Introduction

1. In this talk I will consider the remedies for nuisance. When will the court grant an injunction? When will the court award damages in lieu? My analysis will focus on the case of Coventry v Lawrence [2014] UKSC 13 (referred to in some reports as Fen Tigers Limited v Lawrence).

2. Coventry v Lawrence was a case of private nuisance, as opposed to public nuisance. The type of nuisance alleged was that which causes personal discomfort or inconvenience, as opposed to physical damage to the claimant’s property. In particular, the case was about whether the noise caused by motor sports at a site in Suffolk amounted to a nuisance and, if so, what remedy the court should impose.

Brief summary of the facts of Coventry v Lawrence

3. The key facts were:

   - Since the 1970s the defendant land owners had used a stadium for speedway racing pursuant to various grants of planning permission. In
the 1980s they had also begun to use the stadium for stock car and banger racing, for which they obtained a certificate of lawful use in 1997.

- Since the early 1990s the defendants had used a nearby track for motocross events pursuant to various grants of planning permission.
- There was a bungalow called “Fenland” about 560 metres from the stadium and about 860 metres from the track.
- The claimants moved into Fenland in 2006. They soon began to complain about the noise from the motor sports at the stadium and the track.
- In 2009 they issued a claim in private nuisance. In 2010 Fenland suffered a serious fire which made it uninhabitable.

**The decision at first instance**

4. In 2011 Judge Richard Seymour QC found that the noise amounted to a nuisance, and he granted an injunction restraining the defendants from carrying out activities which emitted more than a specified level of noise. The judge provided that the injunction was only to take effect on 1 January 2012 or (if later) when Fenland was ready for residential occupation. The judge gave the parties permission to apply to vary the terms of the injunction.

**The decision in the Court of Appeal**

5. In 2012 the Court of Appeal reversed the trial judge's decision. The Court of Appeal held that the defendants' activities did not constitute a nuisance at all.

**The decision in the Supreme Court**

6. In February 2014 the Supreme Court allowed the claimants' appeal and held that the noise did amount to a nuisance. As for remedy: the Supreme Court restored the injunction granted by the trial judge, albeit that the defendants
were entitled under the trial judge's "liberty to apply" provision to argue that the injunction should be discharged and damages awarded in lieu.

Issues in Coventry v Lawrence

7. In paragraph 6 of his judgement, Lord Neuberger listed 5 issues raised by the appeal:

(1) the extent to which it is open to a defendant to contend that he has established a prescriptive right to commit what would otherwise be a nuisance by means of noise - the court held that, yes, it is possible to obtain such a prescriptive right, but on the facts the defendants had not shown that their activities had caused a nuisance to Fenland for a continuous period of 20 years;

(2) the extent to which a defendant can rely on the fact that the claimant "came to the nuisance" - the law remains (as it has been for over 180 years) that it is no defence for the defendant to show that the claimant came to the nuisance (though a defendant may in certain circumstances have a defence if a claimant builds on or changes the use of his land after the defendant has begun the activities complained of);

(3) the extent to which a defendant can invoke the actual use of his premises, complained of by the claimant, when assessing the character of the area - Lord Neuberger said that, when assessing the character of the area, the actual use of the premises can be invoked by the defendant, except in so far as those activities are actually a nuisance; I do not find this

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1 The Supreme Court's decision was intended to reflect the fact that the defendants had not argued before the trial judge that damages should be awarded in lieu of an injunction.
particularly convincing, and Lord Neuberger himself recognised (at paragraph 71) that there was an element of circularity in what he was saying; but this difficulty is not my topic for today;

(4) the extent to which the grant of planning permission for a particular use can affect the question of whether that use is a nuisance - the Supreme Court held that, whilst grants of planning permission may well be relevant to remedy, they will not normally have any relevance to the question of liability; hence, the motor sports still amounted to a nuisance, notwithstanding that the various grants of planning permission allowed the defendants to carry out such activities;

(5) the approach to be adopted by a court when deciding whether to grant an injunction, or whether to award damages instead, and the relevance of planning permission in this context - this fifth issue will be the focus of the rest of my talk.

8. After a brief introduction, I will consider the following 5 matters:

(1) Lord Neuberger's approach to choosing between an injunction and damages;

(2) Lord Sumption's more radical view;

(3) the relevance of the public interest;
(4) the relevance of planning permission;

(5) the measure of damages where an injunction is not awarded.

Injunction or damages: setting the scene

9. The question at issue is: where the court finds that there is a nuisance, will the court grant an injunction restraining the nuisance, or will the court award damages in lieu and in effect allow the defendant to continue committing the nuisance? The court’s power to award damages in lieu is derived from Lord Cairns’ Act and is now found in section 50 of the Senior Courts Act 1981\(^2\).

