MANAGING THE RISK OF ENVIRONMENTAL NUISANCE CLAIMS

LEGAL OVERVIEW

The legal principles

1. The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. There is no absolute standard by which nuisance affecting enjoyment of land is judged. It is a question of degree whether the interference with comfort and convenience is sufficiently serious to constitute a nuisance:

   “Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including, for example, the time of the commission of the act complained of, the place of its commission; the manner of committing it, that is, whether it is done wantonly or in the reasonable exercise of rights; and the effect of its commission, that is, whether those effects are transitory or permanent, occasional or continuous; so that the question of nuisance or no nuisance is one of fact” (Stone v Bolton [1949] 1 All ER 237 at 238-9 Oliver J)

2. In deciding whether a nuisance exists, the Court is in effect assessing conflicting interests; that of one occupier in using his land as he thinks fit and that of his neighbour in the quiet enjoyment of his land. An occupier of land may use his land as he thinks fit until the use becomes unreasonable. The Court will be mindful of the fact that the Claimants live adjacent to an industrial estate and that some give and take is necessary.

3. The fact that a nuisance is unpredictable or short-lived does not make it tolerable. The unpredictability of onset of smells is of itself a detrimental factor.
Living in expectation of disturbance can be part of a nuisance (Kennaway v Thompson [1981] 1QB 88).

4. To be able to bring a claim, the Claimant must have a right in the land affected by the nuisance. This could be a freehold or leasehold interest or even a licensee with exclusive possession. A mere licensee does not however have any such right to bring a claim. Children or co-habitees without any interest in the land affected cannot bring a claim.

5. Where the nuisance originates from two sources and it is impossible to distinguish between the sources, the Claimants will need to demonstrate, as against each defendant, that the nuisance from its factory materially contributed to the nuisance. The Court of Appeal in Loftus-Brigham v London Borough of Ealing [2003] EWCA 1490 (103 Con LR 102) considered causation in the context of a nuisance claim:

“We then turn to the rule or formulation appropriate in the law of negligence, and thus of nuisance - and have particular regard to cases, such as the present, where the damage may have resulted from two or more sources - the surest guide is found in the judgment of this court in Banque Bruxelles SA v Eagle Star [1995] QB 375…. “

“the event which the plaintiff alleges to be causative need not be the only or even the main cause of the result complained of: it is enough if it is an effective cause” [the court’s emphasis]

Lord Bingham of Cornhill returned to this principle in Fairchild when at [2003] 1 AC 32[14] he cited with approval the observation of Lord Reid in Bonnington Castings v Wardlaw [1956] AC 613, 620, that:

“[the claimant] must make it appear at least that on a balance of probabilities the breach of duty caused or materially contributed to his injury”.

Bonnington is of particular interest in the context of the present case, because the injury of which the employee complained came from two sources, a pneumatic hammer, in respect of which the employers were not in breach of

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1 The Court of Appeal overturned the decision of the judge below on the basis that he had required the claimants to show that the tree-roots had been either the sole cause of the damage, or at least the preponderant or most probable cause.
the relevant Regulations; and swing grinders, in respect of which they were in breach. Lord Reid held, at page 621, that in those circumstances the court below had been wrong to formulate the question in terms of which was the most probable source of the disease complained of. The employee had to prove that the dust from the grinders made a substantial contribution to his injury, but (at page 622) that was established by showing that the proportion of dust that came from the swing grinders was not negligible.

6. The House of Lords has ruled on causation in the case of *Barker and Murray & Others* [2006] UKHL in the context of personal injury. For present purposes, the relevance of the judgement relates to the ruling that damages to be paid by employers who had contributed to the risk of the employee suffering asbestos illness should be determined according to their relative degree of contribution to the risk of contracting the disease.

7. There are no objective standards for odour and it can be more difficult to measure than noise “It is often very difficult to put into words the nature of a smell” (*Halsey v Esso* [1961] 2 All ER 142).

