NEW SQUARE Chambers

June 2025

BAKHATY & ANOR V HAMPSHIRE COUNTY COUNCIL [2025] EWHC 1175 (KB)

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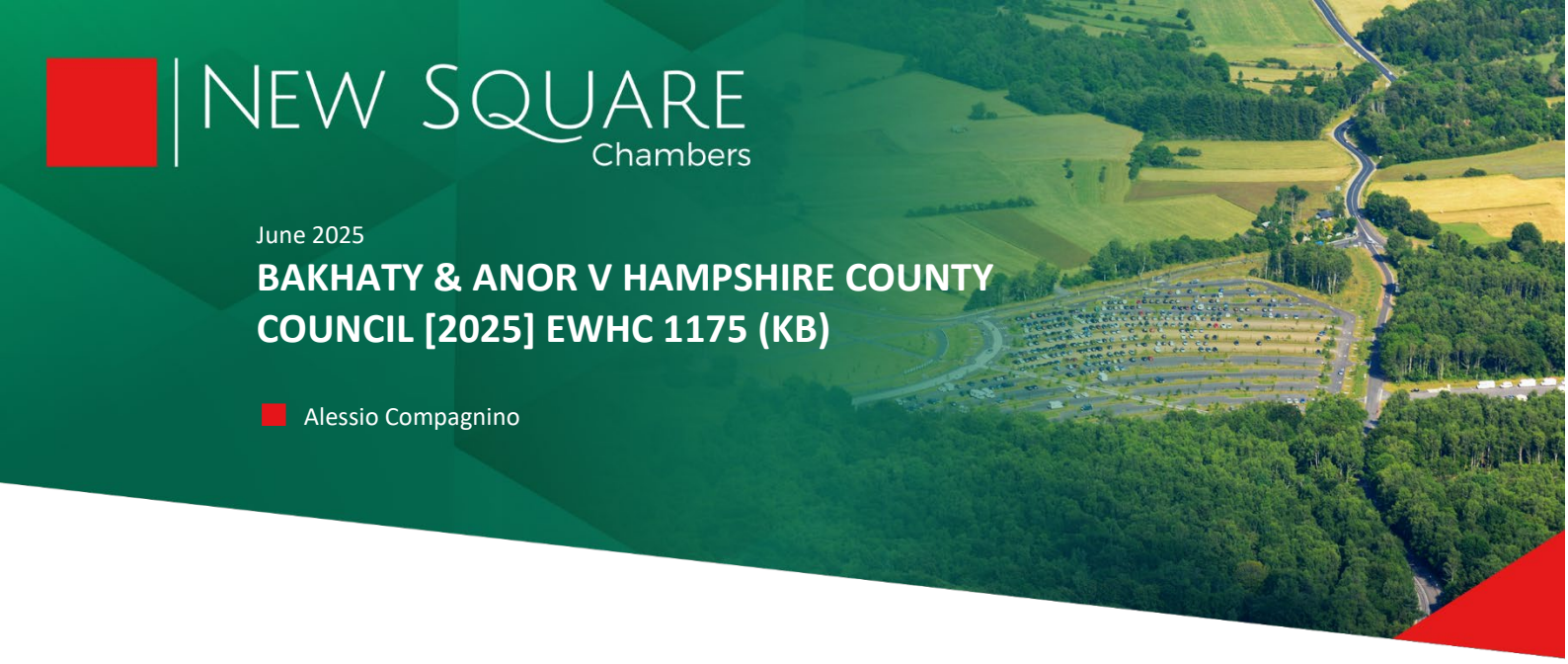

A couple living next to a school have succeeded in establishing that the use of an all-weather play area outside school hours constituted a nuisance.

A. THE FACTS

1. The Claimants purchased their home in 1994. At the time the neighbouring property was used as a school boarding house and as a nursery for up to 55 children. In December 2012 the Defendant sought planning permission to convert it into the "Primary Phase" of the neighbouring Westgate School ("**the School**"), with a total cohort of 420 pupils. The area next to the boundary was allocated as a grassed informal play area. In 2021, the Defendant converted this area into an all weather play area (**"AWPA"**) marked up in the manner of a five-a-side football pitch.

2. The construction of the AWPA was the result of the desire by the Parent School Association (**"PSA"**) to provide an additional facility that could be enjoyed by children all year round in place of a patch of muddy ground and their raising of the funds to build it.

3. At the time of construction, the AWPA was used for both informal play and formal games sessions in the morning, during the morning break, at lunchtime and after school. In addition, the School allowed external organisations to use the AWPA on Saturdays and Sunday mornings in exchange for payment of a fee.

4. The Claimants complained about the noise emanating from the AWPA and the footballs entering their garden over the fence. As a result, the School introduced certain mitigations, including creating a 'buffer zone', installing a net over the top of the AWPA and restricting the use of the AWPA to the school day and only until 4.15pm after school.

