Nuisance injunctions after *Coventry v Lawrence*: revisiting the question of 'prevention or payment'?

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The Supreme Court's decision in *Coventry v Lawrence*[1] is significant for its ruling on a number of aspects of private nuisance (eg the defence of coming to a nuisance; whether an easement to emit noise can be acquired by prescription), but perhaps above all for its ruling on the relationship between nuisance law and planning law. Delivering the lead judgment, Lord Neuberger rejected the reasoning of Buckley J in *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd*,[2] that the grant of planning permission can alter the character of the neighbourhood within which an interference with comfort and enjoyment of land (often referred to as 'amenity nuisance') falls to be determined. *Coventry v Lawrence* has effectively overruled the *Gillingham Docks* case.[3]

The '*Gillingham* exception' (as it was described by Lord Carnwath in *Barr v Biffa Waste Services*[4]) generated considerable judicial (and academic) discussion as to its scope, although that particular debate is now largely at an end. Lord Neuberger dismissed attempts to justify the exception as applicable to 'strategic' or 'major developments':

> It would . . . be somewhat paradoxical if the greater the likely disagreeable impact of a change of use permitted by the planning authorities, the harder it would be for the claimant to establish a claim in nuisance.[5]

The notion in the *Gillingham Docks* case that planning permission per se can decisively change the character of the neighbourhood for purposes of nuisance law is dismissed by Lord Neuberger as 'wrong in principle'.[6]

To say that the debate is '*largely* at an end' is a necessary caveat, for Lord Carnwath, in his judgment in *Coventry v Lawrence*, considered that the *Gillingham Docks* case was correctly decided:

> I would accept . . . that in exceptional circumstances a planning permission may be the result of a considered policy decision by a competent authority leading to a fundamental change in the pattern of land uses, which cannot sensibly be ignored in assessing the character of the area against which the acceptability of the defendant's activity is to be judged.[7]

He thus dissented in preferring to distinguish the *Gillingham Docks* case as confined to planning permission of an exceptional, strategic character. Examples offered are the *Gillingham Docks* case itself, and also *Hunter v Canary Wharf*.[8]

The difference of opinion merits elaboration, both in its own right (because it may resurface in future litigation) and also because it is a fascinating illustration of two very different styles of reasoning between judges of the highest seniority touching on various facets of nuisance law. Lord Neuberger took what can be described as a 'formalistic approach' based on constitutional first principles. He proceeded by first subsuming the issue of the relationship between nuisance and planning permission within a more general constitutional issue of the relationship between private law and administrative law. Planning permission is just like any other administrative consent, on his analysis. It addresses the 'vertical' (not Lord Neuberger's words) relationship between the individual and the state, in the sense of removing a public law obstacle to an individual exercising his or her rights or liberties (in this instance in respect of the right to develop property in one's land). Nuisance law addresses the 'horizontal' relationship of neighbour to neighbour. Hence the two areas of law are to be understood as formally discrete.

This formalistic approach is illustrated by Lord Neuberger's comparison of the position of the developer of land before and after the introduction of the Town and Country Planning Act 1947.[9] The 'pre-1947 Act' developer – Lord Neuberger specified a developer of the Victorian period – was at liberty, from an administrative law perspective, to develop land (for no generalised administrative constraint on intensifying/changing the use of land existed). Change in land use at this time was 'managed' largely exclusively within the framework of private law. The 'post 1947 Act' developer, who had the benefit of planning permission, was in an identical position to his Victorian era counterpart; that is, he was free from a public law impediment. On that reasoning, Lord Neuberger could see no logic in a developer who had obtained planning permission to develop land being

1 [2014] UKSC 13, [2014] All ER D 245 (February). For a commentary see Jason Lowther in this issue of *ELM* at 236.
2 [1993] QB 343.
3 Lord Neuberger states that the better outcome in *Gillingham v Medway* was the alternative contemplated by Buckley J, namely, of refusing an injunction, thus encouraging the local authority to resolve the nuisance through modification of the planning permission it granted to the dock company [at 99]. Interestingly, it is to be noted that the claimant council sought no damages (nor could it have done, for it suffered no loss).
4 [2013] QB 455.
5 *Coventry v Lawrence* (n 1) [88].
6 ibid [90].
7 ibid [223].
8 *Hunter v Canary Wharf* [1997] AC 655. Cf M Lee '*Hunter v Canary Wharf*' in C Mitchell, P Mitchell (eds) *Landmark Cases in Tort Law* (Hart Publishing Oxford 2010) (focusing on the 'fast-track' character of planning permission in this case, in contrast to the public inquiry process underlying *Gillingham v Medway*).
9 *Coventry v Lawrence* (n 1) [88].

