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Case No: HT-2021-BRS-000010

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS AT BRISTOL
TECHNOLOGY & CONSTRUCTION COURT

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 23rd August 2022

Before :

HH JUDGE RUSSEN QC

(**Sitting as a Judge of the High Court**)

- -

Between :

DIANA EFFIE ELLIOT RAY	**Claimant**
- and -	
WINDRUSH RIVERSIDE PROPERTIES LIMTED	**Defendant**

- -
- -

Gordon Wignall (instructed by **Hodge Jones & Allen LLP**) for the **Claimant**
Sara Jabbari (instructed by **Christopher Davidson Solicitors LLP**) for the **Defendant**

Hearing dates: 19th – 21st July 2002 (reading day 18th July 2022)

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Approved Judgment

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HH JUDGE RUSSEN QC

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time of its handing down is deemed to be 10.00am on Tuesday 23 August 2022

HHJ Russen QC:

1. This is my judgment following the trial of the Claim which took place over 3 days in July 2022. The claim advanced by the Claimant ("**Mrs Ray**") is based upon alleged private nuisance through emissions of noise and odour from neighbouring business premises owned by the Defendant ("**Windrush**").

BACKGROUND

2. Mrs Ray is the owner of a property in High Street, Bourton-on-the-Water, Cheltenham GL54, 2AP ("**Kevinscot**") and Windrush is the owner of an adjoining property (**"St Kevins"**). Windrush is a property holding company incorporated in Jersey. The boundaries of the two properties adjoin at the back but they are separated by a common neighbouring property (occupied by estate agents) on their High Street frontage.

3. Mrs Ray acquired ownership of Kevinscot in January 1996. It is now a 4 bedroom property which can sleep up to seven people.

4. Mrs Ray did not live at Kevinscot at any times material to these proceedings. Her home is in nearby Cold Aston and Kevinscot is part of a portfolio of property-based businesses which extends to farming, property development and rural rental properties.

5. From the early 2000's until 2015 Kevinscot had been used as The Living Green Centre to demonstrate what Mrs Ray described as a "sustainable lifestyle demonstration". It was open to day visitors who would visit its secluded walled garden and shop. The garden provided a peaceful haven for those visitors. Strict criteria were applied by Mrs Ray to the type of local and environmentally friendly items that could be sold in the shop. Her focus was upon making sustainability and 'Green' issues accessible, understandable and appealing to the wider public.

6. In 2015 Mrs Ray obtained planning permission for a change of use at Kevinscot so that it could be let as holiday premises which would be suitable for occupation by disabled persons. The house was adapted so as to provide the 4 bedrooms. She incurred expenses in marketing the property, including commissioning a website design for the holiday let.

7. Windrush acquired ownership of St Kevins in October 2006. At that time the property was occupied by two separate tenants. One of them operated a tea room and café as well as a fish and chip takeaway from the main building and another ran a newsagent from the smaller adjacent premises.

8. In 2016, Windrush's associated company, De La Haye Restaurants Limited ("**DLHR**"), took over the running of the food outlet business known as the 'Windrush Restaurant'. Windrush (through Mr Les De La Haye) then obtained planning permission and listed building consent in June 2016 for the construction of a single storey extension and other

alterations to the restaurant. In July 2017, following the departure of the second tenant and the closure of the newsagents, Windrush (again through Mr De Lay Haye) obtained on appeal permission for a change of use for a hot food takeaway in place of the newsagent. Building works at St Kevins were then undertaken to enable the part previously run as a newsagent to operate as a dedicated fish and chip takeaway with the rest of the premises being run as the enlarged Windrush Restaurant.

9. The works extended to the installation of air intake and extraction fans and flues, air conditioning units and a detached refrigeration unit at St Kevins ("**the Mechanical Plant**"). The carrying out of the works meant that Windrush Restaurant ceased to operate for a time. It re-opened for business on or about 26 March 2018. The new takeaway opened about one month later.