8. A business/company will only be liable to the extent it was reasonably foreseeable that its activities would cause a nuisance. In the contamination case of *Cambridge Water Co v Eastern Counties Leather*, it was held that the reasonable supervisor of Eastern Counties Leather’s premises prior to 1976 would not have foreseen the groundwater pollution which resulted from repeated spillages of small amounts of solvent, although it could have been foreseen that if a significant quantity were spilled someone might be overcome by the fumes. In the cases of historic contamination from a neighbouring property, relevant technical issues may include:

   (1) how the pollutant entered the ground
   (2) the nature of the working practices during the relevant period;
   (3) the understanding of the risks of the use of the pollutant at this time
   (4) whether the risk of migration of the pollutant was foreseeable at this time.

*Defences*
9. Authorisation by statute can provide a defence to a claim in nuisance providing the activity is conducted with proper care. In general, the fact that a business is operated in accordance with any licences/permissions will not act as a defence to nuisance except possibly where the development is so major in scale so as to alter the character of the locality. If an activity which constitutes a nuisance continues for a period of 20 years it will become immune from legal action. The claimant’s consent to the existence of a nuisance is a defence. Act of God or act of an unidentified third party may also provide a defence.

10. It is not however a defence that the claimant “comes to the nuisance” and that the defendant was there first nor that the defendant’s activity is socially useful.

**Remedies**

**Injunction**

11. The primary remedy for an ongoing nuisance is an injunction to prevent or restrict its continuance (See the Court of Appeal’s restatement of the position in the recent case of Regan –v- Paul Properties Ltd, Lahaise and Griston [2006] EWCA 1319). The injunction is granted on the basis that damages will not adequately compensate the Claimant. The Court will grant an injunction where it appears ‘just and convenient’ to do so and it is therefore at the discretion of the Court. However where an injunction is sought to restrain the Defendant from operating so as to cause an odour nuisance (a so called prohibitory injunction) the Claimant can expect to obtain the injunction providing there are no special circumstances which make it unjust for the Court to grant it. The most a defendant can hope for is a suspension of the operation of the injunction to enable him to take steps to bring the nuisance to an end. Where the injunction sought is mandatory in form (e.g. requiring the Defendant to install odour abatement equipment), the decision to grant it may depend upon, amongst other things, the probability of grave damage and the cost of compliance for the Defendant.

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2 The power of County Courts to grant injunctions comes from section 38 Count Courts Act 1984. The power of the High Court to do so comes from section 37 Supreme Court Act 1981.
12. In Regan v Lahaise, referred to above, Mr Regan’s living room suffered from loss of light as a result of development opposite him. At first instance, the judge accepted that Mr Regan had suffered a significant loss of light which made his living room less comfortable than previously (and therefore a nuisance). However he refused to grant Mr Regan an injunction and awarded him damages instead. Mr Regan appealed to the Court of Appeal who overturned the first instance decision and granted the injunction. The Court of Appeal emphasised that a claimant is prima facie entitled to an injunction in a case of continuing nuisance and that it was not open to a defendant to ask the Court to sanction the wrongdoing by in effect purchasing the right to right to do so on payment of damages. The Court’s discretion to award damages should not be exercised to deprive a claimant of his prima facie right ‘except under very exceptional circumstances’.

13. Examples of injunctions awarded in odour nuisance cases include Milka v Chetwynd Animal By-products (2000) (unrep) and Straker v Oakleigh Farms (1971) 220 EG 957. In Milka the trial judge was prepared to grant a prohibitory injunction where the Claimants had suffered three years of odour/noise nuisance from a next door knacker’s yard and animal rendering plant. He suspended the operation of the injunction for approximately 1 month and then a further six weeks. In Straker the court was prepared to grant an injunction to restrain the smell of chicken excrement from a large poultry farm subject to a period of suspension to enable the Defendant to make changes given the money invested in the business and the importance of not interfering with food production on such a large scale. The Defendant undertook to abate the nuisance within a specified period of time.