in any more favourable a place in relation to private law than one for whom planning permission was not an administrative requirement. Buckley J's mistake (on this account) was to blur the boundaries between public and private law – boundaries that are to be respected.

By contrast, Lord Carnwath adopted a more particularistic, 'functionalist' approach, drawing on his considerable experience (as a practitioner, judge and writer) of the fine detail of planning and environmental law. In particular, he took the view that planning permission raised discrete issues when compared with some other administrative consent regimes that are familiar in an environmental law setting. This is illustrated by the way in which he distinguished *Barr v Biffa Waste*.[10] Carnwath LJ (as he then was) delivered the lead judgment in that case, where he held that rights protected by nuisance law were not cut down by an Environment Agency permit relating to waste management. Lord Neuberger cited this with approval.[11] Intriguingly, Lord Carnwath explained that he was wrong to do so. The ratio in *Barr v Biffa* did not necessarily apply to planning permission.

Lord Carnwath's distinction appears to lie in the extent to which planning controls and the law of nuisance are on occasion apt to 'pull in the opposite direction'[12] – something that could not be said of the Environment Agency permitting regime as it arose for consideration in *Barr v Biffa*. Where there is opposition of this kind there is the risk (which must be avoided) that nuisance law will serve to 'undermine the planning process' [ibid].

Caution should be exercised before taking Lord Carnwath's words to imply that environmental permits are inherently more complementary of nuisance law than planning permission and that *Biffa* could offer a universal approach to nuisance and environmental regulation. It is true that the potential for a complementary relationship between nuisance and environmental regulation is a point with which Lord Carnwath prefaces his speech [176]. However, there is no general rule here, for Lord Carnwath expressly agrees in this respect with Maria Lee's appraisal, leading to the conclusion that 'it is not realistic to look for a single, across the board response to the complicated relationship between tort and regulation'.[13] This is an important issue for the future. A defendant whose activities are subject to prior approval of an environmental regulator can take more comfort from Lord Carnwath's speech than that of Lord Neuberger.

The same contrast in style is evident in Neuberger and Carnwath JJSC's approaches to equitable nuisance remedies. However, what is striking here is that differences of opinion pervade almost the entirety of the speeches of the Supreme Court Justices, thus producing a confusing array of perspectives. In particular, at least four differing and sometimes even contradictory opinions are advanced on the suitability of the established *Shelfer* guidelines.[14] As is well known, the gist of *Shelfer* is that an injunction will be awarded 'virtually as of right'.[15] Crucially, the public interest bound up with the defendant's tortious activities is not on this authority a relevant consideration in the exercise of equitable discretion to withhold an injunction entirely and award damages in lieu. The reasoning (expressed most clearly in Linden LJ's speech in *Shelfer*, at 315–16) is that the role of judges is not to 'legalise' a *persistent* common law wrong by substituting compensation for an injunction suppressing the nuisance.

Taking first (again) Lord Neuberger's opinion, it is that the exclusion of the public interest in the decision to grant or withhold an injunction as in *Shelfer* is not quite as established as some believe, for it has not been followed consistently. Authorities in respect of right to light cases (for example *Colls*[16]) are cited as evidence that courts are more willing to grant equitable damages in lieu of an injunction than *Shelfer* countenanced and that the authority of *Shelfer* is consequently weakened. That is not a problem for Lord Carnwath. Comparing nuisance and right to light cases, Lord Carnwath is again mindful of specific practical differences underlying the differences in the relevant law.[17] Specifically, right to light claims, such as that in *Colls*, arise principally from the construction of a building rather than the mode of its use (more typical of nuisance claims). Consequently, right to light injunctions usually take a different form – a mandatory form – requiring the removal of a building, rather than prohibiting an activity that, with modification, can comply with nuisance law (as in nuisance claims).[18]

Lord Carnwath is, however, in agreement with Lord Neuberger (and others) on the need for a review of *Shelfer*. He considers (with Lord Neuberger) that a review would be timely in order to refocus judicial minds on the discretionary nature of an injunction. Whilst he disagrees with Lord Neuberger's opinion that planning permission will usually be a strong factor against an injunction being awarded – an injunction will remain the norm on Lord Carnwath's reasoning[19] – the difference here is essentially one of degree.

