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JISCBAILII_CASES_TORT

IN THE SUPREME COURT OF JUDICATURE CHANI 98/0837/3
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(HIS HONOUR JUDGE WEEKS QC
(Sitting as a Deputy High Court Judge)
Royal Courts of Justice
The Strand
London WC2

Wednesday 31st March, 1999

B e f o r e:

LORD JUSTICE EVANS
LORD JUSTICE MUMMERY
SIR CHRISTOPHER STAUGHTON

- - - - - -

(1) PETER HARDING LIPPIATT
(2) RICHARD FEBRY
Appellants
- v -

SOUTH GLOUCESTERSHIRE COUNTY COUNCIL
(As Successor Authority to Avon County Council)
Respondents
- - - - - -
(Handed down Transcript of Smith Bernal Reporting Ltd
180 Fleet Street, London EC4A 2HG
Tel: 0171 421 4040
Official Shorthand Writers to the Court)
- - - - - -
MR B PAYTON and MR P NORMAN (Instructed by Messrs Moger & Sparrow, Bath BA1 2HY) appeared on behalf of the Appellant

MR D SPENS (Instructed by The Solicitor to the South Gloucestershire County Council, The Council Offices, Castle Street, Thornbury BS35 1HF) appeared on behalf of the Respondent

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J U D G M E N T

(As approved by the Court)

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LORD JUSTICE EVANS:

On the eastern side of the A46 road between Bath and Stroud there is a strip of land about 300 yards long on the inside of a curve. The strip therefore is elliptical in shape and it measures about 50 yards at its widest point. It was acquired by the Ministry of Transport in 1961 so that the road could be widened and the bend straightened out. The work was not done, and because the road was down-graded from trunk road status the strip has now vested in the defendants, the South Gloucestershire Council.

From about October 1991 the strip was occupied by travellers in considerable numbers who lived in caravans. In June 1994 they were evicted by order of the Court. The Council applied for the order, and we can take judicial notice of the fact that such evictions can be difficult for the local authority to undertake, as this one seems to have been.

The plaintiffs, who are the appellants, are tenant farmers from the Duke of Beaufort. The farm is a large one, about 480 acres, and it includes land on both sides of the road. They allege that the travellers while they were there caused a considerable nuisance on their land. They brought proceedings against the Council, as I shall call the respondents, in August 1993 claiming an injunction and damages. The claim for an injunction has been overtaken by events. The claim for damages, covering the period from October 1991 until June 1994, came on for trial before HHJ Weekes Q.C. sitting in the High Court (Chancery Division). at Bristol on 1 June 1998 with an estimated length 4 days.

The Council raised a preliminary objection. The Court of Appeal had just decided Hussain v. Lancashire C.C. reported in The Times on 26 May (and now in (1999) 77 P. & C.R. 89). Counsel submitted that in the light of that decision the claim had no prospect of success, as a matter of law, and that therefore the Statement of Claim should be struck out as disclosing no cause of action.

The judge accepted these submissions The Statement of Claim was struck out and judgment for defendants was entered accordingly. The plaintiffs appeal against his ruling.

Because this was a striking out application, and the judge dealt with it as such, he did not make any findings of fact. He considered the issue of law on the basis of the facts as they were alleged. It is easy to be wise after the event, but it was open to the judge, when the application was made at the opening of the trial, either to make limited findings of fact or at least to record those facts which were not in dispute between the parties. Then there would have been a true factual basis, rather than an hypothetical one, for his decision on the issue of law. That would have been a more convenient course for him to adopt, and in the event he came close to doing it, for his judgment refers to certain basic facts which, as it seems to me, either are admitted or are not capable of dispute.

These facts are as follows:-

(1) The plaintiffs are tenant farmers of the land which, they allege, was affected in the way described in paragraph 5 of the Statement of Claim.

(2) The Council has been at all material times the owner of the land and, subject to the presence of the travellers, in occupation of it.

(3) The travellers entered that land as trespassers and “started to occupy” it (judgment 1G) in October 1991. They or other travellers continued there until evicted in June 1994. Numbers increased until there were over 100 assorted vehicles on the site.

(4) The Council was aware of the presence of the travellers from, at latest, 30 October 1991. Thereafter, they resolved that they would "tolerate" what they regarded as an "unauthorised encampment". This went beyond passive tolerance, because (mindful no doubt of statutory duties which are not relevant to this appeal) they provided toilet, water and other facilities for the travellers, so much so that by 1994 there were six toilets, two skips and two water bowsers, all supplied by the Council.