5. In October 2022, the Claimants proceeded to issue a claim on the basis that the operation of the AWPA amounted to (a) a common law nuisance, (b) a derogation from the grant of a strip of land conveyed by the Defendant to the Claimants in 2018 and (c) an infringement of the Claimants' rights under the European Convention on Human Rights (**"ECHR"**).

B. THE LAW

Private nuisance

6. The most recent authority on private nuisance is *Fearn & ors. v. Board of Trustees of the Tate Gallery* [2023] UKSC 4 from which HHJ Glen distilled the following principles:

a. The right protected by the law of nuisance is the utility and amenity value of the claimant's land (as opposed to the personal comfort of its occupiers).

b. The overriding principle behind the law is the need to strike a balance between the conflicting interests of neighbouring landowners.

c. The touchstone is not some overriding and unprincipled test of reasonableness.

d. The first question must always be whether the activities complained of amount to a substantial interference with the ordinary use of the claimant's land. This is an objective test to be judged by the standards of a person of normal sensitivity.

e. If the interference is substantial, the next question is whether the use complained of is part of the ordinary or normal use of the defendant's land. This has to be considered in the context of the character of the neighbourhood or locality.

f. Even if the defendant's use of their land is an ordinary one, it must still be conveniently done.

g. The public interest cannot justify the commission of a private law nuisance, although it may be of some limited relevance when considering the grant of an injunction.

Derogation from grant

7. Derogation from grant amounts to a duty upon the grantor not to use its land for a purpose that renders the grantee's land unfit or materially less fit for the purposes which were in the contemplation of the parties at the time of the grant (*Platt v London Underground Ltd* [2001] 2 EGLR 121).

ECHR

8. Article 8 of the ECHR provides that:

> *"Everyone has the right to respect for his private and family life [and] his home … There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society."*

9. Article 1 of the First Protocol to the ECHR provides that:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law."

C. THE JUDGE'S CONCLUSIONS

Private nuisance

10. HHJ Glen accepted the Claimants' submission that the noise emanating from the School and the number of balls crossing the boundary fence prior to the 2022 mitigations amounted to a substantial interference with the ordinary use by the Claimants of their home. However, he found that, taking into account the character of the locality (i.e. a suburban residential area), there was nothing uncommon about the use of the Defendant's land.

11. The Judge then asked himself whether the installation and operation of the AWPA was done in a convenient manner (i.e. having regard to the need for neighbourly give and take). He concluded that the use of the AWPA by third parties outside school hours did not give proper consideration to the interests of the Claimants.

Derogation from grant

12. Applying the decision of Denning MR in *Molton Builders Ltd. v. City of Westminster LBC* (1975) 30 P. & C. R. 182, HHJ Glen accepted the Claimants' submission that the doctrine of derogation from grant was capable of applying to freehold conveyances. In addition, the Judge agreed that the case of *Yankwood Ltd. v. London Borough of Havering* (1998) Unrep. supported the proposition that there could be a derogation from grant even where there was no actionable nuisance.

13. The Claimants' derogation case led to the same conclusion as their private nuisance case. This was so for two reasons: (a) the Claimants were well aware when taking the conveyance that the Defendant's land would continue to be used as a school, and (b) there was no evidence to establish what increase in the level (as opposed to the character) of noise stemmed from the AWPA.

ECHR

14. The Claimants' arguments in relation to their ECHR rights were dismissed. HHJ Glen considered that the application of the test for common law nuisance catered fully for the balancing exercise required by the ECHR, referring to the dicta of Lord Sales JSC in *Fearn* at [206].

Remedies

15. On the basis that the Defendant had offered an undertaking, HHJ Glen declined to grant an injunction, but adjourned the application for an injunction with permission to restore. The Judge awarded general damages of £1,000 for the period during which there was excess use of the AWPA and when significant numbers of balls were crossing the boundary fence.

D. KEY TAKEAWAYS

16. Practitioners should familiarise themselves with this judgment for the following reasons:

a. It provides a useful example of how the courts are likely to apply the principles laid down in *Fearn* in relation to the tort of private nuisance.

b. It is a helpful reminder that arguments based on Article 8 of the ECHR are unlikely to succeed in the context of private nuisance claims.

c. HHJ Glen confirmed that the doctrine of derogation of grant is capable of applying to freehold conveyances, as well as leases and easements. In addition, the judgment makes clear that liability for derogation from grant may well be established in circumstances where an actionable nuisance cannot be proved (*Yankwood*).

d. HHJ Glen accepted the Claimants' submission that *Dunton v. Dover District Council* (1977) 76 L.G.R. 87 was based on an incorrect application of a general test of reasonableness, thereby giving full effect to the Supreme Court's decision in *Fearn*.

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