suspected this, assuming they had done a more than merely preparatory act.

(3) Any mental element of the substantive offence which is unrelated to an *actus reus* element of that offence also applies to the attempt.

(4) Where the commission of the substantive offence is impossible, the facts should be judged as the defendant believed them to be. If, in the light of that belief, the offence would be possible, the defendant can be considered to have intended to commit the offence.

It follows that the mental element for conspiracy and attempt are distinct, but that is justifiable since attempt is much closer to the commission of the substantive offence than a conspiracy, which consequently requires proof of more significant culpability. This framework for analysing the mental element of attempt accords with common sense, fulfils public policy objectives, and does no violence to the words of the statute.

GRAHAM VIRGO

NOISE AND NUISANCE

IN 1975 Terry Waters obtained planning permission for a speedway stadium in the empty East Anglian fenlands. An isolated cottage stood about 600 yards from the stadium but the nearest village was a mile and a half away. The stadium became the home of the Fen Tigers speedway team. With occasional interruptions it has hosted that noisy sport ever since. In 1984, initially without permission, Mr. Waters began stock-car and banger racing and later, with planning permission, motocross. In 2005 Mr. Waters disposed of his interest, which eventually fell to Mr. Coventry.

In 2006 Ms. Lawrence and Mr. Shields bought the cottage. To paraphrase Lord Denning, they were no lovers of speedway. They complained about the noise to the local council, which issued a statutory nuisance notice ordering Mr. Coventry to carry out attenuating works. Mr. Coventry delayed, so Ms. Lawrence and Mr. Shields brought an action for private nuisance, which they maintained even after he completed the works. The judge found for the claimants and issued an injunction restricting the site to 12 noisy weekends a year. The Court of Appeal reversed that decision ([2012] EWCA Civ. 26; [2012] 1 W.L.R. 2127), saying that the judge was wrong to hold that the actual and permitted uses of the stadium could not be taken into account in assessing the character of the locality. In *Lawrence v Coventry* [2014] UKSC 13 the Supreme Court (Lords Neuberger, Mance, Clarke, Sumption and Carnwath) restored the injunction, subject to the possibility of further applications about awarding damages in lieu of that injunction.

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The Supreme Court discussed five issues: prescription, coming to the nuisance, the relevance of defendants' activities to the character of the neighbourhood, the relevance of planning permission and remedies. The most significant are the final two.

On the first issue, the judge had declared it impossible to acquire rights to commit a noise nuisance by prescription. The Court of Appeal and the Supreme Court disagreed, but the latter held that the defence failed anyway, because the defendant could not prove that the situation 20 years before the action began constituted an actionable nuisance. On the second, the Supreme Court reaffirmed the orthodox position that coming to the nuisance is no defence, save for a perhaps unwise suggestion from Lord Neuberger who, rather unconvincingly distinguishing *Sturges v Bridgman* (1879) 11 Ch. D. 852, said that it might be a defence where the claimant erected a new building affected by the defendant's activities.

On the third issue, the defendant said that the claimants were complaining about noise from motor sports in an area where motor sports were an established use. The claimants said that the character of a neighbourhood should not be defined by nuisances. Lord Neuberger attempted to square the circle by saying that the defendant's activities were relevant to the character of the neighbourhood except when they were actionable nuisances. The problem with this is that whether an activity is actionable depends on the character of the neighbourhood. Lord Neuberger suggested that one can go through an "iterative process", starting with established uses in the area and then asking whether the interference was excessive for those uses. Lord Carnwath pointed out that in cases such as *Rushmer v Polsue & Alfieri Ltd.* [1907] A.C. 121, one found a slightly different and more practical approach: the court would accept actual levels of interference as characterising the neighbourhood, but would go on to find as a fact that the defendant had intensified the interference beyond the established level.

The fourth issue, planning permission, was the heart of the case. The Court of Appeal's approach was derived from *Gillingham Borough Council v Medway (Chatham) Dock Co. Ltd.* [1993] Q.B. 343. Planning permission, it said, could not justify a nuisance, but a development plan or even a single "major" or "strategic" planning permission might change the nature of a neighbourhood. Lord Neuberger rejected that approach. It led, he said, to the "somewhat paradoxical" result that "the greater the likely disagreeable impact of a change of use permitted by the planning authorities, the harder it would be for a claimant to establish a claim in nuisance". He held that planning permission of any sort, major, strategic or otherwise, was irrelevant to whether an activity constituted a nuisance. The character of a neighbourhood was determined by what happened there, whether as a result of planning permission or not. He pointed to the incongruity of local planning authorities determining private property rights, especially because no compensation was offered to losing objectors,