That cannot be said of Lord Sumption's contribution, which is antithetical to the fundamental idea of judges exercising their discretion with an eye to the securing of a remedy which is in the public interest. The judiciary is not competent to perform the function of assessing where the public interest lies.[20] Interestingly, that was the reason the courts in the 19th century gave for awarding an injunction as a matter of course.

10 [2012] EWCA Civ 312.
11 *Coventry v Lawrence* (n 1) [91].
12 ibid [194].
13 M Lee 'Nuisance and regulation in the Court of Appeal' [2013] *JPEL* 277–84 (cited in *Coventry v Lawrence* (n 1) at [198]).
14 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 (Smith LJ) at 322–23.
15 This is the phrase used in R A Buckley 'Injunctions and the public interest' (1981) 41 *Modern Law Review* 214.
16 *Coventry v Lawrence* (n 1) [122]. The right to light cases relied on include *Colls v Home and Colonial Stores* [1904] AC 174.
17 *Coventry v Lawrence* (n 1) [247].
18 This is explored in the Law Commission's Consultation Paper *Right to Light* (2013).
19 *Coventry v Lawrence* (n 1) [246].
20 ibid [158].

Lord Sumption's solution is to propose a complete reversal of the presumption in *Shelfer* in any case where third party interests are at stake (ie in most nuisance claims). The judge's proper role is to put a price on nuisance/pollution so that the market can resolve disputes about amenity efficiently. This is a sign of Lord Sumption's expertise in commercial law, and indeed it is telling that he cites in support of his opinion the withholding of an injunction in a commercial contract case, where the defendant enterprise sought (ultimately successfully) to resist the request of the claimant enterprise for an equitable remedy of specific performance (considering it cheaper to compensate for the breach of contract).[21] He describes the resistance to equitable damages underpinning *Shelfer* as 'unduly moralistic' [160].

Lord Mance is arguably the most sympathetic to the letter and spirit of *Shelfer*. He focuses his short judgment on the important point that a persistent nuisance, where it affects the home, is an inescapably moral issue – it is a civil wrong of a serious and continuing nature, which can often be adequately remedied only through the award of an injunction: 'the right to enjoy one's home without disturbance is one that many, indeed most, people value for reasons largely, if not entirely, independent of money'.[22]

Indeed, it is perhaps noteworthy that Lord Mance does not call for a review of *Shelfer* – at least not explicitly. His speech broadly supports the status quo.

The practical upshot of this diversity of opinion is serious confusion. The central dilemma is well captured in the title of an early article by Stephen Tromans entitled 'Nuisance – Prevention or Payment?' (published in the *Cambridge Law Journal*).[23] Should a tortfeasor be given the opportunity to pay for a persistent wrong where the victim would rather the wrong be prevented from continuing? It is not clear that the opinions given in the Supreme Court, viewed as a whole, resolve this dilemma any better – or at least any more clearly – than the 19th century authorities that culminated in *Shelfer*. The strong thrust of *Shelfer* is that nuisance remedies are appropriately aimed at preventing the continuation of a nuisance and that they are expressly *not* aimed at legalising a persistent wrong on payment of compensation.

In terms of assessment of these opinions, one immediate problem is that the diversity of opinion in *Lawrence* places a trial judge (and counsel) in an invidious position. That is particularly true of Judge Seymour – the trial judge in this case. As Will Upton (Counsel for the claimants) explained in a recent presentation on the litigation,[24] the issue of remedy was resolved at first instance by agreement of the parties. Specifically, it was agreed that the appropriate remedy for the nuisance, if in law it existed (the subject of the appeal), was a suspended injunction which set out a reasonable level and timing of noise (from the respondent's motor racing activities) necessary to comply with nuisance law. It was not until the Supreme Court appeal that the defendants sought to reopen that point. The parties could do no more than make general submissions on it.