I note that there is no express allegation in the Statement of Claim that the Council was the owner of the strip of land. But this clearly is an agreed fact, and it was treated by the judge as such (page 1F). From a legal point of view, the travellers never became tenants of their land, and the Council was in possession and control of it throughout.

Mr Spens' submission is that the Council cannot be held liable for the tort of nuisance on the basis of the facts alleged in the Statement of Claim. Apart from what are essentially agreed facts, as stated above, the allegations are contained in paragraph 5 of the Statement of Claim. This reads -
"The travellers or some of them have since mid 1991 frequently trespassed on the plaintiff's land, obstructed access to the plaintiff's adjacent field, dumped rubbish thereon, and left excrement thereon, tethered goats, ponies and horses thereon, stolen timber, gates and fences therefrom, damaged the stone wall at the edge thereof, permitted their dogs to chase the plaintiff's sheep and acted in a belligerent manner (with dogs and otherwise) towards the plaintiffs, their families, employees and neighbours, assaulted them, and stolen chattels belonging to them. Such acts on the said field have damaged and diminished crops and rendered them unfit for sale or consumption"

The allegation therefore is of activities by the travellers which took place off the defendant's land and in all respects save one on the land of the plaintiffs themselves. The one exception or possible exception is the allegation that the defendants barred entry to the plaintiffs land. This could give rise to liability in nuisance, Mr Spens accepts, because if it took place there was a direct interference with the plaintiffs' use and enjoyment of their own land.

Apart from that one exception, he submits that no actionable nuisance is alleged, because the activities relied upon were those of independent third parties, the travellers, and they took place outside the Council's land.

There is no suggestion of vicarious liability in the present case. The Council is not liable for whatever torts or crimes the travellers may have committed in the neighbourhood of the camp. The issue is whether the Council can be liable in nuisance in the circumstances which are alleged.

In support of this submission, Mr Spens relies on the judgment of this Court in Hussain. Before coming to that and some earlier authorities, however, I shall remind myself of the basic requirements of the tort of nuisance, as set out in Clerk & Lindsell on Torts (17th ed. 1995):-
(1) "A private nuisance may be and usually is caused by a person doing, on his own land, something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his act are not confined to his own land, but extend to the land of his neighbour by ..... (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land "(para.18-05).

(2) "Liability of actual wrongdoer . The person liable for a nuisance is the actual wrongdoer, whether or not he is in occupation of the land" (para. 18.46)

(3) "Continuance of nuisance. The occupier of land is liable for a nuisance even though he has not created it, if he has continued it during the period of his occupancy." (para. 18-49).

The basis for the occupier's liability was explained in Sedleigh v. Denfield v. Callaghan [1940] AC 880. The test in shorthand is whether the occupier "adopted" the nuisance, which was created by another person.
(4) In more limited circumstances, where the land from which the nuisance emanates is subject to a tenancy, the landlord may be liable, notwithstanding that he does not have possession and control of the land. It has been held that the landlord can only be held liable when he expressly or implicitly authorised the creation or continuance of the nuisance (Clerk & Lindsell para.18-51, and see Smith v. Scott [1973] 1 Ch.314.

Applying these principles to the present case, there was no tenancy and so no question arises as to the landlord's liability under (4). Nor, if there was an actionable nuisance, is there any present argument as to

whether it was “adopted” by the Council. The sole issue raised by the appeal is whether the facts alleged in paragraph 5 of the Statement of Claim can amount to a private nuisance as a matter of law.

The judge held not, as the following passages from his judgment illustrate. He considered an earlier judgment of this Court in Page Motors Ltd v. Epsom and Ewell B.C. (1981) 80 L.G.R. 337, and in the course of doing so he said:-

"Pausing there, it is not common ground in the present case that the Council owns the land upon which the gypsies created the nuisance. The nuisances pleaded in the Statement of Claim are nuisances or acts which occurred upon the plaintiffs’ land. That will, in my judgment, be an important feature in distinguishing Page Motors from the present case.”

Later, whilst referring to Hussain (of which an unapproved transcript was available), he said:-

".....it seems to me that the acts pleaded in paragraph 5 of the Statement of Claim unquestionably interfered persistently and intolerably with the plaintiffs’ enjoyment of their land, but they did not involve the gypsies’ use of the Council’s land and, therefore, fell outside the scope of the tort.”