**Damages**

14. Damages may be recovered for diminution in value of any property affected by the nuisance. Valuation evidence will be necessary to support a claim for diminution in value and the Claimant will need to establish that the decline in value has arisen from the nuisance.
15. If no diminution in the value of the property can be shown, damages may also be awarded for the loss of amenity or utility associated with the property (e.g. the ability to enjoy one’s garden) arising from the nuisance. Lord Hoffman in *Hunter v Canary Wharf* (1997) AC 665 (HL) at 706B:

“It seems to me that the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an equivalent house which does not smell. In the case of a transitory nuisance the capital value of the property will seldom be reduced. But the owner or occupier is entitled to compensation for the diminution in amenity value of the property during the period for which the nuisance persisted. To some extent this involves placing a value upon intangibles. But estate agents do this all the time. The law of damages is sufficiently flexible to be able to do justice in such a case (Lord Hoffman at 706E)

16. Damages are measured by reference to the size, commodiousness and value of the property not the number of occupiers. Any damages awarded will be divided between those with an interest in the property.

17. The awards tend to be modest. In *Halsey v Esso* (1961) 2 All ER 145 the Claimant lived next door to an oil distribution depot. He experienced smell, vibrations and noise day and night for 5 years. Acid smuts from the depot damaged his washing and the paintwork on his car. The smell was a pungent and nauseating oil smell. The noise from his boilers caused the windows and doors of his house to vibrate. The Court awarded him £200. On today’s figures the award amounts to £3,433.

18. The approach taken by the Court of Appeal in *Bones v Seale* ([1975] 1 All ER 787) was to treat loss of amenity in nuisance as analogous to loss of amenity (e.g. smell) in personal injury claims. The Claimants were awarded £1000 for 12.5 years of nuisance from smells from a pig farm (the Court of Appeal

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3 Based on an RPI of 12.63 in February 1961 and an RPI of 216.8 in June 2008
reduced the award for each of the Claimants from £6000 awarded at first instance). On today’s figures the award amounts to £7424\(^4\).

19. The House of Lords in *Hunter v Canary Wharf Ltd (HL) [1997] AC page 665* disapproved of the approach in *Bones v Seale*. Lord Lloyd suggested that the analogy with personal injury awards was only for the purpose of showing that the sum awarded by the first instance judge was too high. He went on to say that there was no hint that damages should vary with the number of those occupying their houses as their home (p698). Damages for loss of amenity cannot be expressed mathematically (p696) Lord Hoffman said he could not agree with the approach (Page 706). He went onto suggest that damages for loss of amenity ‘may be affected by the size, commodiousness and value of his property but cannot be increased merely because more people are in occupation and therefore suffer greater collective discomfort’

20. In the more recent case of *Milka v Chetwynd Animal By-products (2000) (unrep)*, the Claimants were awarded £3000 for loss of amenity value following odour and noise nuisance from a next door knacker’s yard and rendering plant from 1997 – 2000. In today’s figures the award amounts to £3,903\(^5\). The trial judge Judge Diehl QC also rejected the analogy with personal injury awards but did not adopt the approach suggested by Lord Hoffman in *Hunter v Canary Wharf* of looking at the size and value of the property. He took the approach that “the sum cannot be assessed mathematically but should be moderate in amount”

21. In summary therefore, caselaw suggests any damages will be modest. On the basis of today’s figures, odour awards for loss of amenity range from approximately £686 - £1301 for each year that the nuisance persists.

22. Generally speaking, damages awarded for nuisance will usually afford ‘just satisfaction’ for the purposes of the Human Rights Act, thereby obviating the need for separate damages (Ramsey J in *Dobson v Thames Water Utilities*

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\(^4\) Based on an RPI of 29.2 in November 1974 and an RPI of 216.8 in June 2008

\(^5\) Based on an RPO of 166.6 in January 2000 and an RPI of 216.8 in June 2008
Application of the legal principles

23. A private law action for contamination or odour or noise pollution will almost certainly not be straightforward. The principles are relatively straightforward but matters of their application are not. Each cause of action contains some important limitations which may make it difficult for a claimant to succeed. The law remains uncertain on many issues of importance to liability. Such confusion is reflected in the relatively few cases before the Courts. Actions are usually brought relying on a number of different legal bases (eg nuisance, negligence, trespass, under the Rylands and Fletcher doctrine) and it may be unpredictable which issues will be fastened on by the Court.

