Can Neighbours be Good Friends?
Where Planning Permission and Property Rights Collide (NSW)

Television Education Network **Webinar**

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21 January 2021

OUTLINE

This session will look at:

- Claims in trespass & nuisance against developers & the intersect between planning law permissions and property rights.
- The rights of the aggrieved neighbour v the rights of the property developer: how can these be reconciled?
- What remedies are available for breach? Injunction and/or damages.
- A case study of *Lawrence v Fen Tigers* [2014] UKSC 13 and how the decision might be applied in Australia.
- The right to airspace: crane over-sailing: *Janney & Ors v Steller Works Pty Ltd* [2017] VSC 363.
- Intersection of the *Access to Neighbouring Land Act 2000,* & Planning Principles.

PLANNING CONSENT MAY BE A DEFENCE TO NUISANCE

The grant of planning permission for a particular use is potentially relevant to defending a nuisance claim in two ways:

(i) the grant, or terms and conditions, of a planning permission may permit the disturbance which is alleged to constitute a nuisance.

(ii) In such a case, the question is the extent, if any, to which the planning permission can be relied on as a defence to the nuisance claim.

RULE IN SHELFER'S CASE

- …. a person by committing a wrongful act ……. is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, *leaving his neighbour with the nuisance, or his lights dimmed, as the case may be.*

  Shelfer [1895] 1 Ch 287

RULE IN SHELFER'S CASE (CONT.)

- *In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.*

- There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorised by this section.

SHELFER'S GOOD WORKING RULE

- A L Smith LJ "good working rule" is dealt with more fully in my loose leaf service, *Injunctions: Law and Practice*, Thomson Reuters

PLANNING PERMISSION IS NOT A LICENCE TO COMMIT A NUISANCE

- “planning permission is not a licence to commit a nuisance”

  Gillingham [1993] QB

  The implementation of the planning permission in *Gillingham* resulted in noise, vibration, dust and fumes which caused serious disturbance local resident.

- See further *Hirose* [2011] Env LR

NUISANCE CO EXISTS WITH PLANNING CONTROLS

- The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. *There is no principle that the common law should 'march with' a statutory scheme covering similar subject matter. Short of express or implied statutory authority to commit a nuisance…, there is no basis…….for using such a statutory scheme to cut down private law rights.*

  Barr v Biffa [2013] QB

Fen Tigers [2014] UKSC: Lord Neuberger's speech

"[t]he court should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge…."

BUT where "*a major development altering the character of a neighbourhood with wide consequential effects* such as required a balancing of competing public and private interests before permission was granted" Lord Neuberger, could

"well see that in such a case the public interest must be allowed to prevail and that it would be inappropriate to grant an injunction *(though whether that should preclude any award of damages in lieu is a question which may need further consideration*)."

Lord Neuberger (cont'd)

- The planning authority can be expected to balance various competing interests, which will often be multifarious in nature, as best it can in the overall public interest, bearing in mind relevant planning guidelines. ……..when granting planning permission for a change of use, *a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance action*; it could not be expected to take on itself the role of deciding a neighbour's common law rights.

Planning Permission May be of Relevance in a Nuisance Case

- [96] However, there will be occasions when the terms of a planning permission could be of some relevance in a nuisance case. *Thus, the fact that the planning authority takes the view that noisy activity is acceptable after 8.30 am, or if it is limited to a certain decibel level, in a particular locality, may be of real value*, ……

  While the decision whether the activity causes a nuisance to the claimant is not for the planning authority but for the court, the existence and terms of the permission are not irrelevant as a matter of law, but in many cases they will be of little, or even no, evidential value, and in other cases rather more."

Lord Sumpton's Conclusion in *Fen Tigers*

Lord Sumpton's opinion was generally aligned with Lord Neuberger. He concluded that *Shelfer* is out of date and that:

"There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance …….

In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission ."

Fen Tigers is getting noticed in Australia

- *Fen Tigers* is now achieving judicial visibility by various Superior Courts in Australia, e.g.:

-- *Sino Iron* [2017] WASCA

-- *Red Engine Group* [2017] QSC

WEATHER-VANING — *Janney's case*

- Courts give short shrift to conscious intrusions by builders into the airspace of neighbours, e.g. for scaffold or crane swing.

- the general principles were summarised in *Janney v Stellar* [2017] VSC

WEATHER-VANING — *Janney's case*

- The fact that the plaintiffs' rights as the owner of land extends into airspace is trite. On one view, the owner's rights extend to protecting not only the land but the sky space above ……. The issue of whether such rights are limited to the prevention of incursions that "[interfere] with that part of the airspace above [the] land which is requisite for the proper use and enjoyment of that land" (such that, for example, claims in trespass cannot prevent aircraft flying over property), has been said to await a definitive ruling from the High Court.

WEATHER-VANING — balance of convenience

- An important ancillary question is whether the balance of convenience, warrants an injunction or whether damages will be an adequate remedy - as it was in *Janney v Stellar* [2017] VSC.

  This involves a consideration of the *Shelfer* rules: see more fully my loose leaf service, *Injunctions: Law & Practice* (Thomson Reuters).

ACCESS TO NEIGHBOURING LAND ACT 2000

- Assume you act for a developer and need to procure the right for e.g. crane weather-vaning; or to put scaffold on a neighbour's land; or to access a pipe on a neighbour's land that serves your land; or you just need access to your neighbour's land for necessary repairs and maintenance to your services.

  Such rights, akin to temporary easements, can be sought in the *Local Court* pursuant to the above Act. Two type of orders can be sought, subject to terms including compensation for the temporary imposition.

Neighbouring land access order; Utility service order

- A person who, for the purpose of carrying out work on land owned by the person, requires access to adjoining or adjacent land may apply for a neighbouring land access order.
- A utility service access order authorises a person to have access to land to carry out work on or in connection with a utility service on the land concerned in accordance with the order.
- No expedition in the Local Court - apply in time.
  BUT
- No costs sting like Sec 88 K(5) *Conveyancing Act*;
- Compensation is only for the temporary imposition, cf for easement.

Intersection of ATNLA ,Planning Principles and Moses at Mt Sinai

- Planning Principles were established in *Galea* [2005] NSWLEC, relating to building walls on a side boundary.

  One of those principles was that if one needed access from neighbouring land to do the work, and one was unlikely to get it, because the neighbour was unco-operative then that militated towards refusal of the application .

  However, as observed in *Alphatex* [2009] NSWLEC, these rules are not engraved like the 10 commandments at Mt Sinai, and if e.g. access can be likely obtained under the ATNLA, then that is no bar to the application.

CITATIONS

- *Shelfer v City of London Electric Lighting Co (No 1)* [1895] 1 Ch 287 at 322-323, per AL Smith LJ
- *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343, 359
- *Hirose Electrical UK Ltd v Peak Ingredients Ltd* [2011] Env LR 34 at [62]
- *Barr v Biffa Waste Services Ltd* [2013] QB 455, at [46(ii)]
- *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822
- *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [No 2] [2017] WASCA 76 [2017] WASCA 76
- *Emprja Pty Ltd v Red Engine Group Pty Ltd* [2017] *QSC 33* [2017] QSC 33
- *Janney v Stellar Works Pty Ltd* [2017] VSC 363, as follows at [28]
- *Galea v Marrickville Council* [2005] NSWLEC
- *Alphatex Australia* [2009] NSWLEC