Neutral Citation Number: [2008] IEHC 29

THE HIGH COURT

[2007 No. 4654 P]

IN THE MATTER OF THE PLANNING AND DEVELOPMENTS ACT, 2000 AS AMENDED

BETWEEN

ROBERT LANIGAN, DEIRDRE LANIGAN AND BENGHAZI LTD TRADING AS TULLAMAINE CASTLE STUD

PLAINTIFFS

AND

MICHAEL BARRY, BREDA BARRY AND MOTORS SPEEDWAY LIMITED TRADING AS TIPERARY RACEWAY

DEFENDANTS

AND

SOUTH TIPPERARY COUNTY COUNCIL

NOTICE PARTY

Judgment of Mr. Justice Charleton delivered on the 15th day of February, 2008

1. The defendants operate a motor racing track in South Tipperary. It is situated within one kilometre, as the crow flies, from Tullamaine Castle Stud, a farm for breeding race horses which is owned and operated by the plaintiffs. Both businesses are situated in rolling countryside where the predominant activity is agriculture. The motor racing track was the subject of only one planning permission in 1981 and is situated on land which was previously a gravel quarrying operation. Tullamaine Castle Stud is about 15 metres higher than the raceway. The raceway has no natural acoustic barrier. The plaintiffs, together with some of their neighbours, complain that their lives have been made unbearable by the noise generated by the car racing and motor use of various kinds at the defendants' premises. As well as bringing an action in nuisance, the plaintiffs have also claimed injunctive relief under s. 160 of the Planning and Development Act 2000.

Planning Permission

2. On the 13th November 1980, the owner of the motor track before the defendants, John McHugh of Cahir, County Tipperary, was notified by Tipperary (South Riding) County Council that he had been granted planning permission for a tarmacadam raceway at Tullamaine. The permission was subject to a number of conditions that were incorporated in the permission. Those that are relevant include the following:-

> "(1) The proposed development shall be carried out in accordance in with the applicant's submitted drawings and outline specification save where these are modified by the following conditions.
>
> …
>
> (7) In the event that the operation of the racetrack gives rise to justifiable complaints by local residents the applicant will be required to take whatever steps are deemed necessary by the Planning Authority to remedy the situation.
>
> …
>
> (10) No shop, stall or vending operation in association with this proposed development shall be permitted".

3. In applying for planning permission, Mr. McHugh specified that he was going to race hot rod cars; that the complex would be located within the 15 acre field site so as to accommodate some 2,000 cars; that it would be intended to operate the racetrack either on a Saturday or on a Sunday evening from April through to October but if a motor organisation wished to practice on, or use, the track during weekday evenings it would be under their proprietor's supervision and control; and, finally, that the duration of each racetrack operation would approximate to three hours at a maximum.

Unauthorised Buildings

4. There are a number of unauthorised building developments at the site of this raceway. Firstly, the racetrack is not where it was planned within the context of the 14 acre field on which it stands. It is now situated much more over towards the eastern boundary of the site. This has a potentially unfortunate consequence since it is almost beside the hedgerow of neighbouring property. Were the building of acoustic barriers, or berms as they are called, to be an appropriate, and lawful solution to any noise problem emanating from Tipperary Raceway, the trading name of the defendants, same would have to be built by purchasing further land in that area. An internal racetrack, which was not part of the original plans, has also been constructed. The original race way is an oval shaped circuit of about half a mile, of which bends take up at least one third, and on inspecting the photographs possibly more, of the track. Within it, there is a substantial area which I am satisfied was used previously for servicing or parking cars that were racing. In 1996, a new internal racetrack was constructed. This is longer than the original track because it curves in and out to make maximum use of the area and it is much less wide. This construction coincided with the commencement by the defendants of the Tipperary Raceway Karting Centre, as it was called. This karting operation continued for at least ten years from that time. The defendants then bought new racing karts; although racing with karts had occurred on the main track for some years previously. The defendants claim that this racing with go-karts has been discontinued due, among other factors, to natural wear to the stock of carts that they purchased over ten years ago. In 1982, a control tower was built at the back of the track. In 1997, some workshops were constructed on the premises. In 1996, a portakabin was put in place on the premises. In 1983, a large viewing stand holding approximately 1,500 spectators was constructed and, finally, in the year 2000 a small viewing stand was erected on the other side of the track. The only structure in respect of which planning permission arguably exists apart from the quarter mile long racetrack is a toilet block for "adequate numbers of male and female toilets": a condition of the 1981 planning permission.

5. The planning history of this site indicates that there is only one planning permission, which I have quoted above, in respect of the motor racing track operated by the defendants. In 2004, the defendants applied to the planning authority to retain all the structures on the site. This application was invalid because it related to a motor racing circuit, which under the Environmental Impact Regulations [1989], S.I. 349 of 1989 articles 23 and 24, is a development that requires an environmental impact assessment. In 2007, a similar application was made and rejected by the authority as invalid for the same reason. Since the commencement of this case in 2006, in December, 2008 a new application for retention permission was made in respect of the small stand on the premises. This has yet to be processed.

6. The development plan for this area, promulgated by Tipperary South Riding County Council, contains the following relevant paragraph:-

"It is the policy of the council to support the improvement and expansion of the equine industry. Proposals for non-agricultural related development that are considered to have a negative impact on the viability of existing stud farms or stables will not be favourably considered".

Neighbours

7. Relations between neighbours are a matter of give and take. Any reasonable person expects, and is expected, to put up with occasional or passing inconveniences caused by those who live near them such as a startling noise, or an annoying noise such as a loud dog or loud lawn mower. Smells and smoke may come and go as people do their garden or their pipes block. House renovation works may impose disruption on a neighbour for weeks and months. Provided these are minimised, and not dragged out much beyond the estimated time, these are usually tolerated with good will. The law recognises that people have to put up with inconvenience from time to time so that others may live beneficial lives and make full use of their properties. That principle would also apply were the person complaining of a nuisance to find themselves defending an action that had caused inconvenience to a neighbour. However, there are limits to what the law expects people to put up with. Here, the plaintiffs complain of an intensification of the use of this racetrack by the defendants which is maddening due to the noise. Most seriously, they claim that the penetrating and intense nature of the noise produced by the racetrack, coupled with its uncertain occurrence and invasive presence, has dealt a heavy blow to the economic viability of their stud farm business.

