BETWEEN:

Nutts Corner Circuit Limited

Appellant

-and-

(1) Antrim Borough Council

-and-

(2) Lisburn City Council

Respondents

1. This is an appeal against identical notices served by the respondent Local Authorities on the 22nd July 2010 (Antrim) and 26th August 2010 (Lisburn) pursuant to the Pollution Control & Local Government (Northern Ireland) Order 1978. The background has been helpfully detailed in both sets of opening and closing arguments which were prepared with the care and skill the court has become used to from Mr Beatie and Mr Shields.

2. It is regrettable that this matter has taken on the characteristics of a modern day version of the litigation portrayed in "Bleak House". The history of this case is the very antithesis of the summary nature of this court and I found myself reflecting on this when I was reviewing evidence from meetings which took place over six years ago. Throughout the course of this hearing I have warned that unless there was an agreed way forward the court would impose a conclusion which will leave one party disappointed. It is a matter of regret that those warnings were not acted upon.

3. The Appellant's business is self-evident from its name- it operates the motor sport circuit at Nutts Corner. I have heard unchallenged evidence

of the nature and extent of the operation, the level of investment into the facility and the employment it provides.

4. I have also heard from two residents, one from each of the respondents' areas, about the effect of living in close proximity to a motor sport circuit. The evidence of Mrs McCloy and Mrs Smyth was clearly heartfelt and borne out of a clear sense of frustration. I have no reason to question their evidence about the effects of the Appellant's business on their lives. In addition the court benefitted from an audio presentation of a recording of motor sport which confirmed, if confirmation was necessary, that the operation at Nutts Corner Circuit produces a significant level of noise.

5. Of note is the conduct of Antrim Borough Council, as was, which is helpfully detailed at paragraph 16 of the Appellant's closing submission. In short, when that council owned the circuit it was aware that there were issues in respect of noise and its impact on homes in proximity to the circuit. Indeed, in response to contact with Lisburn City Council Antrim imposed voluntary restrictions at the circuit between 2005 and 2008. Lisburn at that time was acting on foot of representations from Mrs Smyth whom I heard from. Those restrictions formed no part of the sale by Antrim of the circuit in 2008. The purchase price was £850,000.00 with one caveat- Antrim sold on the condition that the circuit would be used for motorsport and motorsport alone. One can only speculate about the effect of any restrictions of use would have had on that amount. What I am sure of is that had the sale been conditional on those restrictions remaining then these matters would not have reached the doors of this court with all the attendant costs, stress and ultimately disappointment of litigation.

6. I was particularly struck by the evidence from Mrs Sally Courtney the Environmental Health manager at Lisburn who has been involved in this saga since the initial complaint. She confirmed that there were some pre 2008 complaints "but not that many as the track was under restriction". However, shortly after the track was sold in 2008 the significant complaints began. I note that it was her view in April 2008, based on

information coming from Antrim that the restrictions in place were to continue.

7. During the evidence it became apparent that the notices followed the 2005 to 2008 restrictions which begs the question why were they lifted. Antrim knew that unrestricted use generated complaints so restrictions were imposed. The evidence is that those restrictions addressed the issues which had been articulated to Antrim by Lisburn. Antrim then sell the circuit without restrictions which they were bound to know would cause complaints given the pre 2005 history. And in 2010 having accepted £850,000.00 from the Appellant in 2008 for unrestricted use there is an attempt via the notices to return to the pre-sale restrictions.

8. One other piece of evidence which emerged from the testimony of the "lay witnesses" relates to the role of one of the expert witnesses. During examination in chief Mrs Smith provided some very helpful background information in respect of the issues she and her husband encountered after they purchased their home in 1994. In and around 2003 noise from the track became an issue and they employed a PhD student to assist in their attempts to resolve the problem. Whatever the nature of that student's work for the Smiths Mrs Smith confirmed that between 2005 and 2008 when, in her words, Lisburn threatened Antrim there were improvements. Seemingly the student successfully completed his PhD and emerged as Dr Jordan who also appeared in this case as an expert witness for Antrim. Dr Jordan in chief gave evidence of complaints from the late 1990's to the early 2000's and Antrim's restrictions from 2005-2008. What he did not volunteer was his involvement with the Smiths. I find that omission astounding given an expert's obligations to the court.

9. In addition to Dr Jordan I heard from Mr Gaston, Mr Thornely-Taylor and Mr Stigwood in respect of "noise". I remind myself of how courts are to approach such expert evidence. The tribunal of fact does not have to accept the evidence of the expert nor does it have to act on it. The verdict has to be reached after the totality of the evidence is considered. As in this case, judges and juries are often faced with honest and well qualified experts called by the parties differing in their opinions.

Sometimes, again as in this case, such differences lead to an evidential version of trench warfare. By that I mean each side has carefully constructed defensive positions both of which have survived sustained assaults from opposing lines. What we are left with is a stalemate with the evidence of all experts robustly challenged but not weakened in any significant manner. Save in one key respect.

