Neutral Citation Number: [2025] EWHC 1175 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
WINCHESTER DISTRICT REGISTRY

Date: 14 May 2025

Before :

HIS HONOUR JUDGE GLEN
Sitting as a Judge of the High Court
at Southampton

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Between :

(1) Mohamed Ahmed Bakhaty	**Claimants**
(2) Marie-Anne Goodlad Bakhaty	
- and -	
Hampshire County Council	**Defendant**

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Guy Adams (instructed by **HCR Legal LLP**) for the **Claimant**
Julian Waters (instructed by **Hampshire County Council Legal Services**) for the **Defendant**

Hearing dates: 26 and 27 March 2025

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JUDGMENT

His Honour Judge Glen:

Introduction.

1. By this claim, the Claimants seek injunctive and other relief in respect of the installation and operation by the Defendant of what I shall neutrally refer to as an all-weather play area ('AWPA') at Westgate All Through School, Cheriton Road in Winchester, Hampshire. The Claimants were represented at trial by Mr Adams of Counsel and the Defendant by Mr Waters, also of Counsel. I heard evidence and submissions over two days on 26 and 27 March 2025. In deference to those submissions, and the potential consequences for both parties (and others), I reserved this judgment.

Background.

2. In 1994 the Claimants purchased their home at St Anns, Links Road in the Fulflood district of Winchester. St Anns is an impressive brick built dwelling with a large south facing garden and a swimming pool. At that time, there was along the eastern boundary an establishment known as Rotherly House which was used as a boarding house and as a nursery for up to 55 children. The southern boundary of St Anns abuts a public footway known as Green Lane. On the opposite side of Green Lane (to the south and southeast) there are extensive playing fields associated with the substantial 'Secondary Phase' of the School (then the secondary school). To the southwest there is a yet further school (Western School) with further playing fields which wrap round to the end of Links Road (a private unmetalled lane). Fulflood itself is a predominantly residential area lying just outside the centre, but within the bounds, of the city of Winchester.

3. In December 2021 the Defendant submitted an application for planning consent to convert Rotherly House into what is now the 'Primary Phase' of Westgate School. This involved the retention of part of the existing building and the construction of new buildings to the east to accommodate a proposed total cohort of 420 pupils. Immediately to the west of the retained building, a formal play area was to be constructed with a tarmac surface. From there, the site rises going west. It was proposed that there be a further area surfaced with artificial grass and equipped with climbing and other play equipment. The area immediately adjacent to St Anns was allocated as a grassed informal play area. The Claimants objected to these plans (principally on traffic grounds) but consent was granted and the Primary Phase was constructed substantially in accordance with it.

4. The plans show that there was a double feature along the boundary of the school and St Anns, enclosing a number of trees. It would appear that this land fell within the Defendant's paper title but had in practice been fenced off from it and subsequently used by the Claimants. To forestall any dispute, the Claimants agreed to purchase the land in 2018 for about £9,500. The transfer conveying the land contains a covenant on the Claimants' part to use the land solely as garden land as therein defined. The fence dividing this land from the school belongs to the Claimants.

5. It is the Defendant's case that the informal play area was (amongst other things) poorly drained. As a result, it became muddy and unusable during wet periods. In 2021 the Parent School Association ('PSA') proposed that it should raise funds to

construct the AWPA. In May 2021 a planning application was submitted showing it in its present position but with an irregular shape. There is a lively debate over whether construction was started before or after planning consent had been obtained but it is not suggested that the AWPA as constructed breaches the consent as eventually granted. The cost of construction was approximately £36,000.

6. As constructed, the AWPA comprises of a level rectangular all-weather surface surrounded by 2.4m high 'weldmesh' fencing. It lies parallel to, and about two metres from, the St Anns boundary. The boundary itself is marked by a 1.8m close boarded fence. The surface of the AWPA is marked up in the manner of a five-a-side football pitch and there are small goals at each end.

7. At the time of construction, the AWPA was used for both informal play and formal games sessions in the morning, during the morning break, at lunchtimes (which had to be staggered due to the number of pupils within the primary phase) and after school. In addition, the school permitted external organisations to use the AWPA on Saturdays and Sunday Mornings in exchange for payment of a fee. I understand that this generated an additional income of £6,000 - £8,000 per annum which was used to purchase items for the school not covered by the existing budget.

8. The Claimants objected to the planning application and they seem to have been particularly annoyed by the fact that the school had not disclosed its plans when writing to ask them to repair the boundary fence and cut back trees at about the same time. Once the AWPA went into operation, they complained about noise and footballs entering their garden over the fence. The school responded, albeit somewhat tardily, by setting up a virtual meeting necessitated by the Covid restrictions then in force. The meeting was not a success.

9. The school's understanding, as evidenced by a follow up email dated 4 February 2022, was that the Claimants would provide details of their concerns to be discussed at a further meeting. However, disillusioned by the outcome of the initial meeting, the Claimants chose to instruct Solicitors who sent a letter before action on 23 March 2022. Whilst stated to have been sent by registered post, the Defendant claims not to have received it. A further copy was sent on 7 June.

10. It is apparent that some without prejudice negotiations ensued at a legal level. On 20 July 2022 Ms Dean, Headteacher of the School, independently sent a letter to the Claimants offering certain mitigations. Mr Adams sought to persuade me that this letter was privileged but plainly it is not. The mitigations offered were:

    - To fence off the area between the AWPA and the boundary fence to create a 'buffer zone' to be used only for science/natural history teaching.