Race Horses

8. Robert and Deirdre Lanigan, the plaintiffs in this case, have spent their working lives in the stud industry. They bought Tullamaine Castle Stud in 1981, together with its 200 acres. There, they keep fourteen thoroughbred brood mares of their own. The bulk of their business, however, they described as an "equine bed and breakfast operation". Thoroughbred brood mares typically arrive around Christmas time at their farm from owners in England and elsewhere. They are then kept in their premises while they foal in the spring and the animals then go on to be covered by one of a number of famous stallions standing in Ireland, often at nearby stud farms. At their busiest point in the year, they can keep up to a hundred blood horses, including mares, foals and yearlings. They operate with a staff of between seven and ten. The kind of horse they care for has been bred over centuries for racing purposes. I am satisfied, on the basis of the evidence from Desmond Leadon, a veterinary surgeon specialising in this area, that these animals are highly evolved and that they have not been selected for breeding over generations for their calm temperament, but for their speed. These horses are flighty and sensitive. They will flee or kick out at any annoying or unusual noise or event. Mr. Leadon's experience of one demonstration by one car at the premises of the defendants led him to the belief that the racetrack could produce a bizarre noise which was frightening to these animals.

9. Mr. Lanigan, the plaintiff, described a number of incidents with his horses. In September, 2003 a yearling became startled by noise and ran through a fence. During 2007, a filly which was in the stable yard panicked at noise and reared up. It fell down and was killed instantaneously. In 2003, after a day of particularly loud noise from the track, a yearling broke her jaw in agitation. These horses, I was told, and I accept, require routine and some degree of tranquillity. They feed early in the day and then they sleep. They do not sleep at night time.

Noise

10. Robert Lanigan and Deirdre Lanigan described what it was like to live with the noise from the racetrack. I am satisfied that because the lack of any natural barrier, and the slightly elevated site of Tullamaine Castle Stud, the plaintiffs receive the full noise of the racetrack at their premises less only the diminution in energy as it travels through the air. The noise was asserted to be an aggressive presence that "just invades you". It was described as "instant noise", meaning that it has an ability to startle and set nerves on end. It involves backfiring, tyre screaming, roaring, loudspeaker commentary, engine revving and engine screeching. Bernadette Quinn, who used to reside near Tullamaine Castle, described the noise as "very loud". Typically, it would start at midday and go on until 7 or 8 o'clock in the evening. On one occasion she organised a First Communion party for her daughter but found that the guests could not go outside in order to enjoy the garden in fine weather but, instead, were confined, by the noise, to her house. When the inoculation of her cows coincided with use at the racetrack, she recalled that she and her helpers would have to shout out the numbers when they were being recorded and then repeat communication again and again. During race days she would plan, if she knew about them, to go away for the day with her children. During Saturdays, when she could get help with her farm, she was particularly aware of the noise. She observed that when she would start a car, or her neighbour would start a car, nothing would be heard that would startle anyone. In distinction, the noise from the racetrack was described as "revving as loud as an engine can go and screeching". Susan Foley, who lives about two miles from the racetrack, and who breeds national hunt horses there, can hear loud constant vibrating noise from the racetrack which she finds unnerving. While in her house during racetrack use, she turns on loud music in order to distract herself. Nicole Kent, who was a tenant at Tullamaine Castle gate lodge, described the noise as being that which would "drive you to a nervous breakdown". I am satisfied that she would have preferred, because of her business, to stay in Tipperary but that she has moved temporarily away. Inside Tullamaine Castle the noise is less than outside. However, I am satisfied that on a substantial number of occasions during many races and practices, it is experienced as all-pervasive and that it has driven at least one of the children of Mr. and Mrs. Lanigan, then studying for their Leaving Certificate, to resort to Dublin as a quieter location.

11. I will shortly turn to the issue as to whether there has been an intensification in the use of the track, amounting to a material change of use for planning purposes. It suffices to record, in this section of this judgment, that there has been evidence of considerable weight that on the opening of the racetrack, and for a substantial number of years after that, noise was only heard infrequently from March through to October whereas now that it can be heard all the year around and much more frequently and for a much longer duration than previously.

12. I have carefully considered the evidence of John McHugh, Tommy Casey and the defendant Michael Barry, all of whom gave defence evidence that substantial steps have already been taken in order to abate the noise. In particular, Mr. Barry, gave evidence that better silencers were now in place on cars in use on the track that notices had been put up at the raceway that no car was to race without a silencer, that a line of a trees had been planted, that the public address system had been fixed to new maximum, and relatively quiet, level and that karting use has been discontinued. As to the trees, they are there for aesthetic purposes. I also note what John McHugh told the Court about the noises he experienced during the early days of this racetrack after he first opened for business in 1981, and how things are now better. This involved colourful evidence of people near the track stuffing cigarette butts into their ears to make standing track-side bearable. I have regard to the evidence of Tommy Casey that in the 1980s cars racing there had no proper tyres and produced lots of noise and that silencers had since become better.

13. I note that there is a divide in the evidence. On the one hand, evidence as to the brutally intrusive nature of the noise has been given by the plaintiffs, or witnesses in support of them, who are all engaged in farming, or allied work of one kind or another, and are probably animal lovers. Those who have given evidence on behalf of the defendant, including their noise expert, Mr. John Grant, are all aficionados of motor racing and more likely to tolerate the noise, or even to somewhat like it.