10. The issue of the applicability or otherwise of British Standard 4142 in assessing motor sport noise took up significant time during this hearing. Whilst I appreciate that there is no accepted means to quantify and qualify noise from a motor circuit I am not persuaded it is appropriate to draw on this British Standard to inform or to contextualise an assessment of motorsport. That was not a difficult conclusion to reach after reading the scope of BS 4142. It is helpful at this point to quote from paragraph 1.3 of the 2014 iteration:

> "The determination of noise amounting to nuisance is beyond the scope of this British Standard.
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> Sound of an industrial and/ or commercial nature does not include sound from the passage of vehicles on public roads and railway systems.
>
> The standard is not intended to be applied to the rating and assessment of sound from:
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> a) Recreational activities, including all forms of motor sport…"

11. I do not propose to outline the nature or content of the expert evidence here save to conclude that in the absence of an agreed, universally applied standard used to measure, assess and quantify noise from motor sport it falls to the court to determine which approach, if any, is appropriate. I do accept Mr Thornely-Taylor's evidence that when comparing the abatement notices and the Appellant's Noise Management Plan assessment of the Lden shows each is broadly comparable in its effect.

12. Given that the Appellant has proposed a Noise Management Plan as a counter position to the notices the determination of the character of the area assumes less importance. In their closing submissions at paragraph 62 the Appellant accepts this proposition:

> "There is an unrestricted planning use, acknowledged by the planning authority to be seven days per week. Again the issue is rendered less significant because of the common position that a restriction on the operation of the circuit is appropriate…"

13. However it would be remiss of me not to note that the property at 72 Ballydonaghy Road, the home of Mrs McCloy, was built pursuant to planning permission from 2003 which indicated the proximity of the appellant's business "operational seven days a week" with noise interference from "cars/ motorcycles etc. racing at this facility". I highlight this because 2003 would have been in a pre-restriction period of operation when Antrim controlled the circuit.

14. I do not intend to make a determination in respect of "character" but will utilise the relevant evidence in determining whether or not the notices were justified under Article 38.

Statutory Provisions

15. Article 38 of the Pollution Control & Local Government (Northern Ireland) Order 1978 reads as follows:

> "Summary proceedings by district councils
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> (1) Where a district council is satisfied that noise amounting to a nuisance exists, or is likely to occur or recur, in the district of the council, the council shall serve a notice imposing all or any of the following requirements—
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> (a)requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence;

(b)requiring the execution of such works, and the taking of such other steps, as may be necessary for the purpose of the notice or as may be specified in the notice;

and the notice shall specify the time or times within which the requirements of the notice are to be complied with [F1 but a district council shall not, without the consent of the Department of the Environment, serve any such notice in respect of noise if proceedings in respect thereof might be initiated under regulations under Article 4 of the Environment (Northern Ireland) Order 2002.].

(2) The notice shall be served on the person responsible for the nuisance or, if that person cannot be found or the nuisance has not yet occurred, on the owner or occupier of the premises from which the noise is or would be emitted.

(3) The person served with the notice may appeal against the notice to a court of summary jurisdiction within twenty-one days from service of the notice.

(4) If a person on whom a notice is served under this Article without reasonable excuse contravenes any requirement of the notice, he shall be guilty of an offence against this Part.

(5) In proceedings for an offence under paragraph (4) in respect of noise caused in the course of a trade or business, it shall be a defence to prove that the best practicable means have been used for preventing, or for counteracting the effect of, the noise.

(6) In proceedings for an offence under paragraph (4) of contravening requirements imposed under paragraph (1) it shall be a defence to prove—

(a)that the alleged offence was covered by a notice served under Article 40 or a consent given under Article 41 or 45; or

(b)where the alleged offence was committed at a time when the premises were subject to a notice under Article 46, that the level of noise emanating from the premises at that time was not such as to constitute a contravention of the notice under Article 46; or

(c)where the alleged offence was committed at a time when the premises were not subject to a notice under Article 46, and when a level fixed under Article 47 applied to the premises, that the level of noise emanating from the premises at that time did not exceed that level;

and sub-paragraphs (b) and (c) apply whether or not the relevant notice was subject to appeal at the time when the offence was alleged to have been committed.

(7) Where a nuisance which exists or has occurred within the district of a district council, or which has affected any part of that district, appears to the council to be wholly or partly caused by some act or default committed or taking place outside its district, the district council may act under this Article as if the act or default were wholly within that district, except that any appeal shall be heard by a court of summary jurisdiction having jurisdiction where the act or default is alleged to have taken place.

(8) If a district council is of opinion that proceedings for an offence under paragraph (4) would afford an inadequate remedy in the case of any noise which is a nuisance, it may take proceedings in the High Court for the purpose of securing the abatement, prohibition or restriction of the nuisance, and the proceedings shall be maintainable notwithstanding that the district council has suffered no damage from the nuisance; but in any proceedings taken under this paragraph it shall be a defence to prove that the noise was authorised by a notice under Article 40 or a consent under Article 41.

