

IN THE CROWN COURT AT STOKE-ON-TRENT

Ref. A20040143

Bethesda Street
Hanley
Stoke-on-Trent

21st July 2005

Before

HIS HONOUR JUDGE EVERARD
(Sitting with Justices)

BETWEEN:

TUSSAUDS THEME PARKS LIMITED (Appellants)

AND

STEPHEN ROPER AND SUZANNE ROPER (Respondents)

MR CAPLAN QC appeared on behalf of the Appellants

MR HOCKMAN QC appeared on behalf of the Respondents

JUDGE'S RULING UPON APPEAL

Transcript by MARGARET WORT & CO
(Official Court Reporters)
Edial Farm, Edial, Burntwood, Staffordshire, WS7 0HZ

RULING

A JUDGE EVERARD: This is an appeal from the decision of Deputy District Judge
Gascoigne who, on the 2nd August 2004, found that there existed a statutory
B nuisance perpetrated by Alton Towers under Section 82 of the Environmental
Protection Act 1990 on the complaint of the now respondents to this appeal,
Mr and Mrs Roper. The period of time which he was considering, and which we
C are now considering, covers the seasons of 2003 and 2004 up to the
commencement of that hearing which started on 8th July last year.

The complainants, as I have said, are Mr and Mrs Roper, now the
D respondents to this appeal. The appellants are Tussauds Theme Parks Limited, the
owners of Alton Towers, and I will refer to them from now on as Alton Towers.

The form of statutory nuisance relied on by the respondents is noise emitted
E from premises under Section 79(1)(g) of that Act. I refer now to that section:

“Subject to subsections 1(a) and to 6(a) below...” which do not concern
us in this case “...the following matters constitute statutory nuisances for
F the purposes of this part of the Act. That is to say...” – and then under the
sub-subparagraph (g) – “...noise emitted from premises so as to be
G prejudicial to health or a nuisance...” and it is agreed that the word “or” is
disjunctive.

The test for a statutory nuisance is the common law test for nuisance. That is
H agreed by both parties following two particular decisions, *Murdoch v. Glacier*

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Metal Company Limited [1998] ELR732, a Court of Appeal decision, and *Godfrey v. Conwy County Borough Council* [2001] ELR38, a decision of the Divisional Court.

A common law nuisance is an unreasonable interference with the use of and/or enjoyment of land, and I refer also, in considering and setting out the law as it is agreed to be, to a case which Mr Caplan has helpfully referred to in his closing submissions, and it's important, I think, that I refer to it at this stage, the case of *Wyvernhoe Port v. Colchester Borough Council* [1985] decision, where it is said:

“To be within the spirit of this Act a nuisance, to be a statutory nuisance, has to be one interfering materially with the personal comfort of the residents, in the sense that it materially affected their wellbeing although it might not be prejudicial to health.”

Of course we accept – and later refer to two much older cases but the law is still the same – that the test is objective. I should perhaps add to that, helpfully set out in the written part of the closing submissions of Mr Caplan, a passage from “Statutory Nuisance Law and Practice, Oxford University Press” written, I assume, by Messrs Malcolm and Pointing:

“Whereas to the lay person anything that annoys him is a nuisance, the legal test for noise/nuisance is objective. The noise must be both excessive and unreasonable.”

As to the chronology of this particular case it is set out at the end of the case summary prepared at the beginning of the case on behalf of the respondents.

A On the 28th October 2002 there was a notice, which we have in fact a copy
of, served under Section 82. On the 23rd October 2003 a second notice was served,
on which these proceedings were later commenced. That was accompanied by the
expert report of Mr Stigwood. On the 8th July 2004 the Magistrates' Court
B proceedings started on that second notice, and we accept that it was on that second
notice. On the 2nd August, having heard evidence, Deputy District Judge
Gascoigne found that a statutory nuisance existed. The sentence and Abatement
C Order which followed are of no relevance at this stage in our determination as to
whether a nuisance existed.

D We bear in mind, throughout these proceedings, that they are, in effect,
criminal proceedings. That is to say it is for the respondents to prove their case and
we must be satisfied so that we are sure that a statutory nuisance existed in 2003
and 2004 in considering this appeal. That is, the burden of proof is on the
E respondents to the criminal standard.

F I deal next with the character of the area. Alton Towers, since 1979, has
been a theme park. It is one of the largest if not ~~the~~ largest in the country. Prior to
1979 it has a long history of being open for the public as a place of recreation
enjoyed by many thousands of people and we have heard evidence about the
G history, interesting as it was. In the circumstances, in our judgment, it is unrealistic
to expect that there will never be any noise emanating from the site. The local
inhabitants must expect some inconvenience from noise from the site.

