Webster v Meenacloghspar (Wind) Ltd **[2024] IEHC 136**

Background and decision

Nuisance claim

The plaintiffs were two couples. They resided close to two wind turbines. They raised an action in private nuisance, claiming that the noise and vibration generated by the wind turbines, had interfered with the use and enjoyment of their homes, over a substantial period of time. They also complained of 'shadow flicker'. The windfarm was built after planning permission had been granted, subject to certain conditions relating to the maximum noise levels, which could be measured at the nearest inhabited house. The two turbines did not become operational until February 2017. The plaintiffs sought damages for nuisance and an injunction to prevent nuisance. The plaintiffs also claimed that the windfarm was operating otherwise than in compliance with its planning permission, and sought relief under s160 of the Planning Development Act 2000.

The key feature of the plaintiffs' case was that they had found the amplitude modulation (ie the swishing and thumping sound) associated with the two turbines particularly intrusive**.**

Judge Egan stated that to succeed in a case of nuisance, the plaintiff required to show interference with the ordinary use, enjoyment, and comfort of their property: at para. 30. The interference also required to be substantial, in the sense that it was pronounced or prolonged or repeated. The judge stressed that one required to take into account the timing, duration and impact of the occurrence complained of: at para.32. The frequency of occurrence also required to be considered: at para.33. Occasional temporary or fleeting events could not, in general, give rise to a nuisance. However, depending on the particular interference in issue, there may be no requirement that the nuisance is continuous and unremitting, 24 hours a day. The interference with the plaintiff's property required to be objectively unreasonable: at para. 39.

The judge stated that the case concerned the production of renewable energy, which clearly was of vital importance to society and everyone who lived in it: at para.41. However, that factor did not carry decisive weight in determining whether a nuisance had been established.

The defendant's primary defence was that it was not open to the court to find that the threshold for nuisance impact should be set at a specific level, other than the noise limit set out in the planning permission: at para. 174. Since the WTN complied with that limit, a nuisance had not been established. The judge stated that before she considered that matter, she would require to consider planning guidance in relation to wind energy developments. It was also necessary to consider the planning framework. The judge referred to two key pieces of guidance which pre-dated the permission, namely, the ETSU-R-97 guidelines, and second, WEDG 1996 ('Wind Farm Development Guidelines for Planning Authorities').

The judge stated that since its adoption, ETSU had been the primary framework, by which planning conditions pertaining to wind farms were set in the UK. It was also the primary methodology by which planning compliance continued to be assessed, in both the United Kingdom and Ireland.

The judge stated that the noise limits set in the Ballyduff permission were generally in accordance with WEDG 1996.

As far as the current assessment framework applying to the grant of planning permission for windfarms, these were set out in the WEDG 2006.

The judge stated that she was satisfied that the noise limits which were set in the Ballyduff permission, complied broadly with WEDG 1996, and also broadly with WEDG 2006. However, the judge stated that she was not satisfied, on a balance of probabilities, that the WTN on site, complied with the WEDG 1996.

The judge then addressed the relevance of planning permission. The grant of planning permission was of particular relevance to a nuisance claim, in two particular ways. First, the grant of planning permission could permit the very intrusion (for example noise) which was alleged by the plaintiff to constitute a nuisance. In the instant case, the question was the extent, if any, to which the planning permission (or the noise condition specified therein) could be relied on as a defence to a nuisance action. Second, nuisance also fell to be assessed by reference to the character of the particular locality. The grant of planning permission for the development impugned, could authorise the use of the defendant's property for certain purposes, potentially changing the character of the locality. In the instant

case, the question was whether the plaintiff's locality should be seen as including the defendant's windfarm at Balyduff.

As far as the first was concerned, the defendant did not dispute that, as a matter of common law and statute, planning permission could not deprive a property owner of a right to object to what would otherwise be a nuisance. The grant of planning permission for a particular development, did not mean that the development was lawful. A bar to the use imposed by planning law, in the public interest had been removed. However, the defendant nonetheless argued that the court was 'bound' by the terms and conditions of the planning permission, in assessing what was objectively reasonable, in assessing what was objectively reasonable for the purposes of a nuisance claim. The defendant argued that the court was bound to accept and apply the noise limits in the planning permission, as a wholly reliable indicator of what the ordinary person would expect, in terms of noise control. In short, the planning permission noise limits comprised evidence of a reasonable objective standard. There was precedent to support this argument. The defendant founded on *Smyth v Railway Procurement Agency*.