14. Expert evidence as to the level of noise has also been given. Noel Tynan, a witness for the defendant, has forty years of experience in noise control. He measured the ambient noise within this country area at around 37 decibels. While hot rod racing continued at the track, a reading of 93 decibels was recorded there and a reading of 62 at the castle. During practice, the figures were 87 at the track and 58 at the castle. Martin Foley, who has practised as a noise expert since 1994, gave evidence on behalf of the plaintiff. He did tests over a number of days through different years. He recorded noise levels in the garden of the castle at between 47 and 60 decibels on one occasion and 47 and 64 decibels on another occasion. In October, 2007 he recorded outdoor measurements at between 53 and 73 decibels. There was little difference between these experts.

15. I am satisfied that the test as to whether a nuisance does, or does not, exist is not exclusively to be determined by reference to British Standard 4142 (B.S. 4142). This document concerns the setting of standards for acceptable levels of industrial noise. Mr. John Grant, who also gave evidence as an expert on behalf of the defendant, claimed that there was no standard in Great Britain as what is a nuisance by reference to any standard as to noise laid down by an expert body. Mr. Foley and Mr. Tynan both testified that there should be a 5 decibel weighting added on to the scientific reading of a noise where that noise is tonal in character and especially offensive. Mr. Grant did not agree that a 5 decibel weighting was appropriate or suitable either or at all or in particular for car racing noise. I strongly prefer the evidence of Mr. Foley and Mr. Tynan in that regard. People experience a nuisance, whatever it is, based on human factors. In the case of noise, factors such as tone, unexpectedness and irritant factor, which cannot be measured by scientific instruments, are very important. B.S. 4142 takes noise irritation into account by looking at calculations involving the difference between two noises, ambient noise and the noise called into question, and the character of that noise. That seems to me to be right because it tries to take human factors into account. Other measurements take this into account too. The weather forecast can record a scientific measurement of temperature or rainfall. It cannot record the chilling effect of a wind in cold circumstances or the driving nature of almost horizontal rain. Yet, these are factors which affect us. Wind chill is now often stated in weather broadcasts. Best scientific practice should take these kinds of human factors into account. In that regard, I note the differences between the ambient noise and the racetrack noise levels that have been recorded outside Tullamaine Castle Stud with differentials that include this weighting of 5 decibels and give an average difference of 23 decibels. The excess decibel figures over the ambient noise have been recorded between 14 and 24 decibels which, with the 5 decibel weighting, give readings of between 19 and 29 decibels of difference. Both Mr. Foley and Mr. Tynan agree that a difference of 5 decibels unweighted is marginal in terms of the annoyance of noise. A difference of 10 decibels unweighted, however, gives rise to the likelihood of complaints while differences at the level recorded, I am satisfied, are likely to be intolerable to anyone with normal sensitivities. Even within Tullamaine Castle differences of 11 and 12 decibels have been recorded at the Castle before one adds the 5 decibels weighting.

16. Fifty five decibels is the World Health Organisation rating standard for noise from a busy roadway which is about .5 kilometres away. Seventy decibels or more represents the level of noise within a busy restaurant which, in ordinary human experience, involves one listening closely to one's companions and watching them in order to understand what they are saying.

17. I am satisfied that the noise experienced by the plaintiffs involves a pervasive, persistent, frequent and intolerable intrusion. In reaching this conclusion, I am much more influenced by the human reactions of the plaintiffs and their witnesses then by any scientific evidence. Without the scientific evidence, a compelling case has been presented of a severe nuisance by noise, and I accept it as such. Much evidence has also been given as to interactions between Mr. Lanigan and Mr. Barry and, as to one incident, between Mrs. Lanigan and the defendants. The standard to be applied in terms of human conduct is that of men and women and not of perfect incorporeal beings. None of this evidence convinces me, even were I to accept it, that the plaintiffs are in the least bit unreasonable or over-sensitive. Michael Barry, the main defendant in this case, is an energetic person with an attractive personality, but I am not satisfied that he has done anything at all to meet the concerns of any of his neighbours, especially the plaintiffs. Much argument has been advanced in evidence as to why the plaintiffs are almost the only ones to have complained to the local authority. I am satisfied that anyone who complains about a neighbour runs the risk of being isolated and bullied, no matter how real their experience. I am satisfied that the plaintiffs are reasonable people and that they have put up with much more than ordinary give and take before reluctantly bringing this case. They are not to be faulted for complaining, seeing what might be done by the defendants, waiting in vain hope for reasons to prevail and then finally taking legal action in 2006.

Nuisance

18. The tort of nuisance involves interference for a substantial length of time by the occupier of a property with the lawful use or enjoyment of a neighbouring property. There must be a real and definite infringement on the comfort or convenience of the persons occupying or using the premises or land in order to establish an actionable wrong. As to what is uncomfortable or is inconvenient is set according to the plain and simple standards of ordinary and sensible Irish people. An injury to health need not be proved. A trivial or passing interference, or an annoyance with respect to a mere recreational facility like TV reception, does not suffice. Nor can the plaintiff be a sensitive soul who thereby complains unreasonably. In the 17th edition of *Salmond on the Law of Torts* (London, Sweet & Maxwell, 1977, edited by Professor R. F. V. Heuston), at pp.58 and 59 the following appears:-

> "No action will lie for a nuisance in respect of damage which, even though substantial, is due solely to the fact that the plaintiff is abnormally sensitive to deleterious influences, or uses his land for some purpose which requires exceptional freedom from any such influences. Every person is entitled to do on his own land anything that does not interfere with other persons in the ordinary enjoyment of life or the ordinary modes of using property. In other words, his neighbours have a right to the ordinary conditions of comfortable existence, and to the ordinary conditions of the beneficial use of property; but they have a right to nothing more. Extraordinary and special requirements are not protected by the law of nuisance. So Lord Selborne L.C., after referring to counsel's "happy use of a passage in a recent work upon mental science," said, "A nervous, or anxious, or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance, originating within himself, sounds which at other times would have been passively heard and not regarded. [*Gaunt v. Fynney* (1872) L.R. 8 Ch. App. 813] . But a defendant cannot use this argument if his own conduct has resulted in the plaintiff being hypersensitive to noise. Again, a man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. Thus in *Robinson v. Kilvert* [(1889) 41 Ch. D. 88.]. The plaintiff could not recover for damage done by the heat from the defendants' pipes to his stock of brown paper – "an exceptionally delicate trade" – since it would not have prejudicially affected any ordinary trade. But once nuisance has been established, the remedies of damages or an injunction may be available to protect the plaintiffs' unusually delicate or sensitive trade."