H Next we make some general observations, namely these. Many rural areas

A are noisier in the summer than in the winter; the noise, for example, from
agriculture, haymaking, harvesting and so on; the noise from private gardens,
A lawnmowers, strimmers, hedge trimmers, and so on; the noise from public events
such as steam rallies, moto-cross and fairs are generally, if not exclusively, summer
B activities, and in our judgment the respondents cannot expect the same tranquillity
which they enjoy in the winter months, either generally or specifically relating to
Alton Towers. However, if a noise nuisance exists, and we are sure that it did exist
C in 2003 and 2004, it is no defence for Alton Towers to say ‘We are a very large
theme park giving enjoyment to millions of people and, therefore, we can make as
much noise as we like’ and it is of course right to say that Alton Towers do not put
D that forward as an argument.

E The relevance of the history of Alton Towers, recently as a theme park, goes,
in our judgment, to the assessment of whether any noise or noises emanating from
Alton Towers amounts to an “unreasonable” – and I stress the word “unreasonable”
– “...interference with the use and/or enjoyment of land.”

F We turn now to the planning development of Alton Towers. Similar
considerations apply, with the exception of Corkscrew, which started in 1979 and
where planning permission was granted retrospectively in 1981 and possibly two
G other rides where planning permission was retrospective, all the other rides have
been opened with planning permission from the Local Authority. The fact that
planning permission has been granted is relevant to what Mr Caplan has referred to
H – and we have adopted his phrase – as the “character of the area”. However, the

A fact that planning permission has been granted does not, of course, give Alton
Towers licence to make such noise as amounts to an unreasonable interference with
the use and/or enjoyment of land, and I would add at this stage that the planning
evidence, as is plain from the evidence and is agreed, relates in fact only to the
rides; it has no bearing on firework events or concerts.

B Whether a statutory nuisance existed in 2003 and 2004 is a question of fact;
that is, applying the law to the facts as we find them to be and bearing in mind, as
C we do in this case, the burden and standard of proof.

D Dealing with fact brings us to the evidence of the acoustics experts,
Mr Stigwood on behalf of the respondents and Mr Sharps on behalf of the
appellants. Before we deal in general terms with their evidence we make this point.
E We are aware that another expert called, I believe, Dr Jackson gave evidence on
behalf of the appellants in the magistrates' hearing. He has not given evidence in
this appeal and I mention that simply to explain that we completely ignore that. I
F have said that before but I stress it again in this judgment. This is a rehearing. We
pay no attention whatsoever to the fact that we have not heard from him. We
decide the case on the evidence which we have heard and on no other evidence.

G We're entitled, in our judgment, when assessing the evidence of
Mr Stigmore (sic) and Mr. Sharps, to bear in mind that, because Mr Sharps came
into the case later, he took no acoustic measurements before the hearing in the
Magistrates' Court and, indeed, no acoustic measurements in the period of time
H which we are considering, namely the summer seasons of 2003 and 2004.

A In reality the evidence of Mr Sharps is of relatively limited assistance in assessing the evidence of the lay witnesses. We do not, of course, discount it and I will deal with it in general terms.

B A great deal of court time has been spent in hearing the evidence of Mr Stigwood and Mr Sharps. This is not a criticism at all of that and, of course, we give that evidence such weight as we think is appropriate. In our judgment Mr Stigwood has adopted what we believe to be a more balanced approach in this C particular case than Mr Sharps. That is to say, given that there are no statutory or other specific guidelines for the assessment of noise from theme parks, he has compared and contrasted a number of guidelines and, we stress, he has long D experience as an environmental health officer, 19 years in total, from 1975 to 1994, which we consider to be important in this case.

E In relation to machinery noise, Tannoys and screams, Mr Stigwood has not simply restricted himself to the British Standard 4142, he has also considered the World Health Organisation guidelines, and he refers to that in his December 2003 report at page 35 and he has also considered the British Standard 7445 and he F refers to that in his December report at page 38.

G By contrast, in our judgment, Mr Sharps has assessed the noise levels almost exclusively from the World Health Authority guideline values. He says in his report at paragraph 6-40:

H "I have considered all other matters, including the character of the noise source and the nature of the area but have found nothing to dissuade me from

A my conclusion; this being that noise from activity associated with Alton
Towers does not exceed WHO guideline values and so does not constitute a
statutory nuisance in law.”

B In our judgment that approach is too restrictive. The actual decibel levels
are, of course, not unimportant, but Mr Stigwood has concentrated not just on
decibel levels but on what he has called “the character of the noise” – for example,
C the daily clattering of machinery accompanied by Tannoy noise and screams, and
that is referred to by a number of lay witnesses. In any event, Mr Sharps concedes
that a statutory nuisance may exist where the levels – that is the measured levels –
are less than the WHO guideline levels with his caveat about the character of the
D noise.

E On any basis, the extent of measurements actually taken in this case is very
limited. Concerning levels of noise from rides, machinery and screaming,
F Mr Stigwood took measurements in April 2003 and September 2003. He had
earlier taken measurements on the 30th March 2003 before Alton Towers opened
and we do not think it is helpful to compare noise levels from when the park is
G closed to noise levels when it is open. We have already said that given the
character of the area and the existence of Alton Towers as a recreational site for
many many years, that it is unrealistic that there will never be any noise emanating
from the theme park and we have already said, and I repeat, that the local
H inhabitants must expect some inconvenience from this type of noise from the site.