In *Smyth* the plaintiffs' had claimed that a newly established light railway system, which was operated by the defendant ('RPA') had caused them a noise nuisance. They sought an order, directing the RPA to erect an appropriate acoustic barrier, together with damages for nuisance, negligence and breach of statutory duty. The plaintiffs claimed that the noise from the trams had an adverse impact on the amenity of their back gardens, which backed on to the LUAS tracks; that it was difficult to hold a normal conversation in the garden; that the noise from the trams was very intrusive in the kitchen, dining area and living areas of their house, and that the noise impact in the bedrooms at the rear of the house, was such as to cause serious sleep disturbance.

The line had been established under the Transport (Dublin Light Rail) Act 1996 ('the 1996 Act') which enabled the Minister for Public Enterprise ('the Minister') by order, to authorise the construction and operation of the light rail. The statutory process required that the application to the Minister was accompanied by an Environmental Impact Statement ('EIS'), including detailed forecasting on noise emissions. The application was published, and any persons likely to be affected, had a statutory entitlement to make

submissions to the Minister. The Minister was mandated to appoint an inspector to conduct a public inquiry, and submit a report of the resultant findings and recommendations. All affected landowners and occupiers, and other interested parties, were entitled to appear at the inquiry.

The inspector recommended the inclusion of detailed noise conditions in the Line B order, together with general conditions in relation to monitoring noise emissions. The Line B order was promulgated in September 1999.

The trial judge found that if the Green Line had been operated strictly in accordance with the Line B order, then that would have been a complete answer to a claim in nuisance.

In the instant case, the judge stated that in *Smyth* the judge had based his reasoning on the defence of statutory authority. However, *Smyth* did not support the argument that compliance with specific noise limits in a planning permission, was necessarily a complete answer to a claim in noise nuisance.

Judge Egan stated that since the issue of statutory authority did not arise in the instant case, she was required to consider whether the noise from the wind-turbines constituted a nuisance at common law. She observed that in *Smyth* the judge considered that the noise conditions in the EIS and the Line B order set an objective test as to what was reasonable. In short, the noise levels predicted in the EIS were a wholly reliable indicator as to what the ordinary person whose requirements were objectively reasonable, would expect, in terms of noise control. Therefore, since the operation of the Green Line was within the noise levels predicted in the EIS (which were conditioned in the Line B Order) the noise in question did not constitute a nuisance. The defendant, in the instant case, claimed that the limits in the planning permission were a wholly reliable indicator of what was objectively reasonable, in terms of noise. However, Judge Egan disagreed with this. In her opinion, the planning permission which had been granted to the defendant in the instant case, was not comparable to the statutory process in *Smyth* to establish a wholly reliable indicator of what was reasonable in terms of noise impacts. The judge stated that even if that were the case, that would not assist the defendant for two important reasons.

Firstly, the planning permission regulated WTN decibel levels only. However, the ETSU methodology upon which both the Ballyduff planning permission and WEDG 2006 was based, could not establish a yardstick for the particular aspects of the WTN complained of by the plaintiffs, which included high AM (Amplitude modulation) values and 'thump' AM.

Secondly, compliance with the noise limits in the Ballyduff planning permission was not, in any event, demonstrated.

In short, the judge found that, as a matter of law, planning permission was not a reliable indicator of what was objectively reasonable at this locality, in terms of WTN.

The defendant argued that whereas planning permission did not create an immunity from being sued in nuisance, on the authority of *Lawrence v Fen Tigers Ltd* [2014] 2 All ER 622, significant weight required to be attached to the views of the planning authority. In short, planning conditions were a wholly reliable indicator of what was reasonable in terms of noise impact. Judge Egan agreed that in a nuisance action, the court placed considerable weight on the terms of planning permission. However, she went on to state that the court was not bound to decide that the court was bound to accept the planning conditions as a wholly reliable indicator of what was reasonable in terms of noise impact. However, in the instant case, the planning permission regulated only one aspect of the WTN, namely, the absolute decibel limit. The judge went on to hold that, in any case, the defendant had not complied with the relevant planning permission.