    - To erect a ball net above the boundary fence.

    - To install a net over the top of the AWPA to prevent balls going astray.

    - To restrict use of the AWPA to the school day and then only until 4.15pm.

    There is no evidence of any response to this letter. The school however proceeded to put these mitigations into effect with the exception of the boundary net. I do note that

it is the Claimants' case that there has been some isolated use of the AWPA at weekends as evidenced, they say, by recordings they have made.

11. The Claimants issued this claim on 24 October 2022. It is alleged that the activities on the AWPA in terms of noise and the escape of footballs amount to a common law nuisance. Alternatively, it is alleged that the construction of the AWPA was a derogation from the grant of the strip of land in the 2018 conveyance. Finally, it is alleged that the Defendant as a public authority has infringed the Claimants' rights under Article 8 of, and Article 1 of the First Protocol to, the European Convention on Human Rights ('ECHR').

The Law.

12. The principles that underlie the tort of private nuisance have recently been reviewed and restated by the Supreme Court in the well-known case of *Fearn & ors. v. Board of Trustees of the Tate Gallery [2023] UKSC 4.* I derive the following principles from the judgments in that case:

    i) The right protected by the law of nuisance is the utility and amenity value of the claimant's land, not the personal comfort of its occupiers.

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

    iii) The touchstone is not some overriding and unprincipled test of reasonableness. Instead, the question of whether any particular activity is a nuisance has to be approached in a structured manner as established by the authorities.

    iv) The first question must always be whether the activities complained of amount to a substantial interference with ordinary user of the claimant's land. This is an objective test to be judged by the standards of a person of normal sensitivity, not a subjective one. 'Substantial' in this context is intended to distinguish from trifling or transient interferences.

    v) If the interference is substantial, the next question is whether the user complained of is part of the ordinary or normal user of the defendant's land. This has to be considered in the context of the character of the neighbourhood or locality. The parties' respective properties do not in themselves or together constitute a 'locality'. A neighbourhood or locality encompasses a wider area and its actual extent depends on the context. In a different field, it was held in *Manchester City Council v. Lawler (1999) 31 HLR 119* that:

        > *"For people living in an area such as a village, a housing estate or so on, there would be in practice little difficulty in knowing what local people called the locality."*

    vi) Even if the defendant's use of their land is an ordinary one, it must still be 'conveniently done'. This requires 'proper consideration for the interests of neighbouring occupiers' (*Fearn @ [27]*). It is in this respect alone that the concept of reasonableness arises, having regard to the nature, effect, duration and frequency of the activity complained of and the need for give and take.

vii) The public interest cannot justify the commission of a private law nuisance, although it may be of some limited relevance when considering the grant of a discretionary remedy such as an injunction. The existence (or absence) of planning consent is also of no direct relevance.

13. Derogation from grant is a familiar concept in the law of landlord and tenant and in the context of easements (*Wheeldon v. Burrows (1879) 12 Ch D 31* as relied upon by Mr Adams being an example of the latter). It is an expression of the principle that a lessor or grantor *"…cannot take away with one hand that which he has given with the other"* (see *Platt v London Underground Ltd [2001] 2 EGLR 121*). It amounts in short to a duty upon the grantor not to use its land for a purpose that renders the grantee's land unfit or materially less fit for the purposes which were in the contemplation of the parties at the time of the grant. It is sometimes referred to as an aspect of the principle of 'fair dealing'.

14. The relevant parts of Article 8 of the ECHR provide that:

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

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

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

Evidence of fact.

16. The principal evidence given on behalf of the Claimants came from the Second Claimant. In her witness statement, she describes St Anns at the time of purchase as being 'in a quiet country setting'. Much of her statement deals with the development of the school and other historical issues.

17. She describes the increase in, and concentration of, the noise occasioned by the construction of the AWPA as 'immense', accompanied by a substantial increase in the number of footballs traversing the fence (put at 170 over 11 months). Although she had once been a keen gardener, she alleges that the garden has become a 'no go area' due to shouting, whistling and the noise of balls hitting the weldmesh fencing. She alleges that the Claimants can no longer use either their pool or the summer house at the southeast corner of the garden. They also feel unable to hold their annual summer garden party. The position is only 'slightly less unbearable' since the mitigations were put in place by the school, although the number of balls coming over has reduced. As well as the garden, the noise is audible inside rooms on the school side of the house

and disrupts home working. There are also complaints of stones and other objects being thrown over the fence which were in the event not pursued.

18. As part of her evidence, Mr Adams played to the Court a selection of recordings made by the Second Claimant on her mobile phone and on that belonging to her husband. It was possible to hear variable amounts of shouting, cheering and the general hubbub to be anticipated from young children at play. In some of the recordings, a teacher could be heard giving encouragement and it was notable that in those, there was significantly less shouting although one could hear clapping. The sound of what appears to be a ball striking the weldmesh fence is audible as a clashing rather than banging sound. It is impossible to gauge the true relative volume but I noted that there was a quite loud background hum in some of the recordings, suggestive of a high recording level. In others, the sound of birdsong was audible over the noise from the school, as was the crunch of the Second Claimant's feet on her gravel path.