19. This is a correct statement of the law. There are places where the breeding of thoroughbred racehorses is appropriate and there are places where it is silly to even think of it. Within an industrial, urban or suburban setting, the rearing of such animals, with their sensitivity to noise or other emanations, might be regarded as outside the parameters of reasonable user; the standard which the law sets. However, the business of the plaintiffs is set within a rural area that is dominated by cattle and bloodstock farming. These horses are the stock for the business of the plaintiffs. Apart from the effect of piercing noise on a typical racehorse, I must have regard to the reaction of human beings. It is the effect on people that matters, though the law also takes account of how a nuisance affects a business in an appropriate setting. In that respect, none of the witnesses called on behalf of the plaintiffs struck me as

being oversensitive or unreasonable.

Area
20. What would be a nuisance in quiet areas of Dublin 4 would not necessarily constitute an actionable tort in the industrial heartland of West Dublin. I adopt as correct the following passage from the 17th edition of *Salmond on the Law of Torts* at p. 56:-

> "The standard of comfortable living which is thus to be taken as the test of a nuisance is not a single universal standard for all times and places, but a variable standard differing in different localities. The question in every case is not whether the individual plaintiff suffers what he regards as substantial discomfort or inconvenience, but whether the reasonable man who resides in that locality would take the same view of the matter. The reasonable man connotes a person whose notions and standards of behaviour and responsibility correspond with those generally obtained among ordinary people in our society at the present time, who seldom allows his emotions to overbear his reason and whose habits are moderate and whose disposition is equable… The result is that he who dislikes the noise of traffic must not set up his abode in the heart of a great city. He who loves peace and quiet must not live in a locality devoted to the business of making boilers or steamships."

21. *O'Kane v. Campbell* [1985] I.R. 115 concerned a 24-hour shop that was located in Dublin city on the corner of North Circular Road and Glengarriff Parade. The area was characterized by Lynch J. as an intersection between a quiet and established old residential street and a wide and busy thoroughfare. Some years prior to the commencement of the action, the shop had traded during normal business hours. It had then switched to a 24 hour operation which caused noise throughout the night, involving banging doors, car radios, revving and chat. The generation gap accounted for the fact that some younger people living on Glengarrif Parade did not find this such an intrusion as to amount to a nuisance, whereas those who were older did. Lynch J. granted an injunction restricting the shop from trading from midnight to 06.00, noting that such an injunction was one which upheld the amenity of Glengarriff Parade but which might not otherwise have been granted had the shop premises been completely located on North Circular Road.

22. In considering the issue as to the amenity of an area, regard should be had to its immediate history and its character prior to the commencement of the activity complained off. The character of a neighbourhood may, however, change. This may be due to economic depravation or to the development within the area of enterprises and structures which change its character. In that regard, the wider question as to how an area is to develop is to be determined in accordance with the Planning and Development Act, 2000. The legislation is an example of the application of democratic principle to the important question as to how the area in which a citizen lives, or carries on his or her business, may change. In essence, the Act requires that any development of a site, including a material intensification of its use, should be subject to an application for planning permission to the local authority. This application can only be made through lodging detailed plans which indicate precisely what those effected by the development may reasonable expect. The entire community is given notice of the essence of what is proposed through newspaper advertisements and site notices. People may then inspect the plans. Representations may be made to the local authority as to why planning permission should not be granted and these will be primarily directed towards the effect any proposed development may have on the neighbourhood or area. Those who have made observations for an application for planning permission may appeal to An Bord Pleanála and those who have failed to make observations but who were directly affected, by reason of the immediate proximity of the proposed development, may also appeal. Were the legal mechanism of the scrutiny of planning permission not to exist and were it not the case that notice must now be given in a direct manner though what is in effect an advertisement as to what may happen at the site of a proposed development, then persons might feel aggrieved at being taken by surprise when a factory, set of apartments or some house extensions, suddenly spring up beside them. The legal mechanism is there, however, to allow participation in decisions which may effect the environment, the value of property and the nature of such quiet and comfort as may be the settled expectation of people in any particular area. Therefore, where planning consent is given after due process for a development, including a change of use, the issue as to what is a nuisance will be determined according to the character of that neighbourhood as authorised by relevant planning permissions and as declared by the development plan. The approach of Buckley J. in *Gillingham Borough Council v. Medway (Chatham) Dock Co. Ltd.* [1993] Q.B. 343 at 595 is apposite:-

> "Doubtless one of the reasons of this approach is that Parliament is presumed to have considered the interests of those who will affected by the undertaking for works and decided that benefits from them should outweigh any necessary adverse side effects. I believe that principle should be utilised in respect of planning permission. Parliament has set up a statutory framework and delegated the task of balancing the interests of the community against those of individuals and of holding the scales between individuals, to the local planning authority. There is the right to object to any proposed grant, provision for appeals and injuries, and ultimately the minister decides. There is the added safeguard of judicial review. If a planning authority grants permission for a particular construction or use in its area it is almost certain that some local inhabitants will be prejudiced in the quite enjoyment of their properties. Can they defeat the scheme simply by bringing an action in nuisance? If not, why not? It has been said, no doubt correctly, that planning permission is not a license to commit nuisance and that a planning authority has no jurisdictions authorised. However, a planning authority has no jurisdiction to authorise nuisance. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood. That may have the effect of rendering innocent activities which prior to the change would have been an actionable nuisance…"

23. It therefore emerges that the lawful redevelopment of an area, or its gradual change in character over time, can affect the standard by which an action in nuisance is to judged. What would have been a nuisance in the 19th Century context of North Circular Road may not be one now. Equally, what might not have been a nuisance back then may be one now. An example of this is the prevalence of small slaughter houses in centre city areas that have now effectively been relocated to rural areas.