He concluded:-
"It seems to me , on a closer analysis of Page Motors v. Epsom and Ewell, that it is only acts which occur upon the Council’s land and cause damage on the plaintiffs’ land, that the plaintiffs can complain of in nuisance, and that all the acts pleaded in paragraph 5 of the Statement of Claim occurred off the Council’s land on the plaintiffs’ land, or the Duke of Beaufort’s land, and that there is no actionable case in nuisance on which they can rely. Accordingly, it seems to me that there is an insuperable difficulty in the plaintiffs’ proceeding with this action.”(page 15C)

Mr Payton submits on this appeal that the judge was wrong. There is no rule of law to the effect that there cannot be an actionable nuisance when the plaintiff has been injured in his use or enjoyment of his own land by the activities of third persons which have taken place on that land and off the defendant’s land.

Mr Payton says that, according to his researches, this contention has never before been raised, except in one case A.G. v. Corke [1933] Ch. 89 where it was rejected, and he submits that it does not gain any support from the recent judgments in Hussain.

A.G. v. Corke and the later case of Smith v. Scott , where the liability of a landlord was also in issue, can be considered together. In A.G. v. Corke the judge, Bennett J., granted an injunction restraining the owner of a disused brick field from allowing the occupiers of caravans, whom he had permitted to use his land, from committing acts, which included trespass, in the neighbourhood of the property. He did so on the express basis that the acts complained of gave rise to a public nuisance in respect of which the Attorney General and the local authority (see [1933] 1 Ch. at 80) could sue. His judgment includes:-

"The acts which, I think, give rise to a danger to the health of the neighbourhood, are acts done, not on the defendant’s land, but off it by people who live on it” (page 93); and

“The plaintiffs have, however, failed to prove that anything done on the defendant’s land gives rise to a complaint by the neighbours .... All the acts which do interfere with the comfort and convenience of the neighbourhood, and which threaten the health of the neighbourhood, are acts done not on the defendant’s land, but off it, by people whom the defendant brings on to it for his profit" (page 94)

He then addressed the argument for the defendant, reported as “The defendant cannot be made responsible for acts done by the caravan-dwellers off the defendant’s property”. Vaisey K.C. (as he then was) submitted in reply “The wrongful act of the defendant is the placing of caravans on the land” (pages 91-2). The judge held that liability was established under the principle in Rylands v. Fletcher , which:-

“.... affords in my judgment a basis on which the defendant can be made responsible in law for the nuisance which undoubtedly exists, on the facts, in the vicinity of this camp and which nuisance is caused by some of the people whom he brings there for his own profit" (page 95).

Mr Payton therefore is entitled to submit that the point raised by the Council in the present case was decided there against the defendant in an action for nuisance; but equally, Mr Spens is right to say that the claim was brought in respect of a public nuisance, and he could have added that the decision was subsequently the subject-matter of academic discussion (see e.g.) Clerk & Lindsell para. 19-07.

But the law is clarified by the judgment of Pennycuick V. - C. in Smith v. Scott . The plaintiffs alleged that a nuisance was created by tenants of the defendant's property. The nuisance included damage caused to the plaintiff's property as well as noise disturbance near it ("near no.27" page 315F). The Vice-Chancellor said that he was "satisfied beyond doubt, indeed it is not challenged, that the conduct of the Scott family as a whole was altogether intolerable, both in respect of physical damage and of noise" (page 319C). He referred to A.G. v. Corke and doubted whether the rule in Ryland v. Fletcher did apply in that case, but he expressed no doubt as to the correctness of the decision:-

"I should respectfully have thought that Attorney-General v. Corke [1953] Ch.89 could at least equally well have been decided on the basis that the landowner there was in possession of the property and was himself liable in nuisance for the acts of his licensees: see White v. Jameson (1874) L.R. 18 Eq. 303." (page 321H).

This judgment therefore provides clear authority for Mr Payton's submission that A.G. v. Corke was correctly decided and, more generally, that there is no rule of law which prevents the owner occupier of land from being held liable for the tort of nuisance by reason of the activities of his licensees which take place off his land.