What, then, is Seymour J to do in the face of the President of the Supreme Court inviting the defendants to apply for equitable damages in lieu of an injunction?[25] Assuming the defendants express a preference to pay damages in lieu (which the claimants oppose), Seymour J has what appears to be three options:

(1) to follow the position advocated by Lord Neuberger (backed, for opposing reasons and taken to an extreme, by Lord Sumption) that planning consent can be a strong factor in favour of damages being granted in lieu of an injunction or
(2) to follow the opinion of the Justices of the Supreme Court who take a different view to Lord Neuberger (notably Carnwath and Mance JJSC) or
(3) to proceed on the basis that, good intentions aside, *Lawrence* is entirely lacking workable guidance with which to replace/supplement that in *Shelfer*, and thus *Shelfer* remains the guide.

To reiterate, that is not an easy choice for a trial judge.

A second problem with moving away from established guidelines laid down in the 19th century and followed since then is the difficulty – not explicitly contemplated by any of the Justices of the Supreme Court in *Coventry v Lawrence* – of fully separating out questions of remedy and liability. It is easy to see the superficial attraction of the thinking of Neuberger, Sumption and Clarke JJSC that Buckley J was wrong to accommodate public interest considerations at the level of liability (denying the claimant the declaration of nuisance sought), when a more nuanced approach to the exercise of equitable discretion (withholding an injunction) would achieve a remedy at little or no cost to justice for the residents affected by the development. However, as Lord Goff observed in *Hunter v Canary Wharf*,[26] the injunction is private nuisance law's 'primary remedy', and this fact shapes, as it were, 'upstream' rules relating to liability. The good example given by Lord Goff is the rule that standing to sue in private nuisance is confined to the proprietor (rather than extending to a mere occupier of land).[27] If an injunction is to cease to be the norm

21 *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

22 *Coventry v Lawrence* (n 1) [168].

23 S Tromans 'Nuisance – Prevention or Payment?' (1982) 41 *Cambridge Law Journal* 87.

24 UK Environmental Law Association 'From *Farnworth* to *Lawrence*' event held at Herbert Smith Freehills (15 April 2014).

25 Nevertheless, Lord Neuberger is clear in his opinion that it is open to the judge granting or withholding an injunction in this case 'as he sees fit'.

26 *Hunter v Canary Wharf* (n 8) at 692–93.

27 Lord Goff's reasoning is that, in order to sue in nuisance to bring a persistent tortious state of affairs affecting neighbouring land into compliance with the common law, the claimant has in practice to have a future exclusive interest in the land, sufficient to negotiate with a neighbour the necessary corrective measures: 'the person who has exclusive possession can . . . if thought appropriate, reach an agreement with the person creating the nuisance, either that it may continue for a certain period of time, possibly on the payment of money, or that it shall cease, again perhaps on certain terms including the time within which the cessation will take place'. Equity works with the grain of the common law here, to help victims of tort obtain the cessation of the tortious act they seek.

according to (at its most extreme) the opinion of Lord Sumption, then there is a case for a review of the law relating to standing.

Continuing with this theme, it is not only private law that is affected by this problem of the 'law' of unintended consequences. Clearly, the design of decision-making procedures under the 1947 Act and subsequent amendments is based on a certain understanding of the 'prior' individual rights of interested parties under the common law. For example, the answer to the question of who, if anyone, is to have a statutory right of appeal against a decision on a planning matter to which that person might object is coloured by an appreciation of rights at common law. Thus, in most cases only the party who applies for permission (failing to get it at all or on satisfactory conditions) can appeal a planning authority decision. The reasoning is that refusal of planning permission (or grant with onerous conditions) limits a proprietor's common law right to develop, which justifies a safeguard in the form of a statutory 'first party' right of appeal. If, however, statutory planning controls are also to limit the common law/equitable position of third parties (eg a neighbour whose amenity is impaired without prospect of an injunction), then arguably that is a reason to extend the statutory safeguard of a right of appeal – so as to confer a right of appeal where appropriate against the grant of planning permission.