24. The starting point for any action is that a claimant must establish, on the balance of probabilities, a causative link between the activities of a company (or its predecessors) and the problem complained of.

Areas of difficulty

Liabilities of subsequent purchasers

25. The liability in nuisance of a landowner who is the subsequent purchaser of land is not clear in all relevant respects\(^6\). I am not aware of any caselaw which has considered the relevance of acquisition of land by way of a share sale or asset sale in this context. Caselaw suggests that, in the circumstances, the subsequent purchaser may be liable in nuisance if it knew, or ought to have known, of the existence of the contamination by the exercise of reasonable diligence. Knowledge for this purpose includes not only actual knowledge of the nuisance but also cases where ignorance is due to failure to use reasonable care to

ascertain the relevant facts. Whilst the position is not clear it seems likely that liability will only arise if the subsequent purchaser was not only aware of the nuisance but was in a position to take steps to do something about it⁷.

Continuing contamination and irretrievability

26. A landowner may not be liable for any pollution which is continuing to migrate onto a neighbour’s land but which has passed beyond its control (e.g into the groundwater), unless it has acted negligently or unreasonably.

27. In one of the leading cases in this area, Cambridge Water Company v Eastern Counties Leather ([1994] 2AC 264), pools of neat solvent may still have been in existence at the base of the chalk aquifer beneath the defendant’s (ECL) premises in circumstances where the escape of solvent was continuing. The House of Lords rejected an argument that ECL was liable, on the basis the solvent had become irretrievably lost in the ground below and had passed beyond the control of ECL. Commentators suggest that in these circumstances, any liability may be based on negligence or unreasonableness⁸.

Statutory Nuisance

28. Most of the activities which once constituted nuisances at common law are now statutory nuisances. The law is to be found in the Environmental Protection Act 1990. The statutory nuisance regime provides a fast and cheap remedy by comparison with common law nuisance and although proceedings for statutory nuisance will normally be brought by a local authority, aggrieved individuals have a statutory right to apply to a magistrates court for the abatement of a nuisance.

Other potential causes of action: the doctrine in Rylands v Fletcher

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⁷ Sedleigh Denfield v O’Callaghan [1940] AC 880
⁸ See Stephen Tromans: Contaminated Land at chapter 14.16
29. The classic formulation of the Rylands v Fletcher doctrine is as follows:\(^9\):

“We think that the true rule of law is, that the person who for his own purposes brings onto his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape...it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on this neighbour’s, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But, for his act in bringing it there, no mischief could have accrued and it seems but just that he should at his peril keep it there so no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things to brought be beasts, or water or filth or stenches”

30. There are however several important limitations to the doctrine.

31. For the doctrine to apply, “the defendant must bring, collect and keep something on his land for his own purposes”. This requirement may be problematic in circumstances where a predecessor has brought the pollutant onto the land.

“This aspect of the rule will probably present difficulties in the case of subsequent owners or occupiers of land who cannot be said to have accumulated on land noxious materials which were already in place when they acquired the property; nor could contaminants which have already been spilled or dispersed into soil by a previous occupier be said to be held for their own purposes. Any remedy in such circumstances would appear to be in the tort of nuisance or possibly negligence\(^10\)”

Non natural use of the land

32. For the Rylands v Fletcher doctrine to apply, the use of the pollutant in these circumstances must be regarded as a non natural use of the land. This has

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\(^9\) As stated by Blackburn J in 1866 case from which the doctrine derives its name Rylands v Fletcher (1866) 1 Exch 265 at 280

\(^10\) Stephen Tromans Contaminated Land at para 14.15
proved to be one of the most important and complex limitations on the rule (case
law has established that housebuilding is not a non natural activity)

33. The House of Lords in the Cambridge Water case considered that the storage of
substantial quantities of chemicals on industrial premises was a non natural use
of the land\textsuperscript{11}. Lord Goff regarded this as almost a classic case of non natural
use. Similarly, the manufacture of polystyrene and use of a hot wire machine to
cut the polystyrene was a non natural use of the land\textsuperscript{12}.