10. The Mechanical Plant which was then used in the operation of the restaurant and takeaway kitchens, and about which complaint is made in these proceedings, comprise the following items:

    i) two air extraction fan units, located on the roof of the restaurant kitchen;

    ii) an air intake fan unit, located on the roof of the restaurant kitchen;

    iii) two air extraction fan units, associated with the use of the fish & chip shop kitchen, and located on the South-West elevation. The units consist of stainless-steel flues;

    iv) three air conditioning units on the South-West elevation;

    v) four air conditioning units on the North-West elevation; and

    vi) an external refrigeration unit installed to the south west of the restaurant kitchen extension, attached to the boundary wall.

11. Both the restaurant and the takeaway closed for business in late March 2020 as a consequence of the coronavirus pandemic. They have not since re-opened. DLHR was put into voluntary liquidation or about 20 July 2020. Windrush had by then taken the decision to sell St Kevins. In October 2019, Windrush agreed to sell St Kevins to the pub chain Fuller, Smith & Turner PLC ("**Fullers**"). The Contract for Sale dated 15 June 2021, under which completion of the sale to Fullers is conditional upon satisfaction of certain conditions precedent, was included within the trial bundle.

12. Mrs Ray says that during the period of operation of the expanded food business, between March 2018 and April 2020, exclusive, the emissions of noise and odours from the Mechanical Plant were such as to interfere unreasonably with the use and enjoyment of Kevinscot. She says that, as a consequence, she was unable to market Kevinscot as a holiday let and therefore removed it from the letting market. However, in November 2018, Mrs Ray was able to let Kevinscot to a member of her family and her godson, Mr James Tongue, under an assured shorthold tenancy.

13. On or about 29 August 2018 the Cotswold District Council served an Abatement Notice under s.80 of the Environmental Protection Act 1990 requiring the abatement of noise,

amounting to a statutory nuisance, from the operation of the "*ventilation/extraction/ refrigeration system at the rear of [St Kevins] where there is a boundary with [Kevinscot]*" within 8 weeks of the notice. Windrush did not appeal the notice.

14. The abatement of noise from the operation of the Mechanical Plant was part of a wider issue about its installation. On 13 June 2018 the Council had refused retrospective planning and listed building consent for the Mechanical Plant. On 12 October 2018 two Enforcement Notices were accordingly served requiring its removal within 3 months of 30 November 2018. That deadline was subsequently extended to 6 months from 19 August 2019 (i.e. to 19 February 2020) by a decision of the Planning Inspectorate following an unsuccessful appeal by Windrush against those notices.

15. The Decision of the Planning Inspector (Mr Wharton) dated 19 August 2019, in addition to identifying the harm to both the listed building and the Bourton-on-the-Water Conservation Area, said this of the air conditioning units and intake and extraction fans:

> *"…I also consider that these units have detrimentally affected the living conditions of nearby residents and in particular those living at Kevinscot. Having noted the proximity of the air conditioning units to this and other nearby buildings (including the motor museum and the estate agents); having heard the extract fan during my site visit and having read the report of the acoustic consultant (commissioned by the occupant at Kevinscot) I share the Council's concerns about the effect that these works have had on the living conditions of those living or working close to and adjacent to the appeals premises."*

16. The acoustic consultant's report mentioned by Mr Wharton had in fact been obtained by Mrs Ray. It was dated 30 April 2019 and made by Mr Ian Sharps of Sharps Gayler LLP ("**the Sharps Report**").

THE PARTIES' RESPECTIVE CASES

17. As I explain below, the parties' formally pleaded positions are to be considered in the light of developments shortly before and during the trial.

18. Mrs Ray's Particulars of Claim allege that during the period identified by her evidence as that between 1 April 2018 to 23 March 2020 (which, like her, I will describe as "**the nuisance period**" whilst recognising the need for an actionable nuisance to be established by her) the Mechanical Plant:

> *"……. operated typically from 9 a.m. to 8p.m. daily during non-peak seasons and 9 a.m. to 11 p.m. daily during peak seasons. The noise nuisance was current during the whole of these periods. The noise from St Kevins dominated the noise environment at Kevinscot and the windows of the house could not be opened without significantly increasing the loss of amenity by reason of noise. The noise of the refrigeration unit and differences in its sound activities, probably from its motor going on and off, were noticeable during the night."*

19. Mrs Ray relies upon the Sharps Report and the Decision of Inspector Wharton, dated 19 August 2019.

20. In addition, Mrs Ray says the noise emissions from St Kevins extended to the sound of broken glass when bottles were being disposed of outside and the banging of the door of the refrigeration unit when it was being used by DLHR staff.