It may be objected that this analogy lacks proportion. A 'wholesale' statutory limit on the common law right to develop land, the argument may be, is of a different – more serious – order than a limitation of a neighbour's equitable remedy (of an injunction, where equitable damages are awarded in lieu). But herein lies the problem, for it is not self-evident that the right to develop is of greater value than freedom from a persistent nuisance. Of course, this issue only arises if there is a substantial move away from *Shelfer*.

A third and potentially the most compelling reason for sticking to the established *Shelfer* guidelines is that what – admittedly little – empirical evidence there is suggests that the guidelines work well in practice, however odd (in the sense of drastic) they may appear in form or in theory. Specifically, contextual study of the social consequences of the enforcement of injunctions awarded against major corporations suggests that the *Shelfer* guidelines are, or have in the past been, broadly successful in reconciling both private and public interests.[28] 'Success' here, although qualified in important ways that are not particularly material to this discussion, comes in various guises. For example, common law remedies in the Victorian era tended to have problematic distributive justice implications, in that they were largely enforceable only by wealthy landed interests, sometimes at the expense of the urban working classes, who bore the brunt of *unregulated* enterprises relocated pursuant to nuisance law. Perhaps the best historical 'pattern' of success, of which there are many examples, is an injuncted enterprise inventing, often through clean technology, a way of doing business without causing a nuisance. However, the crucial point is that there is no evidence of an injunction bringing to an end a 'valuable' business enterprise. To that extent, Lord Neuberger's spectre of local unemployment in the wake of any injunction addresses a problem that is arguably only imaginary.

The explanation for business enterprise surviving an injunction lies not so much in the arbitrary realm of chance as in a vital, if sometimes hidden, nuance inherent in the *Shelfer* guidelines, namely, the award of injunctions on a *suspended* basis *as a matter of course*.[29] The function of a suspended injunction is to allow for the tortfeasor's affairs to be reorganised with the least inconvenience to either the tortfeasor or the public at large. Where the suspension is for any length of time, the victim can expect equitable damages. The Supreme Court has largely overlooked this.

An illuminating example of this nuanced arrangement – characterised by a mixed equitable remedy of damages in lieu of a suspended injunction – is the 'Great Birmingham Sewage Case'.[30] Behind the façade of the court's ruggedly individualistic posture, characterised by the expression of indifference to public misery (lest the offending sewage undertaking be closed), lies a soft, subtle and compassionate balance of private and public interests. Vice Chancellor Page Wood could see that the purification of sewage from the tortfeasor's primitive sewage works was a tremendous challenge – one that could be only be resolved with time and ingenuity. He thus had this to say:

> Before granting an injunction compelling *the sudden stoppage of works* like these, inasmuch as such an injunction might produce considerable injury, the Court, by way of an indulgence, would afford the Defendants *every* conceiveable facility to enable them to remedy the evil complained of.[31]

This approach has subsequently been adopted on 'innumerable occasions'.[32]

The practice of awarding an injunction on suspended terms is critically important. As Denning LJ explained in *Pride of Derby*, public interest arguments 'are strong reasons for suspending the injunction, but are no reason

28 For a narrow sample of detailed case studies see B Pontin *Nuisance Law and Environmental Protection* (Lawtext Publishing Witney 2013). For a study of a larger number of injunctions 'in practice', albeit limited to the Victorian era, see B Pontin 'Common law clean up of the workshop of the world: more realism about nuisance law's environmental achievements' (2013) 40 *Journal of Law and Society* 173. From a more specifically business history perspective, see the work of Pierre Desrochers (eg 'Victorian pioneers of sustainability' (2009) 83 *Business History Review* 703).

29 Pontin 'Common law clean up' (2013) ibid 187 and B Pontin 'Nuisance law and the Industrial Revolution: a reinterpretation of doctrine and institutional competence' (2012) *Modern Law Review* 1010, 1025–26.

30 That is Lord Carnwath's description of *Attorney General v Birmingham Corporation* (1858) 4 K & J 528 in 'The common laws of the environment: at home and abroad' (forthcoming 2014) *Journal of Environmental Law*.