10. In what follows, I will assume that the claimant is seeking an injunction, and that the defendant would prefer to pay damages in lieu.

(1) Lord Neuberger’s approach to choosing between an injunction and damages

11. The theme of Lord Neuberger’s speech on this issue is one of flexibility. The court’s discretion as to whether it grants an injunction or awards damages in lieu should not be fettered.

12. Lord Neuberger considered the well-known case of *Shelfer v City of London Electric Lighting Co* [1891-94] All ER Rep 838, where AL Smith LJ said at page 848 that a good working rule was that, where 4 conditions are satisfied, damages in lieu of an injunction may be awarded:

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(1) the injury to the claimant's legal right is small;

(2) the injury is capable of being estimated in money;

(3) the injury can be adequately compensated by a small money payment;

(4) it would be oppressive to the defendant to grant an injunction.

13. Lord Neuberger said that an almost mechanical application of AL Smith LJ’s 4 tests was wrong in principle (paragraph 119). Lord Neuberger emphasised 3 points about AL Smith LJ’s 4 tests (paragraph 123):

(1) the application of the 4 tests must not be a fetter on the exercise of the court’s discretion;

(2) it would normally be right to refuse an injunction if the 4 tests were satisfied;

(3) the fact that the 4 tests are not all satisfied does not mean that an injunction should be granted.

14. Lord Neuberger accepted that the prima facie position was that an injunction should be granted, and indeed that the legal burden was on the
defendant to show why an injunction should not be granted (paragraph 121). Subject to those points, Lord Neuberger emphasised that, when a judge is called upon to decide whether to grant an injunction or award damages in lieu, there should be no inclination either way (paragraph 122).

15. Lord Neuberger said that an approach which involved damages being awarded only in “very exceptional circumstances” was wrong in principle and gave rise to a serious risk of going wrong in practice (paragraph 119). This is a significant remark, as the Supreme Court was marking a departure from the Court of Appeal’s view in Regan v Paul Properties [2006] EWCA Civ 1391 and Watson v Croft Promosport [2009] EWCA Civ 15 that damages should be awarded only in “very exceptional circumstances”.

(2) Lord Sumption’s more radical view

16. The other members of the Supreme Court shared Lord Neuberger’s view that there needed to be greater flexibility. For example, Lord Clarke said at paragraph 171 that Shelfer was out of date, and Lord Carnwath said at paragraph 239 that the opportunity should be taken to signal a move away from the strict criteria derived from Shelfer, and that the Court of Appeal was wrong in Watson to hold that the trial judge had not had the power to grant an injunction.

17. However, Lord Sumption went even further than the rest of the court. Whereas Lord Neuberger said that there should be no inclination either way between an injunction and damages, Lord Sumption said that there was “much

3 Watson is interesting as it also concerned noise from a motor racing circuit. In Watson, the trial judge had awarded damages in lieu. The Court of Appeal allowed the claimants’ appeal and granted an injunction.
to be said for the view that damages are ordinarily an adequate remedy for nuisance" (paragraph 161).

18. As I read his speech, Lord Sumption reached this view due to two main factors:

(1) Lord Sumption said that the ordinary principle in most areas of law is that "the court does not grant an injunction where there is an adequate legal remedy. In particular, it does not do so where damages would be an adequate remedy" (paragraph 159). It was wrong to treat nuisance as a special case, where this ordinary principle did not apply.

(2) Lord Sumption felt that Shelfer was out of date as it "was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control" (paragraph 161).

(3) The relevance of the public interest

19. The Supreme Court made it clear that the public interest will be a relevant factor when a judge is deciding whether to grant an injunction or award damages in lieu. At paragraph 124 Lord Neuberger said:

"As for...public interest, I find it hard to see how there could be any circumstances in which it arose and could not, as a matter of law, be a relevant factor."
20. At paragraph 124 Lord Neuberger gave two examples, the first an example of a public interest factor against an injunction, the second an example of a public interest factor in favour of an injunction:

(1) It may be a factor against the granting of an injunction that an injunction might mean that a defendant would have to shut down his business and hence that a number of his employees might lose their livelihood.

(2) On the other hand, a factor in favour of an injunction might be that many other neighbours in addition to the claimant are badly affected by the nuisance.

21. Lord Carnwath likewise did not wish to restrict the circumstances in which the court might take into account the public interest. He implied that a factor against the granting of an injunction in Coventry v Lawrence was that members of the public used and enjoyed the motor racing stadium. He said that the Court of Appeal had been wrong in Watson to hold that the court could only consider the public interest where the damage to the claimant was minimal (paragraph 239).

22. Once again, Lord Sumption went further than the rest of the Supreme Court. He said that there was much to be said for the view that “an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties’ interests” (paragraph 161).
(4) The relevance of planning permission

23. Within the context of the public interest, one particular matter which the Supreme Court discussed was the relevance of planning permission. The Supreme Court said that, though planning permission is unlikely to be relevant to the question of liability, it might well be relevant to the question of remedy.