21. The nuisance alleged through the emission of odours was said to be:

> *"……. variable but could be nauseating in extent and experienced within [Kevinscot] as well as in the garden. Odours were similar to smells of frying onions, oil, chip and baking, greasy or roasting meat, or of fish. The configuration of the buildings at Kevinscot is such as to make it difficult for odours to disperse."*

22. Mrs Ray alleges (correctly) that all items of the Mechanical Plant were installed without planning permission and all items save the refrigeration unit were installed without Listed Building Consent.

23. The Particulars of Claim allege that "*during the nuisance period, emissions of noise and of odours from the [M]echanical [P]lant unreasonably interfered with the use and enjoyment of Kevinscot*."

24. Windrush admits the hours of operation of the Mechanical Plant alleged by Mr Ray, with the qualification that during peak season operations usually ceased at 10pm rather than 11pm.

25. So far as the issue of planning permission is concerned, Windrush accepts that, although planning permission was obtained before the works at St Kevins were commenced in 2017, the plant requirements for the restaurant and takeaway had not at that stage been finalised and were therefore not reflected in the planning application. An application for retrospective planning permission was subsequently made. As at the date of the Defence, dated 25 June 2021, that application was still awaiting a decision by the Council. The Defence said the issue of planning permission has no relevance to the claim in nuisance.

26. Whilst Windrush recognises the need to comply with the Council's Abatement Notice and the Decision of Council Inspector Wharton, it does not accept the Council's assessment or the conclusion that the Mechanical Plant caused an actionable nuisance. The Defence says:

> "*It is admitted that in the course of [DLHR's] operations at the Windrush Restaurant inevitably caused some noise and odour to emanate from the premises during hours of operation, it but it is denied that this was to an excessive level or such to cause any undue interference with the activities of others in the vicinity of the premises or to unreasonably interfere with the Claimant's enjoyment of her property at Kevinscot*."

27. The Defence also stated that Windrush:

> "*has no present intention of re-opening the Windrush Restaurant or take away, and confirms that in any event, it will not do so without first giving reasonable notice*

> *to the Claimant and/or before obtaining planning consent from the Council in relation to the plant machinery in question."*

28. On 6 July 2022, shortly before trial, Windrush lodged a general form of undertaking to the court ("**the Undertaking**"), promising:

> *"1. Not to manage, use or let the Property known as St Kevins, High Street, Bourton-on-the-Water, Cheltenham, GL54 2AP in such a way that it causes an unreasonable interference with the use and occupation of the owners or tenants of Kevinscot, High Street, Bourton-on-the-Water, GL54 2AP;*
>
> *2. Not to use or allow the use by any tenant or occupant of the Defendant, the mechanical plant set out in the schedule of the Particulars of Claim dated 14 May 2021."*

29. Windrush had anticipated that the sale of St Kevins to Fullers would be completed before the trial commenced. However, as explained in Ms Jabbari's skeleton argument on behalf of Windrush:

> "*In the event, although the conditions of sale were met (and the parties to the transaction are bound to complete), it became apparent that completion was unlikely to be achieved, at least by the first day of trial. To alleviate any technical, albeit highly unlikely, possibility that the plant could be used by or on behalf of D in the short period between trial and the completion of the sale of the Premises to [Fullers] [Windrush] gave [the Undertaking]."*

30. The giving of the Undertaking was aimed at meeting Mrs Ray's claim for a prohibitive injunction to restrain Windrush, for so long as it remains the owner of the property, from using St Kevins in such a way which causes and unreasonable interference with the use and occupation of Kevinscot.

31. In addition, the Particulars of Claim sought the following further relief: (1) a mandatory order for the removal of the Mechanical Plant; (2) a declaration allowing her to enter St Kevins to remove it; (3) damages for nuisance including special damages in the sum of £41,144.14 (though upward refinements to this were made in Mr Wignall's closing submissions on behalf of Mrs Ray) and continuing on a monthly basis; (4) interest; and (5) costs.