19. In cross examination, she described the increase in noise following the construction of the AWPA as a 'seismic change'. She said that the Claimants had not found the meeting with the school to be positive and did not sense any willingness to meet their concerns. She took exception to what she perceived (incorrectly) as the decision by the school to mask the faces of the participants. She agreed that they had received the follow up letter from the school but could not say if they had responded.

20. She agreed that they had probably received the letter dated 20 July 2022. She also agreed that the various mitigations suggested in that letter had been put in place. However, balls still came over the fence near the summerhouse, albeit not from the AWPA. The ones visible today had accumulated since August 2022 and had been left on legal advice. She agreed that, with a couple of exceptions as evidenced by the recordings made on 3 and 10 June 2023, weekends and weekdays after 4.15pm (when they normally used their summerhouse) were free of noise.

21. Given these concessions, she was asked by Mr Waters about her contention that the Claimants were no longer able to use their summerhouse, swim in their pool or hold summer garden parties. She responded by saying that he had failed to understand the anxiety and distress generated by the noise. Why, she asked rhetorically, would she hold a party when she was 'living in distress' due to the 'continuous' and 'horrendous' noise? Why should she have to live her life by the school timetable? She described the AWPA as having 'overtaken my life'. She denied exaggerating the impact upon her.

22. Unsurprisingly the First Claimant gives a similar account in his witness statement. He asserts that the Claimants have completely lost the enjoyment of their home due to the constant noise emanating from the AWPA, even after the mitigations were put in place. He concludes by saying *"...I have stopped using the garden as a place to rest, even stopping using the swimming pool which I used to use daily, simply because the noise cuts through the peace and quiet that was once here."*

23. In cross examination, he acknowledged that the Claimants had received the letter dated 20 July 2022 and had sent it on to their Solicitors. He confirmed that there had been occasions when the AWPA had been used at weekends after that letter. He

described how he worked long hours but no longer felt able to return home for a siesta, taking it in his car instead. He insisted that he was supportive of education and that he had no problem with general playing but felt that the AWPA had been installed in order to deliberately upset the Claimants. He said that the school as a whole had 30 acres in which to site the AWPA elsewhere. Instead, it had acted without consideration. He too denied exaggerating.

24. The first witness for the Defendant was Mr Pay, the Senior Site & Facilities Strategic Lead. In his statement, he confirms the reasons why the grassed free play area was regarded as unsuitable and produces a photograph of the relevant area taken at about the time of the application for planning consent. He gives an account of the process of planning for and constructing the AWPA, and subsequently the July 2022 mitigations.

25. He was present at the meeting with the Claimants. He states that the former free play area was the only suitable one within the Primary Phase for the AWPA. Constructing it somewhere within the Secondary Phase was impractical for safeguarding, security and timetabling reasons. He asserts that Government guidance supported what he described as the community use of school facilities and the need to generate income where possible.

26. In cross examination he was taken to some of the documents prepared to support the planning application for the AWPA. He acknowledged that there was a suggestion there that use would be made of the sports fields within the Secondary Phase but he said that this was not practical from a safeguarding perspective (he said that he was a safeguarding lead and had done the relevant training). In any event the sports fields were fully used by Secondary Phase pupils. He gave an account of the genesis of the AWPA which had been designed with the assistance of the County Architect. He was not aware that noise was an issue in seeking planning consent for sports pitches but that is why he had sought this professional assistance. He agreed that the AWPA had not been constructed exactly in accordance with some of the drawings. He was however confident that consent was in place before construction began.

27. He said that the west side of the site had not been suitable for free play and had become something of a mud bath. There had been a number of recorded injuries. He agreed that in theory the grass surface could have been repaired but said that this was not in reality practicable.

28. I next heard from Elizabeth Williams, the former Head of the Primary Phase. Her witness statement was primarily aimed at extolling the virtues of outside activity and identifying the requirements of the National Curriculum and of legislation in that respect. In cross examination she explained the make up of the school's complement, which reached its present level in about 2021. She said that the Primary Phase was fully fenced for security reasons and therefore anyone entering to use school facilities would have to have been let in. All play is supervised by teaching assistants, teachers and lunchtime supervisors.

29. She said that the former free play area became waterlogged and muddy when the weather was bad, restricting the children to the concreted area. There was therefore a

need to be able to use it all year round. She said that the AWPA was not just used for football but for other games as well. There is a rota and an adult is present at all times. She acknowledged that there were occasions when the older pupils were taken over to the Secondary Phase. However, the only area generally available was Chilbolton Field and this took most of the lesson time just to get there and back.

30. I next heard from the current Head of the whole school, Fae-Anna Dean. Other than writing the letter in July 2022, she had little direct involvement in the genesis of the AWPA or in the dispute regarding its use. Her witness statement is directed primarily at the importance of 'free flow access' to secure outdoor space, particularly for pupils with high needs. She identifies the limitations of the Primary Phase site in this respect and points to the need to stagger outside activities. She asserts that space at the Secondary Phase is also under pressure.

31. In cross examination she acknowledged that the Primary and Secondary Phases were part of a single school but they were on a split site separated by a public right of way. There were, she said, 'extensive' reasons why using the Secondary Phase was impractical. Transferring the children would require a risk assessment and additional staff. There would be no toilet facilities. It is for these reasons that the only use is for planned events such as sports days on a few occasions each year. She reiterated that children with higher needs (about 9% of the pupils) needed free flow access to suitable outdoor space. She denied that the School was just taking the easy option; it was a question of what could reasonably be done within the school day and with the interests of the whole school in mind.