The submission is further supported by the judgments in Thompson-Schwab v. Costaki [1956] 1 W.L.R. 335. The plaintiff lived at 13 Chesterfield Street. The defendants used the next door property, No, 12, for the purposes of "carrying on their practices as prostitutes; they were .... walking for the purposes of solicitation towards Curzon Street, returning to the house with the men whom they had solicited, and then the men would leave the house and the women would leave after them" (pages 336-7). Wynn-Parry J. granted an interlocutory injunction against "using the premises for the purposes of prostitution" and this was upheld by the Court of Appeal. The submission was that "no case has come before the courts in which this kind of activity has been held to constitute a common law nuisance" (page 337). The primary argument was that, whilst the susceptibilities of ordinary people might be shocked, there was no material (physical) interference with the plaintiffs' land or their use of it. Lord Evershed M.R. described the basis of the defendants' (alleged) liability as follows:-

"The perambulations of the prostitutes and of their customers is something which is obvious, which is blatant, and which, as I think, the first plaintiff has shown prima facie to constitute not a mere hurt of his sensibilities as a fastidious man, but so as to constitute a sensible interference with the comfortable and convenient enjoyment of his residence ....." (page 339)

This he described as "the alleged nuisance" (ibid.). Romer L.J. made it clear that the plaintiff alleged a private nuisance (page 341) and Parker L.J. agreed with both judgments.

In Hunter v. Canary Wharf [1997] AC 655 in a quite different context the House of Lords considered the legal nature of a private nuisance in some detail. In the leading speech, Lord Goff stated the general principle and referred to the Thompson-Schwab decision with qualified approval:-

"Indeed, for an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, it will generally arise from something emanating from the defendant's land. Such an emanation may take many forms - noise, dirt, fumes, a noxious smell, vibration and such like. Occasionally activities on the defendant's land are in themselves so offensive to neighbours as to constitute an actionable nuisance, as in Thompson-Schwab v. Cantakia where the sight of prostitutes and their clients entering and leaving neighbouring premises were held to fall in that category. Such cases must however be relatively rare" (pages 685-6).

It has not been suggested, therefore, in any reported case since the unsuccessful argument in A.G. v. Corke that the defendant occupier of land cannot be held liable in nuisance when the activities complained of were those of his licensees and they took place off his land. I would hold, before coming to consider Page Motors

v. Epsom and Ewell B.C. and Hussain v. Lancaster C.C. , that there is no such rule of law. The judgments in Thompson-Schwab and Smith v. Scott are clear authority against it, although it can be said that in neither case was the particular issue raised. Since it had been raised and rejected in A.G. v. Corke , that suggests to my mind that the reason for not raising it in the later cases was not that it was overlooked. Thompson-Schwab might be distinguished on the ground that the activities of the prostitutes and their customers, whilst taking place off the defendant's land, did so on the highway rather than on the plaintiff's land itself. But that would mean that that there was no nuisance if the prostitutes solicited from the doorway of the plaintiff's home. That in my view would be an absurd distinction to make.

The principle, as stated by Lord Goff with whom Lord Lloyd agreed (page 700B), is that as a general rule some form of "emanation" from the defendant's land is required. On analysis, what "emanated" in the present case was the travellers themselves. I do not find this form of emanation difficult to accept. If it was somehow excluded from the definition of a nuisance, then any number of examples come to mind where the distinction would be artificial in the extreme. Keeping fierce dogs and allowing them to roam would be a nuisance; taking them onto the neighbour's land and releasing them there would not. Mr Spens submits that the defendant cannot be held liable in nuisance for the deliberate act of a third party. But that is not generally true, because there clearly can be liability for a nuisance created deliberately by a third party, even a trespasser, on the defendants' land. If there was an exception limited to deliberate acts off the defendant's land, then that merely restates the general submission which, for the reasons given, I would reject.

So I come finally to Page Motors and to Hussain. The former is noteworthy, in my judgment, only because no attention was paid to the question whether the acts complained of took place on or off the defendant's land. For the most part they were the former, and the alleged nuisance was of the conventional and usual kind. (The principal issue decided by the Court was whether the defendant could be held liable as occupier for the activities of trespassers on his land.)

The judge in the present case recorded that in another case where a similar claim was made against the Council in 1994, he gave judgment for the plaintiffs against the Council on the authority of Page Motors and that an appeal against his judgment was withdrawn (page 9D). I would hold that his judgment was not contradicted by the recent decision in Hussain as he thought that it was.

