentioned the Local Authority through Mr Mark Jones did not consider the Sellars' diaries notwithstanding the fact that the Local Authority considered them important. And, in my judgement laid too much stress on compliance questions and the Code of Practice adopted by The Club in and about it's activities. Ms Malhotra seeks to defend the position and makes the point that the Local Authority had received numerous emails from Mrs Sellars

identifying the complaint. However, emails do not equate with diaries in this context. They were not contemporaneous and went fundamentally to duration which the emails did not. I have already made the point that mere compliance with a Code does not of itself eliminate the existence of what may be a statutory nuisance.

Both Mr Jones and his colleague Mr Gilbert shared the belief that reasonableness of user on the part of The Club was central to their and the Local Authority's consideration of the complaint. I have doubts about that approach. Reasonableness of user is an objective standard [see Coventry and Lawrence ante at para 179]. As the householder's submit what is otherwise a nuisance cannot be undone or made lawful by reasonableness of user any more than operation of a nuisance over an extended period renders the activity reasonable. To this extent I found the approach of the Local Authority seriously flawed.

I do recognise that the Local Authority is not The Club per se. The errors of the Local Authority are not necessarily The Club's errors yet it was The Club who chose to rely on the Local Authority evidence and any defect in their approach must necessarily be visited upon The Club.

(vi) The Site View: 14 August 2014

The document prepared by the experts and dated 20 April 2014 identifies amongst matters not agreed the following: '6. whether the applicant lives in a quiet rural location'. This identifies one of the questions to be determined. It is not, however as The Club submit whether the applicant lives in 'an ***extremely*** quiet rural location' [see para 28]. This is a gloss added in closing by The Club. It was never suggested in the evidence or elsewhere at

any time that the location was extremely quiet any more than it was suggested this is an area of outstanding natural beauty.

I am not convinced that acoustics experts are necessarily more qualified to determine this question as anybody else or an ordinary person applying his or her own understanding of what 'a quiet rural location' means upon their own everyday experience. Indeed this was one of the purposes of embarking on the site view as I have already commented.

What is a quiet rural location? In the British Isles in today's environment which is beset with the noise of traffic, machinery noise, farm noise, road noise, rail noise, aircraft noise and the presence of people going about their everyday business to find an isolated rural environment devoid of any human interference may be possible but becomes increasingly difficult in the modern world and particularly so when the area in question is close to urban conurbations and all the more so in this part of the South of England.

The point has already been made that the property is close to road noise and suffers if that is the correct description, of being close to local airports and RAF Odiham especially. Does this mean a fortiori that the property cannot therefore be described as being in a 'quiet rural location'? If the phrase is given a broad and purposive meaning the answer must surely be no. I have already described the house set in its own grounds and the area in question. In my judgement the property and its location is self evidently in a quiet rural area notwithstanding the existence of a variety of noise sources already identified. Such sources may be expected in this area and other similar areas but this in my judgement does not deprive the area and the house in question from the label attached to it.

Even if I'm wrong about that artificial model aircraft noise at a level and kind revealed in the evidence and over the duration revealed in the evidence simply is not part of the natural character of this area and I ask the question are not the householders entitled to live in their home free from artificial noise intervention of this kind? In my judgement the answer must be an overwhelming yes.

CONCLUSION

36. The householders have deployed a substantial, well argued case strongly supported by cogent evidence of the existence of an intrusive noise and have relied upon compelling expert evidence. I am of the clear view objectively judged that they have established to the appropriate standard in evidence the existence of a statutory nuisance in the location which forms the subject matter of this case.

37. I am conscious of the fact that there are particular matters canvassed in evidence about which I have not commented, in particular flying direction, insurance issues, and the availability of other flying sites to which The Club may move if so advised. In my judgement these were not central to the main issue as to whether or not a statutory nuisance exists and may be the subject of further argument.

38. The terms of any abatement notice and how model aircraft flying, if at all, may be modified is necessarily the subject of further submissions and/or the hearing of further evidence.

District Judge
Anthony Callaway

7 October 2014