32. Finally, I heard from Penelope Catchpole who is the Chair of Governors for the School. A significant part of her witness statement deals with historic (and therefore irrelevant) issues. She records some of the more detailed complaints made by the Claimants regarding for example things being thrown over the fence and the actions taken to address them. She was present at the meeting with the Claimants on 12 January 2022 and gives an account of subsequent events and the installation of the mitigations.

33. In cross examination, she explained the composition and role of the Board of Governors. She agreed that absolute health and safety could not be achieved and that there had to be a balancing of risk, although that balance was affected by the number of 'dysregulated' children entering the Primary Phase. She repeated the various impediments to moving the children (especially the children with higher needs who could not be 'left behind') over to the Secondary Phase, stating that the timetable is complicated and the erosion of time that would result could not be afforded. It was, she said, ultimately a question of what was reasonably practical.

34. On the question of use of the AWPA by outside organisations, she acknowledged that the income generated was small in comparison with the school's overall budget but it helped to pay for 'nice things'. The local authority encouraged schools to open their facilities for the benefit of the wider community. She was adamant that since July 2022 any external use had been in school hours but was clear that she wished to be free of that restriction. She said that from April this year the School is expected to

make provision for 'wrap around care' and that this will include an after-school club extending to 6.00pm.

35. She was asked about the process leading to the construction of the AWPA. She said that the primary purpose had been to make a play area suitable for all year round play, including a variety of formal activities including gymnastics. The School was growing and need had increased. She said that there were scheduled sessions and some free use in the mornings.

36. The last component of the factual evidence is my observations made during a visit to St Anns on the morning of the first day of the trial, attended by Counsel only. I warned the advocates at the Pre-trial Review that a 'view' was unlikely to be of enormous assistance, it being inevitable that one or both parties would contend that what I observed was not typical. Whilst this turned out to be correct (the AWPA did not appear to be in use), the visit was not without interest.

37. At the start in the garden of St Anns, I noted that even during lesson time at the Primary Phase there was a significant background of the sound of children playing and applause coming from the playing fields to the south and southwest. I noted the presence of about 20 footballs in the flower beds in the tree-lined area adjacent to the boundary. After a tour of the immediate locality, we returned to St Anns in time for the morning break period. Even without the AWPA, there was a substantial amount of typical noise from the children playing in other areas. That sound was barely audible inside, although it was possible to also hear other ambient noise such as aeroplanes.

Expert evidence.

38. The experts approached the exercise of measuring noise in different ways but arrived at similar results. Indeed, there was common ground between them save in respect of the use by Mr Summers of the Shooting Noise Level ('SNL') measurement taken from the Chartered Institute of Environmental Health's publication Clay Target Shooting: Guidance on the Control of Noise ('CTSG'). I gave permission at the Pre-trial Review for oral expert evidence limited to this issue, although inevitably the cross examination travelled beyond this in some respects.

39. Mr Summers is an Acoustic Consultant whose experience and qualifications are more fully set out in his report dated 5 August 2024. He explains that for sound measurement purposes, it is conventional to use the 'A' weighted decibel (dB(A)) as this most closely correlates to the human response to noise. The dB(A) scale is logarithmic and each increase of 10 dB(A) represents an approximate doubling of loudness. Noise is generally measured over a period, denoted by the L_{Aeq} and the time period e.g. $L_{Aeq,\ 16hr}$.

40. In his report, Mr Summers acknowledges that there is no published guidance dealing with noise from all-weather sports pitches or school play areas. He therefore draws on the WHO Guidelines for Community Noise (reflected in British Standard BS 8233:2014) which provide that in outdoor living areas noise should not exceed 50 dB $L_{Aeq,\ 16hr}$ daytime and evening if it not to cause moderate annoyance and should not exceed 55 dB $L_{Aeq,\ 16hr}$ daytime and evening if it is not to cause serious annoyance.

41. Next, he turns to the design guidance note 'Artificial Grass Pitch (AGP) Acoustics – Planning Implications' published by Sports England. This adopts the WHO Guidelines but suggests that they be applied over a shorter time period ($L_{Aeq, 1hr}$) as this is the typical session length. He notes that the guidance note states that *"Weldmesh fencing is commonly used to enclose the AGP and the panels should be securely clamped with resilient fixings to avoid vibrations."*

42. In relation to the CTSG, he considers that the 'impulsive noise' from shooting has been likened to impact noise from other sports and states that as a result this guidance has been used in connection with sports pitches, games areas and skate parks. The CTSG seeks to measure noise by reference to the maximum value of noise caused over a very short period measured in milliseconds. The SNL is the logarithmic average of the loudest 25 'shots' over a 30 minute period. There is no fixed limit but Mr Summers considers that annoyance is less likely to occur below 55 dB(A) and highly likely to do so above 65 dB(A).

43. Mr Summers installed sound monitoring equipment at two positions, one near the summer house (and boundary) at the rear of the garden of St Anns and one nearer the house itself. The general ambient midday noise level measured near the boundary was at around 52-53 dB(A) $L_{Aeq, 1hr}$ but increased to around (and occasionally in excess of) 60 dB(A) $L_{Aeq, 1hr}$ whilst the AWPA was in use. Nearer the house the latter figure was around 3 dB(A) less. He calculates that noise within the house with open windows would be approximately 15 d(B)(A) less but in excess of the WHO guideline value for moderate annoyance of 35 dB(A) $L_{Aeq, 16hr}$.