32. The claim for a mandatory injunction was pursued on the basis that, whilst Mrs Ray recognises that the alleged nuisance has in fact abated since the closure of the restaurant and takeaway, there is no reason to suppose otherwise than at some stage in the future St Kevins will resume operations as a food outlet (when there is no other use for the property given its current configuration) and at that point the nuisance will inevitably re-commence. Indeed, in his closing submissions Mr Wignall said the claim for the removal of the Mechanical Plant was "*what this case is really all about*."

33. Ms Jabbari submitted that there was no basis for the mandatory injunction given the imminent sale of St Kevins to Fullers. The Contract for Sale to Fullers contained several conditions precedent, one of which addressed the need for Fullers to obtain planning permission and listed building consent for their proposed renovations, which included changes to the Mechanical Plant. In her closing submissions, Ms Jabbari

produced the draft TR1 which showed that the transfer of Kevinscot to Fullers would be subject to the planning permission sought by Fullers.

34. As noted above, Ms Jabbari's skeleton argument had said that the sale conditions had been met. However, in her opening submissions she clarified that this was not in fact the case as Fullers' planning applications to the Council were still pending. At that stage of the trial she flagged the point that Windrush was willing to extend the Undertaking to cover the possibility that the Fullers' contract might not become unconditional and instead fall through; so that it would include also a promise by Windrush not to sell to any other party save on terms which provided for the removal of the Mechanical Plant.

35. Windrush had formulated this further limb of the Undertaking by the last day of the trial as follows:

> *"3. If the proposed sale of the Property to Fuller, Smith & Turner PLC pursuant to the conditional contract dated 15 June 2021 does not complete, the Defendant will remove the mechanical plant set out in the schedule of the Particulars of Claim dated 14 May 2021, prior to any future sale to any other prospective purchaser."*

36. Mr Wignall recognised that this was a positive development towards meeting his client's claim, though he suggested that the language should be extended to oblige Windrush to remove the Mechanical Plant before any transfer of title (if not done before "sale") and also to notify Mrs Ray if the sale to Fullers did not complete. However, Mr Wignall's position remained one of urging the court to act robustly, and to eliminate any uncertainty, by ordering Windrush to remove the Mechanical Plant forthwith. One of the points he made was that the only drawings included within the trial bundle, from which Fullers' suggested alternative to the Mechanical Plant might be identified, were some rather rudimentary ones included within one of the noise reports (by Scotch Partners) mentioned below.

37. The special damages sought by Mrs Ray are particularised in the Particulars of Claim as follows:

    i) £20,960 in lost rental for the period February 2018 to November 2018;

    ii) £8,400 in lost rent from November 2018 (being the monthly difference over a year between the value of the current letting and the use of Kevinscot as a holiday let at £400 per calendar month), continuing after the date of the Particulars of Claim at £400 per month;

    iii) £3,950 representing the loss caused by initial advertising (being £3,220 for the contract to create and operate a website by which to market the property, with the remainder for hosting of the website, registration of the URL and the subscription charge for the electronic booking calendar, advertising via Yell and locally at the visitor information centre);

    iv) £4,266.20 in business rates which Mrs Ray was required to pay from February 2018 to November 2018, prior to the occupancy of Kevinscot by her tenants; and

v) £3,567.94 in additional expenditure by Mrs Ray from February 2018 to November 2018 (being £174.24 in electricity bills, £423.44 in gas bills, £276.83 for water rates, £136.31 for a waste disposal contract, £352.62 for phone bills, £150.50 in television licensing, and £2,054 in insurance).

38. The Prayer for relief is expressed in language which does not confine the claim to damages to those special damages. In his closing submissions Mr Wignall suggested that general damages should be awarded in respect of the nuisance period. He suggested the sum of £1,000 per month for the period from April to November 2018 and at a higher rate (recognising that the tenants of Kevinscot had not made their own claim for damages) for the remainder of the period.

THE ISSUES

39. The following issues fell to be addressed at the trial:

(1) The character of the locality of Kevinscot and St Kevins.

(2) The level of noise and/or odour emissions caused the Mechanical Plant during the nuisance period.

(3) Whether and to what extent the noise and/or odour interfered with Mrs Ray's reasonable enjoyment of Kevinscot during the nuisance period.