As to the noise from fireworks, in October 2002 and November 2003

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measurements were taken by Mr Stigwood. The measurements taken in October 2004 by him are, we consider, of little if any relevance. Those firework displays were more than two months after the finding that there was a nuisance on the 2nd August 2004 and it would not, in our judgment, be right to look at the levels of fireworks which took place after that time.

On the 22nd October 2002 he took measurements of the level of firework noise from Peakstone Farm and we have recently been told exactly where that is. That farm is 2,100 metres from Alton Towers. It was raining and there was some wind and the weather would have suppressed, to an extent, the volume of noise from fireworks. Despite that, the maximum level recorded was 91 decibels. He refers to that as being forty times louder than the background noise level. I stress, and should stress, that the fact that he says it is forty times louder may well include what he has considered to be the background noise level, that is when Alton Towers is closed. I've already said that, we don't think, is a proper way of doing it, but we can say that it was very much louder, on any basis, than his background noise level.

On the 3rd November 2003 he took measurements from the side garden of Farley House and he records his findings in his December 2003 report at paragraphs 5.42 to 5.49 and he refers not just to the fireworks but also to music noise and the DJ's Tannoyed voice.

In summary, the noise from the fireworks, or some of them I should perhaps more accurately say, was extremely loud and the music noise accompanying that

firework display was well in excess of the levels recommended in the Code of Practice on Environmental Noise Control at Concerts 1995.

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Finally on the topic of expert acoustic evidence, we think that Mr Stigwood was entirely correct to refer to and take on board what he referred to as the cumulative impact of noise emanating from Alton Towers; that is to say, from all sources of noise.

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In his report of January 2005 at paragraph 1.43 he says:

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“My report clarified that nuisance arose as a state of affairs where the cumulative impact of noise from all sources caused the nuisance.”

He goes on to say:

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“Further impact only ceases when the noise is inaudible. As I explain below, Mr Sharps does not address cumulative impact/the state of affairs at Alton Towers.”

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In our judgment the proper way to approach and to use the scientific evidence when assessing the lay evidence is the one adopted by Mr Stigwood. It is unrealistic to put the various noise sources into separate compartments in assessing whether a noise nuisance existed, and I should add that which juries are told by Recorders and Judges on a regular basis when they hear expert evidence; they, the experts, do not decide the case. If it were as simple as that we would not need to have heard from anyone other than the two experts in this case.

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We turn now to what we consider to be the most important evidence in the case, coupled of course with the help we have been given by the experts, namely

A the lay witnesses; that is the evidence of a number of individuals living in the area
at the time of 2003 and 2004 and before in certain cases. We stress that the area on
which we must concentrate, and have concentrated, is Farley House where the
respondents live and have lived since 1968. It is important that we concentrate on
B evidence from that immediate area and, in our judgment, to the area well north of
that, in the case of Mrs Ryan. I'll refer later to her evidence.

C We bear in mind also that the prevailing wind blows from the south-east; that
is towards Farley House from the general direction of Alton Towers. When the
wind is in that direction, or there is little or no wind, the evidence is that the noise
is – and this is my phrase – more intrusive. When the wind blows away from
D Farley House there is little if any noise from Alton Towers.

E We also bear in mind that the topography of the area is extremely important;
that is including the contours of the land and tree coverage and, although it came at
a late stage and I will refer back to this, the aerial photograph, which we understand
to be taken in the year 2000, is of some significance in relation particularly to one
witness.

F Finally, we make this general point about the lay witnesses. Each and every
one of them is a decent and honest individual who has done his or her best to give a
truthful, accurate and unbiased account of the noise or noises he or she has heard
G during the relevant period. Mainly because of the topography and because of the
precise area in which each of those witnesses lived, it is plain that some were very
H disturbed by noise, whereas others were not. We bear in mind throughout, as I

have said, that the important location in this case is Farley House.

A In our assessment of the evidence of the lay witnesses we find that although
in the main, as I have said, each witness has tried to give an unbiased and balanced
account, not every witness has done so, and it perhaps goes without saying, the
evidence of some witnesses was more impressive than the evidence of others.

B We turn now to what we consider to be the important features of the
evidence given by those lay witnesses and I deal with them, so far as is necessary,
C in the order in which they gave their evidence.

As far as Susan Allen is concerned, her address is on a road which in fact we
visited, although we didn't go to her house, Wootton Lane. We must have walked
D past it to get to the monitoring site from the 5th June. It's much closer to Alton
Towers. There is no need for me to go into any further description but we do not
consider her specific complaints to be of great assistance in deciding this case
E because of where she lives, but we accept that she has lived there for a considerable
period of time and we are sure that her evidence, in particular about the fireworks
event, was truthful and accurate evidence.

F I'm not going to refer obviously to every word of her evidence or indeed of
anybody else's, but she refers to the noise level being "not acceptable, very very
G loud, terrible noise, during fireworks you can't hear anything else. Our windows
literally shake. You just sit there and think at any moment the windows will shatter
with the explosions." We do not think, we are sure, that that evidence was not
H exaggerated.