44. It proved to be impossible to calculate the SNL in accordance with the CTSG because at no stage were there 25 or more 'shots' within a 30 minute period. Instead, he calculated the average of all the fence impacts to arrive at a SNL of 65 dB(A) during lunchtime and coaching periods and 61 dB(A) at other times. Those figures were likely to be 8 – 9 dB(A) lower nearer the house.

45. The Defendant relied on a report from Edward Clarke of Clarke Saunders Acoustics dated 30 July 2024. He was not in a position to conduct extended monitoring from the Claimant's garden as Mr Summers had done. He therefore calculated the difference between noise level at source and within St Anns from a single experiment and then extrapolated from his source readings. He calculated that the noise from the AWPA was at 50 – 55 dB(A) near the boundary and 40 - 45 dB(A) at the far side of the garden.

46. It is his opinion that a useful yardstick is the level at which communication is affected i.e. where persons have to raise their voice to be heard. The generally accepted threshold level for this is 60 dB(A). He notes that *"...other factors such as timing, frequency of occurrence, duration, context and so on need to be factored into an assessment regarding nuisance."*

47. As I have said, a good measure of agreement is evident from the joint statement. The experts recognise and agree that the issue of whether the AWPA is a nuisance is a 'contextual determination' taking into account the various factors identified by Mr Clarke and quoted in the previous paragraph. They note that *"Mr Clarke has suggested that if used consistently throughout the week, the additional inclusion of use on Sundays might be sufficient to trigger a noise nuisance. Mr Summers agrees*

with this position". There was agreement that measured sound levels were in the mid to high 50s, occasionally reaching 60 d(B)(a). The only areas of disagreement were over Mr Summers' reference to the CTSG and Mr Clarke's view that the impact had to be considered over the whole garden of St Anns rather than by focussing on the area immediately adjacent to the school.

48. It became apparent at the start of Mr Summers' oral evidence that he had made sound recordings as well as recorded measurements. I permitted Mr Adams to play a selection of them as part of the evidence. A general hubbub was audible with the occasionally 'clashing' sound of the ball striking the weldmesh fence being noticeably, but not significantly, louder.

49. In cross examination, Mr Waters fairly quickly went 'off piste' in terms of the issues in dispute between the experts but I permitted him to do so as the matters he explored were of assistance. Mr Summers agreed that there was nothing atypical in the construction of the AWPA or in its use and that noise levels were largely normal for an installation of this kind.

50. He was asked about the difference between sound measurements with a period of $L_{Aeq, 1hr}$ as used by him for the purposes of his measurements and those with a period of $L_{Aeq, 16hr}$ as used in the WHO Guidelines. He agreed that 50 dB(A) $L_{Aeq, 16hr}$ was equivalent to 62 dB(A) $L_{Aeq, 1hr}$ with a concomitant 12 dB(A) increase at higher levels. He however reaffirmed that he was primarily basing himself of the AGP Guidance Note which had the applied WHO figures at $L_{Aeq, 1hr}$.

51. On the areas in dispute, he agreed that clays were normally shot in relatively quiet areas. He asserted that the St Anns was also in a quiet area, although he acknowledged that the general play of children at the School would give rise to a loud ambient noise. He also agreed that the frequency of balls hitting the weldmesh fence, whilst variable, was less than that of shooting clays. He acknowledged that he had no professional experience of clay pigeon shoots and was not trying to equate the noise of shooting with that in this case. He was simply looking at the CTSG for what assistance it could provide and denied that it was inappropriate to do so.

52. Mr Clarke said in cross examination that the AGP Guidance Note was not directly applicable in this case but was (like the WHO Guidelines and to some extent the SNL) a useful reference point. It was a precautionary design guide for planning application purposes and was significantly more onerous that WHO Guidelines. Proving nuisance required the noise to cross a 'higher bar' than this precautionary level. He agreed that the AGP Guidance Note used $L_{Aeq, 1hr}$ as it was more suited to the type of activity under consideration.

53. On the subject of the CTSG, he said that he was not aware of any example of it being applied to noise of this kind. He pointed out that it was not mentioned on the AGP Guidance Note even though this considers ball impacts. He described the methodology in the CTSG (to average the 25 highest sounds) as completely inappropriate to this situation.

<u>Submissions.</u>

54. What follows is a composite summary of Counsel's written and oral submissions. I am acutely conscious that it does not do full justice to the well-fleshed skeleton arguments that have been submitted but I have taken all of the contents into account in reaching this decision.

55. In relation to the issue of derogation from grant, Mr Adams argued that the conveyance of the strip was a relevant 'grant' for these purposes. The user of the strip was restricted by the conveyance to garden land. By exposing that land to the noise from the AWPA, the Defendant had substantially interfered with that user and thus derogated from that grant. He argued, relying on *Yankwood Ltd. v. London Borough of Havering (1998) Unrep.*, that there could be a derogation from grant even where there was no actionable nuisance.

56. In relation to the Claimants' rights under the ECHR, Mr Adams recognised that this was a 'reserve argument'. Nevertheless, he argued that the focus in this context was on the person rather than the property. The burden lay on the Defendant to justify an interference with the Claimants' rights. He drew attention to what he contended had been the Defendant's failure to comply with the duty of disclosure and its lack of candour. He submitted that issues of public law lawfulness were in play.