In Hussain the defendant was held not liable in its capacity as the local housing authority for what the plaintiffs alleged was a nuisance created by its tenants on the local housing estate. The plaintiffs were shopowners and they claimed to have suffered severe harassment from tenants which included threats, racial abuse, the throwing of missiles and attempts to burn down their premises. They alleged that "the harassment comes from a number of identifiable people both men, including teenagers and boys, and women". Some individuals had been prosecuted, and a total number of 106 was involved.

The first question considered by the Court was whether, on these alleged facts, the plaintiffs could establish a claim against the defendants in nuisance (per Hirst L.J. at page 108). Applying "Professor Newark's statement of general principle that its essence is that the defendant's use of the defendant's land interferes with the plaintiff's enjoyment of the plaintiff's land", which was "amply vindicated" by Lord Goff's approval in Hunter v. Canary Wharf , the Court held that the acts complained of "did not involve the tenant's use of the tenant's land and therefore fell outside the scope of the tort" (page 109). In a later passage, Hirst L.J. distinguished Page Motors where the conduct of gypsies "involved use (or rather misuse) of the council's land" (ibid.).

In my judgment, the facts alleged in Hussain were materially different from those in the present case. The disturbance complained of in Hussain was a public nuisance for which the individual perpetrators could be held liable, and they were identified as individuals who lived in Council property; but their conduct was not in any sense linked to, nor did it emanate from, the homes where they lived. Here, the allegation is that the travellers were allowed to congregate on the Council's land and that they used it as a base for the unlawful activities of which the plaintiffs, as neighbours, complain. It is at least arguable that this can give rise to liability in nuisance, and so the claim should not be struck out; and it seems to me that upon proof of the alleged facts, and subject to any defences e.g. the statutory responsibilities of the Council, such liability could be established.

The view taken in Hussain was that the alleged nuisance was “originally perpetrated by the culprits” (page 96). It may be that the correct analysis, where it is alleged that the owner/occupier of the land is liable for the activities of his licensees, is that he is liable, if at all, for a nuisance which he himself has created by allowing the troublemakers to occupy his land and to use it as a base for causing unlawful disturbance to his neighbours. Vaisey K.C. so submitted in 1933. If that is correct, then strictly the question whether the owner/occupier has “adopted” a nuisance created by the travellers (question (2) above) may not arise. For that reason, I express no other view than that, on the facts alleged in the present case, the Council’s objection that the claim in nuisance cannot succeed, as a matter of law, must be rejected, and the appeal should be allowed.

The judge referred also to an application for leave to amend the Statement of Claim, which he refused, because it raised a case other than “the case which the defendants came to meet today” (page 18B). We do not know what the proposed amendment was. Mr Payton formulated it orally in the course of his submissions, and no written record of it was kept. Precisely what it was, I find puzzling. If it reformulated the existing claim in nuisance, relying on the same facts as already pleaded, then it is doubtful whether leave to amend was necessary and, in any event, the allegation cannot have taken the defendants by surprise. If it sought to allege some further facts, then we do not know what they were, and the application for leave is not pursued as part of this appeal.

Mr Spens raised an objection which he accepted was “legal and technical”, and which as I understood it was that the existing pleading does not enable the plaintiffs to succeed in their claim in nuisance, because no such claim is made. But, muddled though it is, the Amended Statement of Claim alleges facts which in my judgment, for the reasons given above, are sufficient to constitute an arguable claim in nuisance, and the allegation of nuisance is expressly made. This objection is groundless.

I would order that the action be remitted to the High Court (Chancery Division) for retrial, at Bristol or elsewhere as may be directed.

LORD JUSTICE MUMMERY:

I agree. I gratefully adopt the summary of the facts and of the proceedings in the judgment of Evans LJ. The judge held on the first day of the trial that the plaintiffs' action against the Council for nuisance had no prospect of success, that leave to amend the statement of claim should be refused and that the action should be dismissed without hearing any evidence. His reason for taking that unusual course at trial was that the claim for nuisance was bound to fail because-

" Here there is no misuse of the Council's land, which causes damage to the plaintiffs. What caused damage to the plaintiffs is the very regrettable activities of the travellers off site, on the plaintiffs' own land."