24. For example, Lord Neuberger said at paragraph 125:

"In some cases, the grant of planning permission for a particular activity (whether carried on at the claimant's, or the defendant's, premises) may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of whether or not to grant an injunction."

25. In other words, a planning permission which in effect authorises the activity causing the noise nuisance can be a factor in favour of awarding damages in lieu:

"This factor would have real force in cases where it was clear that the planning authority had been reasonably and fairly influenced by the public benefit of the activity, and where the activity cannot be carried out without causing the nuisance complained of. However, even in such cases, the court would have to weigh up all the competing factors."

26. Again, Lord Sumption's view was more radical. He said (at paragraph 161):

"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".
27. The rest of the Supreme Court felt that Lord Sumption had gone too far. Lord Mance (paragraph 167) and Lord Carnwath (paragraph 246) did not think that a grant of planning permission could give rise to any presumption against an injunction. Lord Mance also emphasised the significance of the right to enjoy one’s home without interference (paragraph 168); Lord Neuberger saw “real force” in Lord Mance’s remarks (paragraph 127).

(5) The measure of damages where an injunction is not awarded

28. The Supreme Court briefly considered what the measure of the damages should be where the court awards damages in lieu of an injunction.

29. The traditional approach is that the damages should represent the reduction in value of the claimant’s property as a result of allowing the nuisance to continue. In other words, the focus is on the loss to the claimant, whether that takes the form of a reduction in the capital value of his land, a reduction in the letting value or merely the reduced “amenity value” of the land.

30. However, Lord Neuberger and Lord Clarke, who both referred to Jaggard v Sawyer [1995] 1 WLR 269, expressed support for the possibility of awarding gain-based damages, i.e. damages which consider what the defendant gains from being allowed to continue the nuisance. Thus, Lord Neuberger said at paragraph 128:

"While double counting must be avoided, the damages might well, at least where it was appropriate, also include the loss of the claimant’s ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction."
31. On the other hand, Lord Carnwath was more cautious about whether it was appropriate to award "Wrotham Park damages" in nuisance, and did not think that such damages would be easy to assess (paragraph 248).

32. In a recent article in the Journal of Planning & Environment Law, Maria Lee of UCL makes the interesting point that, if one of the aims of awarding damages instead of an injunction is to allow the activity to continue, this aim will not be achieved if substantial gain-based damages are awarded which bankrupt the defendant’s business. She observes that in Anslow v Norton Aluminium Limited [2012] EWHC 2610 (QB) the cumulative award of £1.4 million in damages (though not gain-based damages) sent the defendants into administration.

**Conclusion**

33. In summary:

- Prior to Coventry v Lawrence, there had often been a strict application of the fourfold test set out in Shelfer and hence a strong presumption in favour of an injunction. In cases such as Regan and Watson, the Court of Appeal had said that damages should be awarded only in "very exceptional circumstances".

- No longer is there any presumption in favour of an injunction. The court’s power to award damages in lieu of an injunction is a classic exercise of discretion which should not be fettered.

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4 “Private Nuisance in the Supreme Court: Coventry v Lawrence” (JPL, 2014, Issue 7, pages 705-713, in particular 708 and 710-711)

5 The fact that the defendants in Coventry v Lawrence did not even argue before the trial judge that damages in lieu should be awarded is an indication of the difficulty of persuading a court to award damages in lieu prior to the Supreme Court’s decision in Coventry v Lawrence.
34. *Coventry v Lawrence* also makes clear that, notwithstanding that we are dealing with private nuisance, the public interest may be considered, and may be a factor either for or (more usually) against an injunction. As an aspect of the public interest, planning permission may be a relevant factor against an injunction. However, planning permission is just one factor for the court to consider, and the rest of the Supreme Court did not agree with Lord Sumption’s view that a grant of planning permission creates a presumption in favour of damages.

35. The only case which I have found which considers (albeit briefly) the Supreme Court’s remarks in *Coventry v Lawrence* about the choice of remedy is *Higson v Guenault* [2014] EWCA Civ 703. *Higson* was very different from *Coventry v Lawrence*. It involved a boundary dispute, in which the Court of Appeal held that a fence constituted either a trespass or an actionable interference with a right of way. On either cause of action, the Court of Appeal decided (at paragraph 51) that the appropriate remedy was an injunction requiring the removal of part of the fence. An injunction was appropriate whether the court adopted the strict *Shelfer* test or adopted the more flexible approach to remedy advocated by the Supreme Court in *Coventry v Lawrence*. This reinforces one of Lord Neuberger’s points, namely that decisions as to remedy are highly fact-sensitive.

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16th June 2014