57. Turning to the core issue of nuisance, Mr Adams acknowledged that the locality for this purpose was a residential neighbourhood, albeit with schools. He sought immediately to address the decision of Griffiths J in *Dunton v. Dover District Council (1977) 76 L.G.R. 87*. In that case, the Defendant constructed a playground immediately adjacent to the garden of the Claimant's hotel. The Claimant alleged that the noise made by the children from dawn to dusk was intolerable. Interim relief was granted restricting the ages of the children and the hours of use. Griffiths J held that whilst unrestricted use of the playground had given rise to an actionable nuisance, the restricted use did not. Accordingly, injunctive relief was refused and a modest award of damages made.

58. Mr Adams argued (in my judgment correctly) that *Dunton* had been decided on an incorrect application of a general test of reasonableness. He further sought to distinguish it on the basis that the Defendant there had no choice as to the siting of the playground. In this case, he argued there was no necessity to put the AWPA where it is having regard to the space available over the whole school site. The AWPA did not add to the space available to the children. The same result could have been achieved by keeping the grass on the former free play area in repair. The installation of the AWPA was not an ordinary use of the Defendant's land and in any event it was not done 'conveniently'. Instead, there had been no regard to the Claimants' interests. The Defendant had 'concealed its plans' and made no effort to consult.

59. Turning to the evidence, he described the Claimants' evidence as 'understandable'. He invited me to draw adverse inferences from the fact that the AWPA was not in use at the time of my visit. He invited me to prefer the expert evidence of Mr Summers. The use of the SNL was appropriate as it was meaningless to average impact sounds (which were qualitatively different to shouting etc.) over a one hour period.

60. I invited Mr Adams to address me on the question of remedies. He confirmed that the Claimants sought an injunction prohibiting any use of the AWPA. I asked him to quantify the damages that he sought, either as an alternative to the grant of an

injunction or in a *Dunton* scenario. He declined to do so, submitting that there would have to be an inquiry as to such damages.

61. Mr Waters submitted that a conveyance of freehold land could not be a 'grant' for the purposes of the doctrine of derogation from grant. So far as the Claimants' ECHR rights were concerned, he drew my attention to *Fearn* at *[206]* where in his dissenting judgment Lord Sales JSC held that:

> *"In my view, the basic concepts of the English law of nuisance are already adapted to cover the circumstances of the present case and reference to article 8 is unnecessary and unhelpful. The claimants do not need to rely upon article 8 to make good their case on* [nuisance]*."*

62. Mr Waters submitted that the locality for the purposes of nuisance was Fulflood; a residential area which included schools. He disputed that the Claimants had successfully proved that there was a substantial interference by virtue of the construction of the AWPA, having regard to the 'ambient noise' of the children generally. The AWPA was a common and ordinary use of land and there was nowhere else for it to go. It was a valuable facility for the school and the wider community.

63. He was critical of the Claimants' evidence, describing it as the product of undue sensitivity and exaggeration. He urged me to accept Mr Clarke's categorisation of the AGP Guidance Note as precautionary and reminded me that the WHO Guidelines had to be read with Mr Summers' recorded sound levels having regard to the differing periods of measurement.

64. Turning to the question of remedy, he acknowledged that if I found the AWPA to be a continuing nuisance then he would be unable to resist the grant of an injunction. In this scenario, he urged me to consider the lesser alternative of ordering the removal of the weldmesh fencing. If I were to conclude that the AWPA had been a nuisance prior to the mitigations put in place by the School but not since, he argued that there was no need as a matter of discretion for the grant of an injunction or the giving of formal undertakings given the School's approach. He submitted that damages award in *Dunton* of £200 was an appropriate figure for any award of general damages for the period prior to July 2022.

Conclusions.

ECHR

65. It is convenient to deal at the outset with what I regard as the subsidiary issue of interference with the Claimants' ECHR rights. Despite Mr Adams' attempts to persuade me that the facts of this matter left some residual room for the application of the ECHR, I consider that this case is in this respect indistinguishable from *Fearn*. The Claimant's ECHR rights are qualified rights. The application of the test for common law nuisance set out above caters fully for the balancing exercise that the Convention requires.

Derogation from grant - application

66. In the case of an easement it is not difficult to identify a 'grant'. Similarly, albeit to a lesser extent, a lease (and the package of rights that forms a part of it) is often said to result from a 'grant' (see in this context *Chartered Trust v. Davies (1998) 76 P. & C.R. 396*). However, both leases and easements are subsidiary interests in land and both necessarily involve some form of continuing relationship between grantor and grantee. It is less easy to categorise an outright conveyance of freehold land as being a grant and there is no intrinsic continuing legal (as opposed to geographical) relationship between transferor and transferee.