In those circumstances the Council could not be held liable in nuisance for acts of the travellers on the plaintiffs' land. On the basis of two Court of Appeal decisions - Page Motors -v- Epsom and Ewell BC [1981] 80 LGR 337 and Hussain -v- Lancaster County Council [1999] 77 P& CR 89 - the judge concluded that the plaintiffs faced an insuperable legal difficulty which he identified in these words-

"It is only acts which occur upon the Council's land and cause damage on the plaintiffs' land that the plaintiffs can complain of in nuisance and that all the acts pleaded in paragraph 5 of the statement of claim occurred off the Council's land on the plaintiffs' land.... and that there is no actionable case in nuisance on which they can rely."

In my judgment the judge did not correctly appreciate either the scope of the plaintiffs' pleaded case or the reach of the law of nuisance. This is not altogether surprising, as (a) the statement of claim is not as clearly drafted as it might have been; and (b) the judge's attention was not drawn by counsel to the decided cases from which it appears that an occupier of land may be held liable in nuisance in these exceptional circumstances: the plaintiff's use and enjoyment of his rights in his land is interfered with by the continuing presence on the defendant's land of persons whose actual or apprehended activities include, to the knowledge

of the defendant, harmful acts repeatedly committed by them on the plaintiffs' land from their base on land occupied by the defendant.

1. The pleaded case

The amended statement of claim,which was originally settled by different counsel, is a muddled document. When read as a whole, however, it is clear that the plaintiffs make the following complaints against the Council:-

(1) From mid-1991 travellers, without authority, encamped on the Council's land on the verge of the A46 Bath to Stroud road in increasing numbers.
(2) By letter dated 14 July 1992 (which is incorporated into the statement of claim) the plaintiffs' solicitors suggested that the Council should take reasonable steps to ask the trespassers to leave the land and contended that in the absence of any decisive action the Council was "adopting or continuing a nuisance (due to the act of others) and following a reasonable period for its abatement". The letter added that a reasonable time for the abatement of the nuisance had already expired.
The letter also set out details of alleged damage caused by acts of the travellers including "loss of his crop which will be reduced and may not be wholly able to be harvested because of the apprehended danger to employees or to contractor's employees.." Other heads of damage are alleged and repeated in paragraph 5 of the statement of claim served on 25 August 1993. They refer to obstruction of access to the plaintiffs' adjoining field and to specific acts committed by the travellers on the plaintiffs' fields since mid-1991. Those acts are alleged to be nuisances to the plaintiffs' land and to include trespasses and interference with goods. Particulars of damage,including continuing loss, are given (paragraph 7) and amplified in an undated schedule of special damage.
(3) The Council failed to remove the travellers encampment and vehicles or to prevent access or egress to the Council's land by vehicles and dogs or to prevent the spreading of debris or to ensure that the plaintiffs have access across the Council's land to their adjacent field.
The plaintiffs claim a mandatory injunction to abate the nuisance, an injunction to prevent occupation of the land by persons who cause loss and damage to the plaintiffs and damages to be assessed. As the travellers were evicted in June 1994 only the claim for damages remains a live issue.
The amended defence reveals that the Council deny that it had adopted the nuisance by the travellers or that it was able to abate it or that it was liable for the pleaded damage.

The New Cases

In Attorney General -v- Corke [1933] Ch 89 a defendant whose land was occupied by caravan dwellers was held liable in public nuisance and under the rule in Rylands v Fletcher and was restrained by injunction in circumstances where offending acts were committed by the caravan dwellers, who were permitted to occupy the defendant's land, on other land in the neighbourhood. Bennett J rejected the submission of the defendant's counsel (at p 91) that

"The defendant cannot be made responsible for acts done by the caravan dwellers off the defendant's property."

Although that case has been criticised on the ground that it was an unwarranted extension of the rule in Rylands v Fletcher , it was regarded by Sir John Pennycuick in Smith v Scott [1973] Ch 314 at 322A as a case which could equally well have been decided on the basis that the landowner was in possession of the property and was himself liable in nuisance for the acts of his licensees.
Secondly, in Thompson-Schwab -v- Costaki [1956] 1 WLR 331 the nuisance on the defendant's property consisted of a brothel. The defendant was held liable to the plaintiffs for interference with their use and enjoyment of their neighbouring land by the "perambulations of prostitutes and of their customers" (at p 339). Those acts took place off, not on, the defendant's property.
Neither of those authorities was cited in Hussain (supra). That case was concerned with a landlord. He was held not to be liable in nuisance for the activities of his tenant which did not involve use of the land leased by him to the tenant. There is nothing in that case or in Page Motors (supra) which precludes a court from holding an occupier of land may be held liable for a nuisance which consists of a continuing state of affairs existing on his land where that nuisance manifests itself in the form of repeated acts on the plaintiffs' land and those acts are, to the knowledge of the defendant, committed by persons based on his land and they interfere with the plaintiff's use and enjoyment of his land.