The judge then went on to consider the character of the locality and the relevance of planning permission, in terms of the law of nuisance. Whereas the plaintiffs argued that the locality was simply a quiet rural location, ie one without the presence of wind turbines, the defendant argued that planning permission had defined the character of the locality, as one with a windfarm. The judge stated that she was required to determine whether one should assess the character of the locality with, or without, the Ballyduff windfarm.

The judge stated that the Irish Courts had tended to afford weight to the decisions of planning authorities, in determining the character and nature of a locality. The judge stated that in the instant case, the planning permission had authorised WTN of a particular decibel level. However, the

plaintiffs did not complain about the decibel levels from the wind turbine, but rather, its character. Furthermore, it had not been demonstrated that the WTN was within the limits specified in the permission, in any event.

The judge went on to find that the plaintiffs were not hypersensitive to noise and were reasonably tolerant individuals. The judge found that whilst low frequency noise was not the dominant characteristic of the WTN, there was a significant element of audible and lower frequency noise which manifested as 'thump'.

The judge went on to find that the noise from the windfarms was an unreasonable interference with the plaintiffs' enjoyment of their property and therefore, constituted a nuisance.

The judge concluded by requiring the parties to attempt to resolve the differences between them by engaging in mediation.

Personal injury claim

The judge then went on to address the issue whether damages for personal injuries could be brought in a nuisance claim. In the House of Lords case of *Hunter v Canary Wharf Ltd* [1997] AC 655 (page??) Lord Hoffman stated that an action in nuisance was based on the defendant causing an injury to land, not for causing personal discomfort. However, the judge added that such an approach did not represent the law of Ireland. The judge therefore went on to consider whether the plaintiff could recover in respect of the psychiatric injury which he had sustained. She stated that in contrast to the law of negligence, the liability in a nuisance did not turn on foreseeability. However, in a nuisance action, whereas foreseeability of the risk of harm was irrelevant, in establishing liability, reasonable foreseeability of the type of injury sustained by the plaintiff was required to be proved by the plaintiff. Therefore, in the instant case, reasonable foreseeability of psychiatric injury was a precondition to the award of damages for such injury. The judge therefore, refused to strike out the plaintiff's claim to damages for psychiatric injury. However, she stated that whereas, in the instant case, psychiatric injury was not reasonably foreseeable, imposing liability for such an injury would involve an extension of the existing law, and would ultimately be a matter for the Supreme Court.

Comment

Webster raises a number of interesting issues. The first is whether mere compliance with relevant planning permission could be employed by the defendants as a defence in a nuisance action. The court answered that question in the negative. In short, planning permission could not be equated with statutory authority. However, a more contentious issue was whether planning permission could change the character of the land. In short, the defendants argued that the grant of planning permission had changed the character of the land from land without wind turbines, to land containing wind turbines. In the Supreme Court case of *Lawrence v Fen Tigers* [2014] AC 822 at 846 Lord Neuberger was of the view that whereas implementation of planning permission could give rise to a change of character of the locality, simply because the relevant work had the benefit of planning permission was no different from work that did not require planning permission. Furthermore, the mere fact that the activity that is said to give rise to the nuisance had the benefit of planning permission, would normally be of no assistance to the defendant in a nuisance action: at [849]. However, Lord Carnwath after stating that there should be a strong presumption against allowing private rights to be over-ridden by administrative decisions, without compensation, that in exceptional cases (ie in relation to large scale developments) a planning permission could be the result of a considered policy decision by the competent authority, which could not sensibly be ignored in assessing the character of the area, against which the acceptability of the defendant activity was to be judged: at [878]. In *Webster,* given the fact that the defendant had not complied with the relevant planning permission, this issue was irrelevant.

As far as the personal injury claim was concerned, the law of nuisance has been regarded in the UK as protecting the occupier of land from unreasonable interference. In short, the pursuer's right to successfully raise an action against the defender derives from the former's right to occupy that property. The law of nuisance does not protect the pursuer against any form bodily harm, such as mental illness from activities taking place outwith that land.

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