67. There is however authority for the proposition that the principle of derogation from grant has wider application. In *Molton Builders Ltd. v. City of Westminster LBC (1975) 30 P. & C. R. 182* (not cited to me) Denning MR held that:

> *"The doctrine of derogation from grant is usually applied to sales or leases of land, but it is of wider application. It is a general principle of law that, if one man agrees to confer a particular benefit on another, he must not do anything which substantially deprives the other of the enjoyment of that benefit: because that would be to take away with one hand what is given with the other. It is said to be "a principle which merely embodies in a legal maxim a rule of common honesty": see Harmer v. Jumbil (Nigeria) Tin Areas Ltd. per Younger L.J. Sometimes it is rested on an implied term in the contract. But this is not correct. It is a principle evolved by the law itself. Applied to sales or leases of land, it means that, when a man has sold land or granted a lease of it and expressly or impliedly agrees that the buyer or lessee shall be at liberty to use it for a particular purpose, then he must do nothing actively to render the premises unfit or materially less fit for the particular purpose for which it was sold or let."*

68. I am therefore bound by authority to conclude that Mr Adams is correct to submit that in principle the doctrine of derogation of grant is capable of applying to freehold conveyances. He is also correct in submitting that *Yankwood* establishes that in principle liability for derogation from grant can be established in circumstances where an actionable nuisance cannot be proved and vice versa. I will return to the question of whether it can do so in this case later in this judgment.

Nuisance - Substantial interference

69. I acknowledge that the Claimants' pleaded case is that it is the AWPA that is responsible for the substantial interference with their use of St Anns, rather than the noise from the School more generally. Attractive though the argument is, I am not persuaded by Mr Waters that the correct approach is therefore to ask in the context of nuisance whether there has been a substantial interference when judged against the ambient noise of the school as it was immediately prior to construction. Rather, the question is whether the noise at it is (or was) taken as a whole amounts to a substantial interference. The AWPA may (or may not) simply have been the straw that broke the proverbial camel's back.

70. It is convenient in this context to make an assessment of the Claimants' evidence. I recognise that they are extremely fond and proud of what is on any view a beautiful home. I fear however that they have become sensitised by the noise from the School in a way which has caused them to become over invested in their belief that they are

victims of a wrong. In short, they have lost perspective. This is most graphically illustrated by the Second Claimant's description of the locality of St Anns and her answers to questions in cross examination as recorded in paragraphs 16 and 21 above respectively and by the First Claimant's perception that the School had sited the AWPA with the intention of causing them distress. In my judgment, the Claimants' subjective view of the impact of the noise on their property and their ability to use it is not a reliable guide to an objective assessment of that impact.

71. Turning to the expert evidence, provided that they are taken as reference points rather than limits, then I accept (as I think in the end Mr Clarke accepted) that the WHO Guidelines, the AGP Guidance Note and (to a much more limited extent) the CTSG SNL are all of some relevance. I accept Mr Clarke's evidence that the levels in the AGP Guidance Note are precautionary and I question whether a period of $L_{Aeq,\ 1hr}$ is entirely appropriate to this scenario. Certainly, it is very difficult to see how the CTSG SNL is of more than peripheral assistance. In the round, what I draw from the expert evidence is that the measured levels of noise (at least adjacent to the boundary) lie within a range conventionally regarded as being capable of causing an at least moderate annoyance.

72. Expert evidence is not competent on the question of whether any particular level of noise is capable of constituting a nuisance; that is the province of the court alone. The assessment is a multi-factorial one of the kind identified by Mr Clarke in his report. In the round, I am satisfied that the noise from the school (with or without the AWPA) amounts to a substantial (in the sense of not being trivial or transient) interference with the ordinary user by the Claimants of St Anns. I am also satisfied that the substantial number of balls crossing the boundary fence prior to the 2022 mitigations falls into the same category.

Nuisance - Ordinary user

73. The question of whether the installation and use of the AWPA is an ordinary or normal user of the Defendant's land has to be considered in the context of the character of the locality. The identification of that locality is now relatively uncontroversial in this case. The locality is in my judgment properly described as a suburban residential area featuring (as such areas often do) a number of educational establishments.

74. It seems to me to be difficult at first sight to contend that the construction of an all-weather play area in the grounds of a school in such a locality is not an ordinary user of land. Mr Adams' contentions to the contrary in his oral and printed cases seem to me to roll up issues which might more properly go to the question of whether the user is 'convenient'. In my judgment, they do not persuade me that the user is out of the ordinary.

Nuisance - Convenience

75. This issue lies at the heart of this case. Accepting that the installation and operation of the AWPA was an ordinary user of the Defendant's land, was it nevertheless done in a 'convenient' manner; with proper consideration for the interests of the Claimants having regard to the need for neighbourly give and take?

76. It may in this context first be necessary to review the question of why the AWPA was constructed. I accept the Defendant's evidence that it was the result of a desire by the PSA to provide an additional facility which could be enjoyed by the children all year round in place of a patch of muddy ground. Whilst it could not be said to be necessary, its provision was certainly desirable.

77. I reject Mr Adams' submission that (to the extent that it is relevant) there was some lack of candour or other underhand conduct in the process leading to installation. It may be that plans changed over time and it may also be that construction started before all formal consents were in place. However, planning permission was applied for and the Claimants had notice of that application. All relevant consents are now in place.

78. The next issue is location. It was not really suggested that there was some other location within the secure area of the Primary Phase where the AWPA could have been constructed. The 'free play area' was, from the School's perspective, the only obvious choice. The issue here as developed in the evidence is the question of whether the AWPA could have been constructed elsewhere in the grounds of the School in its full sense i.e. in the Secondary Phase.