24. What standard of amenity is set for an area is directly influenced by the planning process. This does not mean that a nuisance is authorised by a planning permission granted in accordance with the development plan of a local authority. On the contrary, people retain their rights but according to the standard, judged against the nature of the locality, that the law sets.

25. All of this emphasises the primacy of the planning process in setting local standards of amenity. That process can not be ignored or flaunted or undermined by deception. The standard of amenity that is reasonably to be expected by people living in an area can change as an area is lawfully developed. The nature of businesses suitable for an area can also change as an area is developed by lawful means. Unless the business activity be regarded as unduly sensitive, and therefore unsuitable for the character of an area in which it is situated, no one is entitled to use a planning permission to destroy the business of a neighbour.

Business
26. I am satisfied that the business of the plaintiffs has suffered considerably in consequence of the nuisance emanating from the defendants' premises.

27. On the 6th September, 2006, Robert Lanigan received a letter from Harry Dunlop, of Windsor House Stables in Berkshire, withdrawing his racehorses from the plaintiffs' premises. The letter is hearsay. I am satisfied, however, that the effect of the letter has been proven by the evidence of Mr Lanigan, which I accept, as to the diminution in his business in consequence of the experience of some of his customers. The letter reads as follows:

> "Thank you for showing me your 2006 yearlings. They looked very well and I hope they fetch good prices at the forthcoming sales. With regard to the mare I was considering boarding with you I think due to my expressed concerns about the excessive noise I will keep her in England. I would have been very worried about the possibility of her slipping her foal or alternatively damaging herself, a risk I cannot afford. Thank you for all your advice and I am only sorry that we cannot take up your offer this year. If the situation changes and the motor circuit noises are drastically reduced or are stopped altogether then I would not hesitate to send her to you. I hope to see you at the yearlings sales".

28. In addition, there has been evidence from Mr. Lannigan that Simon Marsh, another Englishman in the bloodstock business, who used to have eight to twenty animals with the plaintiffs, and was an anchor client, had withdrawn all of his animals. I am satisfied that this happened due to the fact that Mr. Marsh visited the plaintiffs' stud farm during a day of motor racing or other motor use, and was alarmed by the noise.

Intensification of use

29. I now turn to the issue of whether there has been a material intensification in the use of this motor racing track. I find myself having difficulty with the evidence given by John McHugh, the original owner of the racetrack. I accept his evidence that when the racetrack opened in 1981 there would be racing every Saturday night. This situation was, apparently, brought to an end by the Roman Catholic Church allowing their faithful to fulfil their Sunday obligation by attending Mass on a Saturday evening. So, the motor racing fans preferred that. He tried an unorthodox solution of offering mass in a forty foot trailer, but this did not help matters. I accept his evidence that the racetrack was run from St. Patrick's Day to October. There would then be a gap through to the following mid March where there would be a charity event featuring hot rods. From time to time, he said there might be other events during the closed season, but his memory was that these would not occur more than once a month. I found the evidence of Garda Michael Craddock to be helpful. Although now retired, he served as a Garda in New Inn village from 1981 until 2002. On one occasion at Rose Green village, which seems on the map to be about two kilometres away from the racetrack and in a different area to the plaintiffs' farm, he experienced a situation where the prevailing wind brought the noise directly to where he was operating a checkpoint. He reached the conclusion that one could not possibly live with such noise. His view as to whether use at the racetrack intensified from the 1980s to the present was that since Mr Barry, the defendant, took over the racetrack he had made a big effort to make it attractive and that since then fields across the road from the racetrack had for the first time to be used for parking. Given that the original planning application contemplates that up to two thousand cars might be parked at the racetrack, I find the evidence of Mr McHugh to be mistaken when he testified that meetings in the 1980s were much larger than at the present day. In addition to that, I take into account the evidence of Deirdre Lanigan and of Robert Lanigan that there has been a considerable escalation in the times when noise has been a nuisance to them over the years. In 1997 intensive go-carting started on the new internal track. In 2002, drift racing, involving cars going sideways in a skid around bends, started up. Mr. Lanigan said he could remember noisy days when the racetrack first started up. He did not find this an issue, as he put it, because there were so few of these days and these all seemed to be on an occasional basis at the weekends. His feeling was that matters of racing and motor noise had ceased altogether in 1991. I accept his evidence that the operation or the racetrack from 1981 to 1991 and somewhat beyond that did not discommode him.

30. The history of the track, in that regard, is that it was first operated from 1981 to 1991 by John McHugh. In 1991 Michael Barry bought it together with two partners. After a year or so, they moved on because, in Mr Barry's words, "they did not see it as profitable". He then reopened the racetrack in March of 1992, assuming, as he put it, that everything was "OK as regards planning permission". During that year, he said it was mainly opened on a Sunday and race programmes involved crash racing and hot rod racing and other forms of motor use or racing. He claimed that from 1992 through to the present day there had been no escalation in use. I note, however, that flyers produced for the defendants' premises in more recent times, also described it as a "Karting Centre". These notices advertise outdoor "Leisure Karting" an experience involving "the ultimate speed sensation on twin engine pro-karts". In these notices, the track was described as being "fully flood lit" and "top domestic and international race meetings" were advertised as occurring throughout the year. The raceway, in addition to the new year-long use, is advertised as being "open seven days". The turnover figures for the raceway were produced from 1997 through to 2003. In 1997 a turnover of €48,000 was recorded whereas in 2002 the turnover figure was over five times that. And so it has continued.