34. However the approach of Lord Bingham to this question in Transco PLC v
Stockport MBC ([2003] UKHL 61) alongside the decision in British Celanese
Ltd v AH Hunt (Capacitors) Ltd provides a different steer.

35. In Transco PLC v Stockport MBC Lord Bingham of Cornhill regarded
‘ordinary user’ as a preferable test to natural user or reasonable user, to make it
clear that the rule is engaged only where the user is shown to be extraordinary
and unusual at the time and in the location in question. A user may be quite out
of the ordinary but not unreasonable. On this line of argument, it could be said
that the operation of a brewery in an industrial area of Leeds is not an
extraordinary activity but an ordinary activity. In British Celanese Ltd v AH
Hunt (Capacitors) Ltd, the manufacture of electrical and electronic components
in 1964 on an industrial trading estate was not a non-natural use\textsuperscript{13}.

36. The doctrine only applies to things likely to do mischief if they escape. The
House of Lords in Transco PLC v Stockport MBC expressed the position as follows:

\textit{\textquotequoteright}It must be shown that the defendant has done something which he
recognised, or judged by the standards appropriate at the relevant
place and time, he ought reasonably to have recognised as giving rise

\textsuperscript{11} Cambridge Water Company Ltd v Eastern Counties Leather plc

\textsuperscript{12} LMS International ltd (2) Wallaby Investments Ltd (3) Contract Experts ltd v (1) Styrene Packaging & Insulation ltd
(2) Paul Edge (3) Michael Edge (4) Maria Edge (5) Robert Cooper (2005) [2005] EWHC 2065 (TCC)

\textsuperscript{13} [1969] 1 WLR 959
37. The pollutant must ‘escape’ from the defendant’s land. More precisely, there must be an ‘escape’ from a place where the defendant has occupation or control over land to a place which is outside its occupation or control\textsuperscript{14}.

38. Commentators suggest that where contaminated land is resulting in a continuing escape of contaminated substances, it could be argued, following the \textit{Cambridge Water} case that there is no liability where the contaminants in question have passed out of the control of the defendant by becoming ‘irretrievably lost in the ground’ (see further above)\textsuperscript{15}.

39. The contamination must be reasonably foreseeable. The same principles apply as for the foreseeability requirement in nuisance (see above).

40. Where the activity which has given rise to the escape of contaminants is regulated by statute (here an industrial pollution regime) which makes provision for liability, there may be an argument that the statutory provision amounts to an exhaustive code of liability for a particular form of escape which excludes the rule in Rylands v Fletcher\textsuperscript{16}.

\textbf{Limitation Period for starting a claim}

41. Limitation can be an important and difficult issue in nuisance cases, Proceedings must be brought within 6 years of the date on which the cause of action accrued (section 2 of the Limitation Act 1980). In historic contamination claims it can be very difficult to pinpoint the time at which the cause of action accrued.

42. If the migration of the pollutant or the odour or the noise is continuing, fresh causes of action can continue to accrue and action can be brought in respect of whatever portion of the continuing wrong lies within the limitation period (i.e

\textsuperscript{14} HL in Transco v Stockport.
\textsuperscript{15} Stephen Tromans Contaminated Land at para 14.28
\textsuperscript{16} See the judgment in Transco v Stockport MBC
the preceding 6 years prior to the issue of proceedings). This rule is easy to state but can be much more difficult to apply. Technical evidence can be necessary to assess the extent of any continuing migration and whether it is possible to identify portions of the contamination which has migrated during the last 6 years.

43. To the extent that migration of the pollutant is not continuing, the claimant faces a problem with limitation if the ‘damage’ to its soil occurred many years ago but the condition of the soil has only become problematic because of its redevelopment proposals. In general terms, time runs from the date the damage occurred not the date or which it was discovered (Pirelli General Cable Works Ltd v Oscar Faber and Partners [1983] 12 AC 1). It is unclear whether the provisions of sections 14A or 14B of the Limitation Act which provide for cases of latent damage, apply to nuisance and/or Rylands v Fletcher.

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