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and he approved of the then Carnwath L.J.'s statement in *Barr v Biffa Waste Services Ltd.* [2012] EWCA Civ 312, [2013] Q.B. 455 at [46] that the common law need not "march with" statutory regulation. Lord Carnwath himself disagreed. He distinguished his own judgment in *Barr*, confining it to the specific environmental regulatory regime there considered, and he endorsed *Gillingham*, insisting that "in exceptional cases a planning permission may be the result of a considered policy decision by the competent authority leading to a fundamental change in the pattern of uses, which cannot sensibly be ignored in assessing the character of the area". A majority of the Court, however, took Lord Neuberger's view.

Lords Neuberger and Carnwath came together on other points about planning permission. They both countenanced that the terms of consents – conditions about times, frequencies and intensities of activity – might influence a court's assessment of reasonableness. And they both, in a highly significant development in the law, allowed planning permission to influence the remedy a claimant could obtain. Both said that the existence of planning permission could justify refusal of an injunction and the award of damages in lieu. The idea is a new departure, but, as the Court pointed out, it extends a line of thought, familiar from cases such as *Dennis v Ministry of Defence* [2003] EWHC 793 (QB), [2003] Env. L.R. 741, that although the public interest rarely if ever determines actionability, it can influence remedy.

One way of interpreting the case is that Lord Neuberger was filling the gap he himself identified in the planning system, which is that it offers no compensation to those adversely affected by grants of permission. The overall effect of his approach in practice will be that where nuisances flow from planning consents, the view of the planning system will prevail and the nuisances will continue but the beneficiaries of the consents will have to pay compensation to those whose private rights are violated. Lord Carnwath's approach would have achieved the same result except that, in some cases, private rights would have been extinguished without compensation.

Students of damages in lieu might ask how the Court's approach squares with the classic case *Shelfer v City of London Electric Lighting Co.* [1895] 1 Ch. 287, in which the Court of Appeal said, "[A] person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance". Lord Neuberger, speaking for the Court, rejected that view. The public interest, far from being excluded, was recognised as highly relevant. A court might take into account, for example, whether an injunction would mean lost jobs or wasted resources. Moreover, in the new dispensation the court's discretion

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will not be fettered by the *Shelfer* rule that claimants were entitled to an injunction unless the injury was small, measurable by money, adequately compensated by money, and it would be oppressive to grant the injunction. The defendant would still bear a "legal burden" to show why an injunction should not be granted, but the court should take into account any relevant matter. The *Shelfer* considerations might be relevant, but they were not decisive, either individually or collectively. In effect, *Boomer v Atlantic Cement Co*., N.E. 2d 870 (1970) has arrived in England.

Lord Sumption would have gone further. He would have adopted a presumption against injunctions. His argument rested on the view that the value of all rights is measurable in money and every loss of rights is fully compensable by money. The other judges treated this suggestion with great caution, and some were hostile, pointing out that many people value, for example, their own homes in ways that money cannot fully compensate. A long-running academic debate rages about whether Lord Sumption's world might be more economically efficient (see e.g., Ayres, *Optional Law: The Structure of Legal Entitlements* (2010)), but in the post-Great Crash era that debate seems increasingly outdated. A further bout of financialisation now looks not economically literate but irresponsible.

The final issue was quantum. The Supreme Court remitted the point to the judge, but it discussed whether damages in lieu could be calculated in nuisance on the same basis as in trespass, namely employing the "user principle" (e.g., *Jaggard v Sawyer* [1995] 1 W.L.R. 269), in which defendants pay a "reasonable price" arrived at by considering both what the claimant might have demanded and what the defendant might have offered to extinguish the relevant right. The Court's discussion was tentative, and marred by confusion between user principle damages ("What is a reasonable price?") and an account of profits ("How much did the defendant gain?"). The degree to which defendants thought they might benefit is certainly relevant to assessing a reasonable price, since no rational defendant would offer more than the monetary equivalent of that benefit, but that is not necessarily equal to any sum they did in fact gain, which might be greater or smaller. More is to come on these matters.

DAVID HOWARTH

INDEMNITY AND THE LAND REGISTRATION ACT 2002

THE recent decision of the High Court in *Swift 1st Ltd. v Chief Land Registrar* [2014] All E.R. (D) 12 (Feb) considered the status of a registered, but flawed, land transaction, and the possibility of obtaining an indemnity where a charge is removed from the register.

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