31. When planning permission was sought in 1981 in respect of the raceway, the conditions of the planning permission that was granted required compliance with the application. This application sought permission to use the proposed track for a maximum of three hours racing with a potential for some supervised practise during the week. These are the relevant figures for racing hours at the defendants' racetrack in 2007: January, thirty three hours; February, forty one hours; March, sixty hours; April, thirty eight hours; May, fifty one hours; June, thirty six hours; July, twenty nine hours; August, thirty three hours; September, fifty nine hours; October, thirty two hours; November, twenty one hours; and December, thirty two hours. To that, the evidence clearly establishes that one should add in a large number of hours per month for what are described as "practice sessions", but which can also involve other forms of motor use. I am satisfied this at least doubles, and probably trebles, those hours. This use is all-year around and potentially on every, or any, day or time up to 22.30 hours. The raceway should never have operated during the period November through to April. The use originally contemplated and the use, to which I am satisfied the raceway was put at least through into the early 1990s, involved three hours of racing on a Saturday or a Sunday from April through to October. Multiplying three hours by 4.33, the number of weeks in a month, one reaches thirteen hours maximum of racing per month. In addition to that, one might reasonably add on seven hours of practise giving a total of twenty hours in any month. During 2007, and I am satisfied during previous years, at least since the year 2000, this total of a maximum of twenty hours of use per month, apparently allowed by the planning permission, has been very substantially exceeded by a multiple of up to ten, or perhaps more during some months. In that regard, I accept the evidence of Liam McGee, a development officer for the local authority, that there has been a substantial increase in activity which has been incremental and that this amounts to a significant intensification of use by the nature and duration of the activity. Even apart from that evidence, every credible witness points to a substantial and unregulated escalation in the use of the defendants' motor racing facility

Material change of use

32. An intensification in the use of premises may, of itself, constitute a development which requires planning permission. The classic statement of law, in this regard, is that made by Keane J. in *Butler v. Dublin Corporation*, [1999] 1 I.R. 565 at :-

> "Although the expression 'intensification of use' is not be found in our planning code or its English equivalent, the legislatures in both jurisdictions must have envisaged that a particular use could be so altered in character by the volume of activities or operations being carried on that the original use must be regarded as having been materially changed. One

man digging up stones in a field and carrying them away in a wheelbarrow for a few hours each week may be succeeded by fleets of bulldozers, J.C.B.s and lorries extracting and carrying away huge volumes of rock from the same site. The use in both instances may properly be described as 'quarrying' but that its intensification to a particular degree may constitute a material change in its original use is, I think, not merely born out by the authorities to which I have referred, but is consistent with the underlying policy of the Act of 1963 and the amending legislation of ensuring that significant changes in the physical characteristics of the environment are subjected to planning control."

33. There is much discussion in the relevant textbooks as to how this statement of the law should be construed. In the quotation just given, Keane J. refers to the object of the business that was carried on and to the method by which profit was obtained from the operation and to the scale of use in comparison to a relevant previous time. *In Galway County Council v. Lackagh Rock Limited* [1985] I.R. 120, Barron J. stressed the importance of the issue of planning considerations in judging whether any intensification of use amounted, in effect, to a new development, and therefore one for which planning permission was required. Environmental impact is regulated through the planning process. It is the effect on the wider neighbourhood that should be at issue in any adjudication as to whether an intensification of use had taken place to the degree that fresh planning permission is required. However, there can be cases where an isolated operation simply decides to ignore the planning code, in which case the latter considerations may be less important.

34. Here, the issue is as to whether the 1981 planning permission authorises the activity of the defendants as it has been carried on over the last four or five years prior to the commencement of this action in 2006. In *Simons- Planning and Development Law* (Second Edition, 2007) at para. 2-64, the learned author offers the opinion that, in principle, the intensification of the use of development which is already subject to planning permission can give rise to material change in use. I agree with this view and with the passage which follows on from that opinion:-

> "To a large extent this turns on the nature of the development permitted under the planning permission, and in particular, as to whether or not a particular use has been specified under s. 39(2) of the Planning and Development Act, 2000. Even if a use has not formerly been specified, it may be that the documentation accompanying the application suggests the level or scale at which the development is to be carried on. In this regard, it is important to note that it is almost a universal condition of all planning permission that the development be carried out in accordance with the plans and particulars lodged with the application, or as part of a response to any request for further information.".

35. Here, I have no doubt that the intensification in the use of this racetrack is of serious environmental impact and that it has unlawfully changed the character of this area outside the lawful changes that may take place under the planning code.

Construction of the grant

36. A planning permission is not a legal statute and nor is it to be construed as such. Rather, it is a document addressed to the world at large and one of particular interest to those who feel, by reason of proximity to the development authorised, or for good reasons like the preservation of what remains of the traditional Irish country side, that they maybe affected by it. It is the view of a reasonable person looking at the permission and the conditions attached thereto, which should determine how a court construes the documents. In that regard, I imagine now that in the lead up to the grant of permission to John McHugh, and just after permission was granted, in respect of this motor racing track in November, 1980, a stud farmer, a cattle farmer and the owner of an isolated dwelling in this area might have gone into the offices of Tipperary (South Riding) County Council and looked at the relevant documents. They would have seen that by virtue of Condition 7, the Planning Authority proposed to take a close interest in the operation of the raceway to ensure that justifiable complaints were dealt with. They would have noted that sale operations were forbidden at the site of the development. Most importantly, they would have noted the condition which requires that the raceway was to be developed in accordance with the applicants' submitted drawings and outlines specifications. Looking at those and wondering, as any reasonable person might, as to how often cars would be racing around this track, and wondering what they might be expected to tolerate, they would have seen that the raceway was not supposed to be operational during the months of November, December, January, February and March and that there was to be weekend use of 3 hours at a maximum coupled with a certain amount of practice under the supervision of the proprietor. That is what the applicant promised to do. Thereby, nobody would have thought it important to object. When they saw the conditions of planning permission adhering the applicant to his promises, they would have felt well satisfied. No reasonable person would have expected that the raceway would operate on a seven day a week basis, as the advertisement promulgated by the defendants have proclaimed; that practice would become indistinguishable, in terms of the intensity of the noise coming from the raceway and its duration, from racing, that activities other than racing, and amounting to pleasure motoring, would take place instead; and that one of the fundamental economic bases of the area would be undermined in respect of anyone living within a kilometre or two of this raceway: namely, that the breeding of race horses would become very difficult. Instead, they would have expected an occasional, and seasonal, interruption to their peace and quiet; one for which any reasonable person might have made advanced provision and written off in the interests of give and take.