31 ibid 541 (emphasis added) (quoted in Pontin (n 29) 1025).

32 *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese* [1953] 1 Ch 149 (Romer LJ) 194.

for not granting it'.[33] Much of the opinion in the Supreme Court (and indeed in academic literature) appears to be premised on an injunction bringing about a 'sudden stoppage' of a defendant's activity. That is mistaken. *Shelfer* is about tortfeasors having time to organise their affairs so as to abate a nuisance by one means or another, under pressure of the injunction 'biting' should the tortfeasor fail to demonstrate a diligent and effective response.[34] The victim is rewarded for her enforced forbearance by receiving equitable damages should the suspension be for a substantial length of time.

Of course, the *Birmingham* example also highlights a key theoretical difficulty with the suspended injunction, namely, how long is a tortfeasor legitimately to be given to reorganise its affairs to comply with the common law? In that case the sewage authority was granted suspensions periodically over 37 years, which was the time it took to invent and adopt a satisfactory system of sewage purification.[35] A suspension of this extraordinary length of time is to be understood in its historical setting. It fitted with Victorian era politics concerning land based around large estates held in inter-generational family trusts, which passed from the custody of one son (or nephew as in Adderley's case in *Birmingham*) and heir to another.[36] It is ridiculous to suppose that this approach could 'work' in the context of, for example, an assured shorthold tenancy. Nonetheless, suspensions have been awarded to a yearly tenant farmer (in *Manchester Corporation v Farnworth*[37]) and a protected tenant (in *Halsey v Esso Petroleum*[38]), with demonstrable mutual benefits (and with no hint of the imagined crisis in the economy becoming reality).

It would be futile to attempt to predict what will happen with the suspended injunction awarded by the trial judge in *Coventry v Lawrence* (which expired in 2012). Certainly, having studied compliance with injunctions in some detail, it is easy to see how, as in other cases, the injunction – with a renewed suspension – could be complied with in a mutually beneficial way for all parties (and for the 'public'). Perhaps the most obvious option is for the tortfeasor to attempt to profit from fewer noisy events (by charging customers higher prices) and/or diversifying into other events that can benefit from the existing facilities without causing a nuisance. That appears to have been the approach adopted by the enterprise behind Thruxton Motor Racing Circuit, which was granted planning consent by the Secretary of State in the 1970s on terms that neighbours refused to accept. The subsequent threat of nuisance proceedings resulted in a settlement, consisting of the number of noisy uses being limited more strictly than the planning consent had granted. The enterprise adapted by diversifying its uses, as it continues to do.[39]

A more radical reorganisation of affairs would be for the defendant(s) to relocate their business to a site where there are no residents in such close proximity (or if there are then the residences are owned by the motor racing enterprise as landlord and let out on terms which permit levels of noise that would otherwise be an actionable nuisance). That could be funded from the proceeds of the sale of the existing site for redevelopment, for instance, as houses. The claimants would surely not object to planning permission for a change of use of this kind, although redevelopment would have to be acceptable in planning terms. The loose analogy here is with *Tipping v St Helens Smelting Co Ltd*.[40]

Maria Lee, in her review of *Coventry v Lawrence*, cautions against the assumption that an injunction, suspended or otherwise, will always lead to an 'adequate compromise'.[41] She cites a recent contextual study of *Shelfer* itself by Mark Wilde.[42] Applying this to the specific practical setting at hand, it is indeed true that there are potential limits to the extent of the mutual benefit that can be assured. One specific concern mentioned by Lee is that of the costs of complying with an injunction short of closure and outright cessation of the enterprise (for instance, as discussed above, by staying in business by providing fewer events for which consumers are charged a higher price) may be passed on to consumers/workforce, which could itself create problems.[43] It would be interesting to explore this further whilst, however, bearing in mind that nuisance law as it stands is geared around corrective justice – about correcting a (typically) persistent neighbourly wrong. If that prejudices the interests of those members of the public who are reliant on the wrongdoing (as consumers or workers), then it may be appropriate to look for a solution to this problem through regulation that does prejudice the tort victim.

Overall, it can be concluded that *Coventry v Lawrence* is the latest in a long succession of nuisance actions that highlight the unsuspected complexity that can lie beneath

33 ibid 192.