(4) If there was such interference amounting to a nuisance, as alleged:

a. whether such interference caused the losses pleaded by Mrs Ray in the Particulars of Special Damages; and

b. whether Windrush threatens to cause further interference and/or in the circumstances generally Mrs Ray should be granted the injunctive relief sought.

40. The second issue required expert evidence (as to noise levels). That expert evidence also informs the decision on the third issue. Both of those issues fall to be addressed against the parties' significantly contrasting positions on the first issue.

41. The Particulars of Claim described the locality as follows:

> "*The properties belonging to the Claimant and to the Defendant are located in the centre of the Bourton-on-the-Water Conservation Area, Bourton-on-the-Water being a quiet and picturesque town in the Cotswolds and this being an area of Outstanding Natural Beauty. The river Windrush meanders past both properties and the village green is nearby. The nature and character of the area is one of tranquillity, albeit that it is popular with visitors and it has a number of other food outlets and shops in the immediate area. St Kevins is east of the Cotswold Motor Museum and opposite the Church Rooms ….."*. [A plan of the local area is then attached as Appendix 3.]

42. The Defence says:

> *"……the Claimant's description of the nature and character of the area as one of tranquillity is denied. The character of the locality is a matter which is more appropriately addressed in evidence; however, in broad terms, the Defendant's case is that Bourton on Water is a popular and bustling tourist destination, receiving up to 10,000 visitors each day, with all of the noise and activity that brings. Much of that activity is centred around the High Street, on which the parties' respective properties are situated; the Claimant's description of the locality as a place of tranquillity is therefore misplaced. It admitted that the plan at Appendix 3 indicates some local attractions and businesses, though it is not admitted that this represents a complete representation of the businesses in the locality. The Defendant will, in the course of these proceedings, furnish evidence as to the nature and character of the locality."*

43. The above issues also fall to be addressed in the light of an open offer which Windrush made on the same day it gave the Undertaking. By a letter dated 6 July 2022, Christopher Davidson Solicitors LLP referred to the Undertaking (as then framed) in support of their observation that, whilst there was no risk in practice of Windrush resuming activity at St Kevins and the application for injunctive relief was in any event unnecessary, the giving of the Undertaking meant that there was no need for any order to be made on the application for an injunction. The letter went on to say that Windrush did not accept liability but as a gesture of goodwill offered Mrs Ray £20,000 in respect of her damages claim. That sum did not include any element of costs on the basis that Mrs Ray had the benefit of legal expenses insurance in respect of the claim.

44. Windrush pointed to the offer, alongside the Undertaking and earlier statements by which it had consistently maintained that it had no intention of re-opening the restaurant or takeaway business and that the quantum of the claim was exaggerated, in saying that Mrs Ray had unreasonably pursued matters to trial.

45. Mrs Ray did not accept the offer. By an open letter dated 8 July 2022, Hodge Jones & Allen LLP made a counter-offer that Windrush should pay £35,000 in respect of the damages claim, agreed to remove the Mechanical Plant (and pay for its removal) and agree to pay Mrs Ray's costs to be assessed on the standard basis if not agreed (with a payment on account of £50,000). The letter began by referring to "*the mischief retaining the mechanical plant in situ*", both from the perspective of Windrush being in breach of the Council's Enforcement Notices and the risk that a purchaser of St Kevins might resume use of the Mechanical Plant.

46. The uncompromised dispute over liability and (if liability is established) Mrs Ray's entitlement to any relief beyond that volunteered by Windrush therefore meant all of the four issues identified above were argued at trial and are to be decided by me.

THE EVIDENCE

The Factual Evidence

47. Six witnesses of fact gave evidence at the trial and their evidence is summarised below.

48. The following gave evidence on behalf of Mrs Ray: (1) Mr Charles Tongue (Mrs Ray's godson, son of her cousin and her tenant at Kevinscot since early November 2018); (2) Mrs Ann Chapman (a resident of Bourton-on-the-Water and someone who previously worked for Mrs Ray); (3) Mr Gordon Jackson (Mrs Ray's husband); and (4) Mrs Ray herself.

49. The witnesses called on behalf of Windrush were Mr Les De La Haye (a director of Windrush) and Mr Octavian Cote (the Managing Director of DLHR prior to the company going into liquidation).