37. Instead, the entire character of this neighbourhood has been altered in a manner which has not been subject to democratic scrutiny under the planning code. It has been unlawfully altered by the refusal of the defendants to have any regard to their obligations under law. What has occurred at the raceway has been a completely new development in respect of which no planning permission exists. In interpreting the planning permission, which stands independently as a public document, I have regard to those other documents which it incorporates, namely the form of the application which the condition attached to the permission acquires to be abided by; *Readymix (Éire) Limited v. Dublin County Council*, Supreme Court (Unreported July, 30th, 1974).

Prescription

38. The defendants claim that they are entitled to carry on this nuisance by virtue of long usage. Section 1 of the Prescription Act 1832, as amended, provides as follows:-

> "No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of [The State]… shall, were such right, profit or benefit shall have been taken and enjoyed by any person claiming right thereto without interruption for the full period of [20] years be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of [20] years, but nevertheless such a claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit, shall have been so taken and enjoyed as aforesaid for the full period… the right thereto shall be deemed absolute and indivisible, unless it shall it appear that the same was taken or enjoyed by some consent or agreement expressly made or given for that purpose by deed in writing".

39. The proceedings herein were issued in the Circuit Court in 2006, and the time is to be reckoned from then. The defendants claim a prescriptive right, by virtue of the user of this raceway from 1986, to make the noise complained of. Prescriptive rights are traditionally understood in the context of rights of way, the taking of water from rivers, and the discharge of effluent. These,

certainly, can be exercised on an intermittent basis but they occur on a basis that can be predicted and sensed, as where the flow of stream is markedly interrupted, where gas is discharged through a flue in a party wall, or were a man claims the right to walk along a path through another's property. Under s. 4 of the Prescription Act, 1832 an interruption is deemed not have occurred unless it has been submitted to or acquiesced for one year after the party interrupted shall have had notice thereof, and of the person or making or authorising the same to be made. I adopt this as correct the passage at para. 13-12 of *Bland- The Law Easements and Profits à Prendere* (Dublin, 1997):-

> "The intermittent character of certain rights can deprive the potential servient owner of an opportunity to interrupt enjoyment. From the interruption provision there emerged a number of propositions relating to the proof user for a prescriptive period: it was held that s. 4 required that 'there must be act of user and enjoyment in the year proceeding the bringing of the action', that there is an act in the year of the prescriptive period, and that the acts occur on at least year by year basis. The better view is that s. 4 has imposed no requirement as to continuality of user, as the section relates to an adverse act of the potential servient owner and not the non-user of the claimant. The courts have not in practice required proof of an active user for every year of the prescriptive period. Whether there has been sufficient continuity of user is a matter to be decided on the basics of the principles of common law that user be continuous. That principle takes account of the possible factors which may exclude an inference that the easement or profit is not enjoyed as of right, such as a period of impossibility of user."

Actions in law for private nuisance are capable, as a matter of theory, of being barred by the defence of prescriptive right. That has not occurred here. First, I am satisfied there have been substantial interruptions to the prescriptive right claimed, particularly in the years around 1991. That is not as important as the second factor, which is that no right to commit a nuisance by noise has succeeded in any case of which I am aware. In *Denis v. The Ministry of Defence* [2003] E.W.H.C. 793, a case about noise from Harrier jump-jets coming and going at a Royal Air Force base in the English countryside, Buckley J. noted that counsel on both sides of the case had agreed that there was no objection in principle to a prescriptive right to commit a nuisance by noise. The defence, however, was rejected on the facts of that case in so far as no evidence on the decibel level of the relevant noise over the necessary twenty years had been put before the court such would satisfy an imaginary grant of an easement. The theory of prescription is based upon the legal fiction that at some stage in the past a prior owner, or indeed the present one, had granted to another landowner, a dominant right over his land. In order for a prescriptive right to commit a nuisance by noise to exist, it seems to me that any reasonable person giving such a servient grant would specify the time at which the noise was to be allowed, its duration, and the level at which it was to occur. I also have regard to the evidence in this case which demonstrates that noise can be tonal in character, can be influenced by prevailing wind conditions, can be of a character differing from mildly annoying to maddening and that its intrusion on a neighbour depends on the action of the user as to when, and for how long, it is expected to be endured. This makes a prescriptive grant unlikely.

40. In this case, the nature of the unauthorised development carried on by the defendants has been such that the noise has climbed from being intermittently annoying to becoming, in the last eight years, a persistent and insufferable presence. Even were I bound by a period of twenty years user to assume a lost grant, which statute to my mind has replaced by a calculation based on time, I could not imagine anyone agreeing to a nuisance of this kind without particularising its duration, timing and intensity. Since this has not occurred, it seems to me that *Denis v. The Ministry of Defence*, is a compelling authority.