34 ibid. The onus is on the tortfeasor to persuade the court that a suspension which expires should be renewed: 'It would be as well, however, for the members of the corporation to bear very clearly in their minds that a further suspension of the injunction will by no means be granted automatically' (Romer LJ).

35 In *Pride of Derby*, the initial suspension extended over two years – more modest than *Birmingham* but substantial nonetheless (besides it is unclear from the law reports whether further extensions were granted).

36 The second claimant in *Pride of Derby* was the Earl of Harrington Angling Club Ltd, in what can be understood as a throwback to the aristocratic 19th century nuisance actions.

37 [1930] AC 171.

38 [1961] 1 WLR 683.

39 See for a glimpse of this story http://www.motorsportcircuits.co.uk/html/thruxton_track_guide.html. The reference to 'planning restrictions' is in fact a reference to the post-planning nuisance settlement.

40 [1865] 11 HL Cas 642. St Helens Smelting did close down, but only for it then to move on. The relocation was funded through the sale of its 'problem land' to a different (less polluting) enterprise, for whom the land was suitable and not a source of complaint from its neighbour(s). Indeed, with funds released from the sale of land, the defendant in *Tipping* invested in a cleaner, state of the art copper smelting process, which potentially generated a secondary income stream – a green economy. See Pontin (n 28) 89–94.

41 M Lee 'Private nuisance in the Supreme Court' *Journal of Planning and Environmental Law* (forthcoming July 2014).

42 M Wilde 'Nuisance law and damages in lieu of an injunction: challenging the orthodoxy of the *Shelfer* criteria' in Stephen G A Pitel, Jason W Neyers and Erika Chamberlain (eds) *Tort Law: Challenging Orthodoxy* (Hart Publishing Oxford 2013).

43 Lee (n 41).

ostensibly 'simple' neighbourly rules which have evolved over almost a thousand years. The judgment of the Supreme Court on the matter of liability regarding planning permission is most welcome. It is a return to the 19th and 20th century paradigm, exemplified by *Tipping* and *Halsey*.[44] In the latter, Veale J explained that the task of determining the character of the neighbourhood centres on a finding of fact based on a wide variety of evidence relevant to the criterion of the reasonable user:

> In assessing the character of the neighbourhood, I have been assisted by what I have seen myself. On February 22, at 10 o'clock in the morning, I attended a formal view when I went inside the depôt as well as walking along certain of the neighbouring roads. I was accompanied by counsel representing both parties. In addition, on two occasions, entirely unaccompanied, I have walked along Wingrave Road and part of Rainville Road, namely, at approximately ten minutes to nine on Thursday, February 9, and at approximately half past eleven at night on Friday, February 10. This enabled me the better to see the character of the neighbourhood by day and by night. It also enabled me to understand the nature of the alleged smell and of the alleged noise, both of which are matters which are extremely difficult to put into words.[45]

Clearly, putting into words the reasonableness or otherwise of a use of land for purposes of nuisance law is not something that is possible on the basis of desk top study of administrative (or other) documentary evidence alone, as is now clearly recognised by the Supreme Court (after the hiatus of the *Gillingham Docks* case).

On the other hand, the opinions on the issue of remedy, at least in their totality, are more troubling. The difficulty is not that the Supreme Court is premature in deciding that the time is right critically to probe the *Shelfer* guidelines in order to ensure, where appropriate, that nuisance remedies are in keeping with the public interest. It is of course essential that the courts apply equity in a way that is in the interests of society, and it would be unacceptable if injunctions were to be socially harmful. However, any review must be based on an accurate articulation of the law as it currently stands and how it works in practice. The difficulty with *Coventry v Lawrence* in that regard is the allusions – with some notable exceptions – to the mistaken idea that injunctions awarded under the auspices of the *Shelfer* principles put an immediate stop to an activity, with chaotic results. That is not how the law works, at least on the evidence we have. It is therefore possible, if not indeed likely, that a thorough review of *Shelfer* will show that it is fit for purpose, and besides, any reform should be mindful of unintended consequences, for the reasons explained.

44 Note 38.
45 *Halsey v Esso Petroleum* (n 38) 689.