50. In addition, I was invited to read the witness statements of Mr Lloyd De La Haye (a director of Windrush and a director of DLHR until its liquidation and son of Les) and Mr David Jones (the Managing Director of Evans Jones planning consultants, who were instructed by DLHR in respect of planning matters concerning St Kevins) on the basis that their statements contained no point of contention on which Mr Wignall wished to cross-examine them, or, in the case of Lloyd De La Haye, only one point of no real significance to the outcome of the claim.

51. The position of Mr Mark Campbell (an employee of Evans Jones) was a little different. It had been intended that he would be called on behalf of Windrush. However, he was not able to attend on the third day of trial which, through slippage in the trial timetable, was the only day left for him to do so. Mr Wignall fairly volunteered that most of the points he had intended to put to Mr Campbell in cross-examination were ones that could be made by him by reference to the documents.

52. The statements of Lloyd De La Haye, Mr Jones and Mr Campbell essentially gave an account of dealings with the Council over planning issues and steps taken to address noise issues and planning issues following the Council's service of the Abatement Notice and the Enforcement Notices in 2018.

53. Lloyd De La Haye had also attended a meeting in the garden of Kevinscot in May 2018 mentioned by some of the other witnesses. He said that the noise from the Mechanical Plant did not appear to him to be louder than what he thought it should be and that the odours were not beyond what was to be expected.

54. Mr Jones explained how the Council's Environmental Health Officers became involved in the course of the application for retrospective planning and listed building consent. He said that the issue of noise played a role within the planning process but was not raised "*front and centre*" and that it was considered to be a resolvable issue. He had no recollection of odours being cited as an issue. It was his firm Evans Jones who engaged the services of the acoustic experts Noise Consultants Ltd ("**NC**") whose George Gibbs liaised with the Council over the Abatement Notice. Following a meeting with Council officers on 7 March 2019, NC agreed to undertake a sound survey on 17 April 2019. NC prepared a Report in June 2019 based on that survey. Mr Campbell's evidence was that it was clear to him that the Council had accepted NC's findings and that he and Mr Gibbs continued to work closely with the Council into 2020 to find a solution on the noise issue. As it was part of the wider planning and listed building issue over the Mechanical Plant, Mr Campbell said "*there was no indication from the Local Authority that they would take enforcement action on the abatement notice*."

55. I found all 6 witnesses called to give evidence to be honest witnesses who gave their evidence in a clear and straightforward manner. I should note that, save in relation perceptions of the locality and the degree of tranquillity it offers, none of the witnesses were cross-examined on the basis that he or she was guilty of understatement or exaggeration of points with a view to either reinforcing or deflecting the complaint of nuisance. Any finding by me to the contrary would therefore be on shaky ground.

56. I should also make some further preliminary observations.

57. Three of the witness statements served on behalf of Windrush made observations about Mrs Ray's opposition to DLHR's business which included her use of placards and stickers urging people not to use the restaurant. As one of the witnesses, Mr Cote, put it: "*I felt Ms Ray did not want the business to be there are was trying to disturb the functioning of the business*." In his testimony, Mr Cote referred to her leaving potatoes on the tables outside the takeaway with little flags inserted suggesting there were public health issues associated with the business and that she had also confronted customers with her views and "*not in a polite way*". By her second witness statement Mrs Ray rejected the suggestion that she had a personal dispute with Mr Les De La Haye or held a fundamental objection to the restaurant and takeaway business, though she did not take issue with her use of discouraging notices.

58. Save in relation to the suggestion that Mrs Ray had objected to the 2016 planning application for the change of use to support DLHR's business, which Mrs Ray denied, Ms Jabbari did not cross-examine her upon her suggested wider opposition to it. In my view that was a sensible decision by counsel because the issue is collateral to the question of whether or not, during the nuisance period, the business created an actionable nuisance and (in circumstances where the business was curtailed by Covid-19 rather than successful propaganda by Mrs Ray) also to the issue of relief if a nuisance is established.

59. I take the same view of the suggestion which Mr Wignall put to Les De La Haye in cross-examination, the thrust of which was that Windrush and DLHR had pressed on with the operation of the business without any real concern over the planning consequences and, once the time for compliance with the Council's Enforcement Notices had expired, without regard for the criminal consequences of the Mechanical Plant remaining in place. As I mention below in my analysis of the case, whether or not the Mechanical Plant was installed and has since remained in situ in breach of planning law is a different question from whether or not (when operational) it created an actionable nuisance.