3. Conclusion

It is reasonably arguable that the continuing presence of the travellers on the Council's land constituted a nuisance to the plaintiffs' use and enjoyment of their rights in their land, even though the travellers' activities involved using the Council's land as a launching pad for repeated acts of trespass on the plaintiffs' land.
It is not, contrary to the submission of Mr Spens for the Council, a case of the plaintiffs seeking to make the Council vicariously liable for individual acts of trespass committed by uncontrolled third parties (i.e. the travellers) on the plaintiffs' land. It is rather a complaint of a continuing and potentially injurious state of affairs on the Council's land ie the presence of the travellers who, as the Council were made aware, repeatedly behaved in the way complained of by the plaintiffs. The Council let that state of affairs continue to exist on its land notwithstanding the complaints of the plaintiffs; and that state of affairs was capable of constituting a nuisance for which the Council was liable, even if individual acts of the travellers of which the plaintiffs complained occurred on the plaintiffs' land.
In those circumstances I conclude that:-
(1) the case is reasonably arguable in law and on the state of the pleadings;
(2) the judge should not have struck out the plaintiffs' action on the first day of the trial; and
(3) he should have heard the evidence in order to decide whether or not the plaintiffs had established a case in nuisance against the Council, and, if so, what damages the Council was liable to pay to the plaintiffs.
I express no view either on the likely outcome of the case or on the recoverability in law or fact of any of the items of special damage claimed by the plaintiffs, should they succeed in establishing liability for nuisance.
For those reasons I also would allow this appeal.

SIR CHRISTOPHER STAUGHTON:

The case of Hussain v Lancaster City Council (1999) 77 P & CR 89 decided, as it seems to me, two questions. They are set out in the judgment of Hirst L.J. at p.108:
"Two main questions arise in connection with the claim in nuisance, using that word in its technical tortious sense, first as to its scope, and secondly as to the ambit of responsibility of landlords for their tenants' acts of nuisance."

We are bound by the conclusions of this court in the Hussain case on both issues, subject to the fate of any application for that case to go further.

On the first issue, Hirst L.J. (at p.109) described the essence of the tort as that

"the Defendant's use of the Defendant's land interferes with the Plaintiff's enjoyment of the Plaintiff's land."

I can see room for argument in a case where a defendant habitually fires missiles into neighbouring territory of the plaintiff, or sends his dogs on a mission to kill, or sets up a ghetto-blaster (see the judgment of Henry L.J. in Northampton Borough Council v. Lovatt (1998) EG 142). It seems to me that there is not a great difference in such a case whether the offending act of the defendant takes place on his land, or on the public road outside his gate. But we need not rule on that today. The nuisance in this case was the presence on the Council's land of a large number of persons, some of who had shown a disposition to commit acts of vandalism and worse on the land of the plaintiffs.

As to the second issue, there is in my judgment a difference between a case such as Hussain, where the offenders were (for the most part) tenants of the defendant with an interest in the land, and the present case where they are either licensees of the Council or else trespassers, and can be moved on. In the latter case, the Council may be found to have adopted the nuisance by failing to exercise its power to turn out the travellers once their habitual misbehaviour became apparent. Alternatively, it can be said that the nuisance becomes that of the Council in leaving the travellers on the land, if that amounts to anything different from what I have said before.

I would allow this appeal, set aside the Order of Judge Weeks, QC, and direct that the case be remitted to the Bristol District Registry for trial.

ORDER: Appeal allowed with the costs of the appeal. As regards the costs of the hearing below, defendants ordered to pay one half of the costs of the day's hearing before the judge. The other half of that day's costs will remain as costs in the cause. Those costs of the half day will be paid by the defendants to the plaintiffs in

any event. Application for leave to appeal refused. Order sought in relation to the payment in ordered, in terms which can be agreed between counsel and notified to the Associate.

Direction that the circumstances of that final order be omitted from the transcript.
(Order not part of approved judgment)

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