16. The statutory grounds of appeal are set out in The Control of Noise (Appeals) Regulations (Northern Ireland) 1978:

> Appeals under Article 38(3)
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> 4. - (1) The provisions of this regulation shall apply to an appeal brought by any person under Article 38(3) (summary proceedings by district councils) against a notice served upon him by a district council under that Article.
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> (2) The grounds on which such a person served with such a notice may appeal under the said Article 38(3) may include any of the following grounds which are appropriate in the circumstances of the particular case:-
>
> (a) that the notice is not justified by the terms of Article 38;
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> (b) that there has been some informality, defect or error in. or in connection with, the notice;
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> (c) that the council have refused unreasonably to accept compliance with alternative requirements or that the requirements of the notice are otherwise unreasonable in character or extent, or are unnecessary;
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> (d) that the time, or where more than one time is specified any of the times, within which the requirements of the notice are to be complied with is not reasonably sufficient for the purpose;
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> (e) where the noise to which the notice relates is noise caused in the course of a trade or business, that the best practicable means have been used for preventing, or for counteracting the effect of, the noise.
>
> (f) that the requirements imposed by the notice are more onerous than the requirements for the time being in force, in relation to the noise to which the notice relates. of-
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> (i) any notice served under Article 40 or 46; or

(ii) any consent given under Article 41 or 45; or

(iii) any determination made under Article 47;

(g) that the notice should have been served on some person instead of the appellant, being the person responsible for the noise;

(h) that the notice might lawfully have been served on some person instead of, or in addition to the appellant, being the owner or occupier of the premises from which the noise is emitted or would be emitted, and that it would have been equitable for it to have been so served;

(i) that the notice might lawfully have been served on some person in addition to the appellant, being a person also responsible for the noise and that it would have been equitable, for it to have been so served.

(3) If and so far as an appeal is based on the ground of some informality, defect or error in, or in connection with, the notice. the court shall dismiss the appeal if it is satisfied that the informality, defect or error was not a material one.

(4) Where the grounds upon which an appeal is brought include a ground specified in paragraph (2)(h) or (i) above, the appellant shall serve a copy of his notice of appeal on any other person referred to, and in the case of any appeal to which this regulation applies, he may serve a copy of his notice of appeal on an other person having an estate or interest in the premises in question.

(5) On the hearing of the appeal the court may-

(a) quash the notice to which the appeal relates; or

(b) vary the notice in favour of the appellant in such manner as it thinks fit; or

(c) dismiss the appeal;

and a notice which is varied under sub-paragraph (b) above shall be final and shall otherwise have effect, as so varied, as if it had been so made by the district: council.

(6) Subject to paragraph (7), on the hearing of the appeal the court may make such order as it thinks fit-

(a) with. respect to the person by whom any work is to be executed and the contribution to be made by any person towards the cost of the work; or

(b) as to the proportions in which any expenses which may become recoverable by the council under Part III of the Order are to be borne by the appellant and by any other person.

(7) In exercising its powers under paragraph (6), the court-

(a) shall have regard, as between an owner and an occupier, to the terms and conditions, whether contractual or statutory, of any relevant tenancy and to the nature of the works required; and

(b) shall be satisfied, before it imposes any requirement thereunder on any other person other than the appellant that that person has received a copy of the notice of appeal in pursuance of paragraph (4).

Case Law

17. I have also been referred a number of decided cases including Lawrence & Another –v- Fens Tigers Ltd & Others [2014] UKSC 14; Coventry & Others –v- Lawrence & Another [2014] UKSC 13; Watson & Others –v- Croft Promo-Sport Ltd (2009) EWCA Civ 15 and Barr –v- Biffa Waste Services Ltd [2012] 3 all ER 380.

Discussion

18. I conclude that the notices were justified under Article 38- given the shared position that the noise from the circuit needs some form of management I could hardly find otherwise, but I will allow the appeal

under the ground at reg. 4 (2) (c). Being satisfied that both the notices and the Noise Management Plan produce a broadly similar outcome it must be unreasonable for the Respondents a) to produce an abatement notice which, on Mrs Eastwood's evidence, will render the circuit unviable and b) to fail to consider alternative requirements which will allow the circuit as a business to continue. I was particularly struck by Mrs Eastwood's evidence of her meeting of 11th May 2010 and her view that the Appellant company left that meeting to review its proposed noise management plan only to have the notices served later that summer without any further discussion of the NMP with the respondents. The subsequent six year stand-off has benefitted none of the parties in this matter.

19. I will exercise my powers under reg. 4 (5) (b) and vary the notices by replacing the particulars of each notice by the Appellant's noise management plan of 22nd March 2016. I do this in the hope that the residents can benefit from a noise regime which is a reasonable response to the operation of Nutts Corner Circuit as a going concern. I also trust that the Appellant's enterprise can flourish now that the spectre of this litigation has been lifted and that a return on the substantial amount of private and public money invested at the circuit can be realised. It is my sincere hope that those who branded the enterprise a "white elephant" are proved spectacularly wrong.

Peter King

District Judge (Magistrates' Court)

19/03/16