41. When one turns to the nature of the nuisance which I have found exists in this case, one realises, from the evidence, that in terms of its duration, its intrusiveness, its intensity and its character that it has come and gone away in a manner which could not give rise to any valid prescription plea on the part of the defendants. I approve as correct the following passage from McMahon and Binchy – *Law of Torts* (3rd Ed., 2000), at paragraphs. 24.99 and 24.100:-

> "Whether there is a prescriptive right to commit all types of nuisances doubtful. It is clear that a person may acquire a right to discharge rain-water from his eaves onto a neighbour's land, to send smoke through flues in a party wall, or to discharge surface water onto adjoining land. On the other hand, one cannot acquire a prescriptive right to let the branches or roots of a tree intrude onto one's neighbour's property.
>
> No reported decision has held squarely that one may otherwise acquire by prescription the right to annoy a neighbour by smoke, smells, noise or vibrations. It has been argued that such a right would be impossible to acquire since the quantity of interference would be variable, thus lacking the degree of certainty and uniformity of rights capable of acquisition by prescription".

Injunction

42. Section 160 of the Planning and Development Act, 2000, provides that an application may be brought either by the planning authority or by any other person, to restrain the carrying out of any unauthorised development on land, or to require that the development be carried out in conformity with any permission pertaining to that development and any condition to which the permission is subject. Having regard to the findings of fact previously made in this judgment, I have no doubt that the use to which this raceway has been put, is unauthorised and is not in conformity with the conditions to which the relevant permission is subject. I am satisfied that by virtue of section 27 of the Local Government (Planning and Development) Act, 1976, that the large viewing stand, the spectator safety wall, the spectator fence, the maintenance building to the rear of the new viewing stand, the control tower and the flood lighting, cannot be the subject of an injunction requiring that these should be torn down. Nor am I satisfied that by virtue of the construction of the inner parting track in 1996, that the wider limitation period contained in section 160, of five years as opposed to the earlier seven years, should not apply.

43. These considerations as to limitation do not apply to the use to which the premises have been put. There is nothing in the Planning and Development Act, 2000, or its predecessor, which authorises a court to ignore, by virtue of the passage of time, a completely new user of a site, or an intensification of a use in respect of which some form of planning permission has been granted and which has been entirely altered by the illegal user thereof. I am satisfied that as a matter of law, the defendants have had the choice of using this racetrack in accordance with the planning permission of 1981, or of ignoring it. They have chosen the latter course. Instead of having one race on each weekend over a seven month period, with occasional supervised practice or use during the week, they have operated the raceway on a week-to-week basis during the entire year in a manner which is utterly at odds with the terms of the planning permission granted to their predecessor in 1981. Every occasion on which this unauthorised user has taken place has given rise to the potential for criminal prosecution on an individual basis; *Clare County Council v. Derek Floyd*, [2007] IEHC 48.

Equitable Principles

44. In *Morris v. Garvey* [1983] I.R. 319, the Supreme Court set out the principles that should move the court in considering whether an injunction under section 27 of the Local Government (Planning and Development) Act, 1963, should be exercised. These same principles apply to an issue as to the grant of an injunction under s. 160 of the Planning and Development Act, 2000. At page 324 the Supreme Court, through Henchy J., held that for the court not to restrain a breach on the planning code it would require:

> ". . .exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or suchlike extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance), as is necessary to ensure that the development is carried out in conformity with permission".

In *Wicklow County Council v. Forest Fencing Limited* [2007] IEHC 242, at paragraphs 49 and 50, having considered the relevant authorities of more recent times as to declarations by the court of planning permission by default, and of injunctive relief where planning permission is found by the court not to exist, I offered the following view:

> "The balance of authority is in favour of the Court exercising its discretion to make a declaration that planning permission has been granted where the Court has found as a fact that there is a default permission in favour of a developer. The Court is there to uphold the law. Its discretion should not be used to change the law or to its operation. A similar principle, to that outlined in the separate judgments of O'Leary J. and Clarke J., should apply in the opposite circumstances, such as here, where the Court has found that there is no default permission: where the developer has, on the contrary, developed the site entirely in accordance with his own wishes and with little or no reference even to the plans in respect of which he once sought permission. The discretion of the Court, in this context, is very limited. The balancing of that discretion must start with the duty of the court to uphold the principle of proper planning for developments under clear statutory rules. Then, the Court should ask what might allow the consideration of the exercise of its discretion in favour of not granting injunctive relief.
>
> To fail to grant injunctive relief in these circumstances, on these facts, would be to cause a situation to occur where the Court is effectively taking the place of the planning authority. The Court should not do that. This is a major development, for which there is no planning permission. It is in material contravention of the County Wicklow Development Plan. It is built entirely to suit the developer and with almost no reference to legal constraint. I am obliged to decide in favour of the injunctive relief sought".

45. Unfortunately, this is a clear case where I must act to restrain major breaches of the planning code which have flaunted the legal rights of the community in favour of an unrestrained action that has seriously impacted on the character of a quiet area and the reasonable use by neighbours of their farms and dwellings.

Result

46. I make the following summary of the findings of fact that have been made in the course of this judgment for the purpose of determining the form of the final order:

> (i) The plaintiffs have been subjected to a persistent and invasive nuisance due to noise emanating from the premises of the defendants, the nature of this being such as to require this court to restrain it through an injunction.
>
> (ii) The plaintiffs are reasonable persons who have held off the issue of proceedings in a reasonable manner and are not, therefore, to be faulted due to delay. There is no prescriptive right in favour of the defendants.
>
> (iii) The defendants are bound by the terms of the planning permission of 1981 to operate their motor raceway so that a car race occurs only on either a Saturday or a Sunday and for a maximum duration of three hours during the months of April to October only. In addition, the defendants may be allowed up to two hours of practice during the week of a race, but no more than that. They are now injuncted to comply with these terms.
>
> (iv) Where the defendants wish to have a race, they are required by the terms of this injunction to put a notice to that effect on the gateway to their premises seven days before such event so that all the neighbours can take evasive action and re-plan their lives around the expected noise.
>
> (v) On the basis of nuisance, I equally impose the restraints set out in paragraphs (iii) and (iv) by way of injunction.
>
> (vi) I propose to make no order as to the physical condition on the premises of the defendants.
>
> (vii) Any issue as to damages has been left over by consent of the parties pending this decision as to liability.