79. I accept the evidence of the Defendant's witnesses that this would be impractical for many of the reasons that they gave. Against the context of tightly timetabled lessons and constraints on staff, it is simply unrealistic to contend that cohorts of children should be escorted to and from some other location within the Secondary Phase in order to use the AWPA. Aside from the time and staff resource issues, I accept that there is a need for so called 'free flow' access by higher needs children and recognise the unfairness of treating them differently to other children. All of this is without even considering the impact on children attending the Secondary Phase. The requirement to act conveniently does not equate to a requirement to take every possible step to minimise the possible impact on neighbouring occupiers. It requires only that reasonable steps are taken to achieve that aim having regard to all the circumstances.

80. The final key issue is time and duration. It is in this respect only that I consider that the Claimant's case has some traction. The AWPA was constructed for the benefit of the children attending the Primary Phase with money raised from their parents. There is nothing obviously unreasonable (in the 'conveniently' sense) in wishing to use it during the hours when those children are at the school.

81. User at other times and for the benefit of other persons raises different considerations. I can well understand the attraction of raising additional funds to supplement a no doubt tight school budget. I can also understand the Defendant's wish to offer school facilities for community use. It is however in this context that the principles of give and take demand some give. Desirable though these things are, they are not necessary. The impact on the Claimants of weekend use is clearly significant having regard to the fact that the 'ambient' noise of general play would normally be absent. Enabling the use of the AWPA at these times is not in my judgment giving proper consideration to the interests of the Claimants. Instead, it is considering only the interests of the School.

82. There are a number of less significant issues that I do not intend to dwell on. There is it seems to me nothing intrinsically wrong with the use of weldmesh fencing and

some adjustments have already been made to reduce the noise it makes. There are in theory a number of further mitigations that could be made but they are not ones that in my judgment should reasonably be made.

83. This analysis leads me to the following conclusions as far as the claim is nuisance is concerned:

(a) The installation and use of the AWPA does not per se give rise to actionable nuisance.

(b) Having regard to all the circumstances, the use of the AWPA by third parties outside of school hours was not done 'conveniently' and was therefore a nuisance to that extent.

(c) Similarly, the frequent projection of balls over the boundary from the AWPA was a nuisance.

(d) The mitigations put in place in July 2022 were such as to prevent a further actionable nuisance from arising. The occasional ball over the fence since that time (something common to many gardens), whilst annoying, is not at a sufficient level to be a substantial interference with the Claimant's use and enjoyment of St Anns.

(e) In my judgment, use by children attending the Primary Phase during school hours (including any pre-school or after school provision) does not give rise to an actionable nuisance, provided that the net over the AWPA is maintained. There can also in my judgment be no objection to the use by the school of the area presently fenced off behind the AWPA for structured activities such as natural history lessons. Indeed, if a net was erected to prevent balls (and other objects) from crossing the boundary fence, I cannot necessarily see that there could be any real objection to opening this area up altogether.

Derogation from grant - contravention

84. I return then to the question of whether the application of the principle of non-derogation from grant can assist the Claimants to some different result. In general terms, I consider that this is one of those cases where there is in substance no distinction in the test to be applied. If however there is one, then it lies in the fact that the Claimants were well aware when taking the conveyance that the Defendant's land would continue to be used as a school. That carried with it knowledge that the land conveyed would be affected by all the noise that already stemmed from the school which as I have already said was substantial.

85. I note in this context that there is no evidence (other than that of the Claimants which I have found to be unreliable) to establish what increase in the level (as opposed to the character) of noise resulted from the AWPA. Mr Adams declined to identify any in answer to my question on this point in submissions. The Claimants have not in my judgment proved that the AWPA was itself responsible for rendering use of the strip unfit or materially less fit as garden land.

86. In any event, the parties must be taken to have had in contemplation at the time of the conveyance not only the existing noise from the school but any which may result from

other future ordinary uses of the School grounds. I have already determined that the construction of the AWPA was such a user. To the extent that the AWPA was used without proper regard to the Claimants' interests it was both a nuisance and a derogation from grant. To the extent that it was not, derogation from grant does not create a liability in this case where nuisance does not.

Remedies

87. In the light of these findings, I am not persuaded that it would be appropriate in the exercise of my discretion to grant an injunction. I do not consider that the Defendant 'threatens and intends' to continue the nuisance that I have found existed, albeit that they would have liked in other circumstances to have done so. It is in my judgment sufficient to accept a general undertaking to be recorded in the preamble to any final order that the AWPA will be used as I have indicated with the application for an injunction being adjourned generally with permission to restore.

88. Turning to the question of damages, there has been no direction that damages be assessed separately. The purpose of a trial, at considerable expense to the parties, is to resolve all of the matters in dispute. I therefore decline Mr Adams' invitation to order an enquiry into damages. I propose to assess general damages for the period during which there was 'excess use' of the AWPA and when significant numbers of balls were crossing the boundary fence.

89. General damages of this kind are often categorised as being 'modest' but they must nonetheless reflect the upset and inconvenience that would, objectively, have reasonably resulted. The period in question seems to me to be roughly 10 months covering September 2021 through to July 2022 (being respectively the start and end months of the relevant school year). I am also satisfied that the Claimants prove that the AWPA was used at weekends on one or two additional days thereafter.

90. In my judgment the figure proposed by Mr Waters is far too low. The £200 awarded in *Dunton* would be worth over £1,150 now and seems to have been compensation for noise nuisance over a period of about 3 months, albeit on a 7 day a week basis. Using *Dunton* as a benchmark (it seeming to me to be in the right area) and factoring in that I am only looking at Saturdays and Sunday mornings, I assess general damages at £1,000.