60. In fact, Mr De La Haye gave a clear and convincing explanation as to how, following the unsuccessful appeal against the Enforcement Notices, Windrush was working with Evans Jones to find a satisfactory solution to the outstanding planning issues. His explanation was fully supported by the contemporaneous correspondence between Mr Jones and Mr Campbell, of Evans Jones, and Windrush/DLHR which began with Mr Jones reporting the disappointing result of the appeal by an email dated 28 August 2018. For example, an email dated 17 October 2019 from Mr Campbell to Les De La Haye and Mr Cote referred to Evans Jones working with the architects in "*progressing a scheme to cover all the matters coming out of the enforcement appeal*". It raised certain questions to assist them in that task, to which Mr De La Haye responded the same day in an entirely constructive way.

61. My observation that none of the witnesses gave anything other than a straightforward account of *their own perception* of the impact of the operation of the Mechanical Plant is subject to this next one. That is that the evidence of Mrs Ray, Mr Jackson and Mrs Chapman revealed to me that they each judged the impact of DLHR's operations with the passion of individuals who had put a significant amount of their time into and/or derived great enjoyment from the creation of a green and tranquil space at The Living Green Centre. This was particularly true of Mr Jackson who had created the garden, including its so-called "Spirit Corner". It was clear to me that their perceptions of the noise and smells emanating from St Kevins reflected a sensitiveness which was based upon their own and others' past enjoyment of the garden at Kevinscot, as opposed to their own use and occupation of the property as a whole. None of them lived at Kevinscot.

Claimant's Witnesses

Charles Tongue

62. Mr Tongue is a banker, working for the London office of a leading global investment bank. The nature of his work means that he travels a lot (usually in the working week) and is such that he does not need to be in a particular location. He explained that his wife also worked in London. Their main home is there. They had two children when they took the tenancy of Kevinscot and have since had a third child.

63. Mr Tongue and his wife entered into the assured shorthold tenancy with Mrs Ray on 2 November 2018 ("**the AST**"). The term was for an initial fixed period of 6 months which would continue on a monthly basis unless they gave one month's notice or Mrs Ray gave two months' notice to terminate the tenancy.

64. The rent under the AST is £1,053.40 per month (£1,000 plus the amount of monthly telephone and broadband charges which Mrs Ray agreed to bear under her existing contract). Mr Tongue explained his understanding that this was a favourable rate. He said that Mrs Ray had forewarned him about the noise from St Kevins and that he was aware that she had complained at length about it. He said this was a "con" against taking the AST but the "pros" were the favourable rent and a landlady he knew. He said that if Mrs Ray increased the rent to what he understood to be a market rent of, say, £1400 per month then that would probably give him cause to think about renting a second home elsewhere. However, he recognised his own degree of inertia in relation to such matters.

65. He also explained how the family spent most weekends at Kevinscot, as well as several weeks in the winter, several weeks in the summer and a week in the Spring. He said that both he and his wife were able to work from the property.

66. Mr Tongue kept a log of the smells and nuisances emanating from St Kevins over 9 days in February and March 2019 which he submitted on behalf of himself and his wife to the Council's Environmental and Regulatory Services Department. He said that Mrs Ray had made him aware of the need to keep a record and it was possible she had asked him to compile the log. He explained that he was not very diligent in keeping the log

and that he would note matters as they occurred to him. He made entries in the log at the end of the day having reflected upon that day's experience of noise and/or smell.

67. An example of the entries made by Mr Tongue is the one for 16 February 2019 between the hours of 11am and 6pm: "*Noise from extractor fans and intermittent smell. Crashing of bottles into bins. Too noisy to use garden consistently*". Other entries recorded the smell of fat in the front as well as rear garden of Kevinscot.

68. The log concluded with this statement:

> "*Note, whilst one can work/live around the nuisance it is noticeable and I would certainly think twice about buying or renting this house if I was aware of it beforehand."*

69. As I have noted, Mr Tongue said in evidence that he had been aware of Mrs Ray's concerns about the noise from St Kevins before entering into the AST.

70. Mr Tongue has and does spend a decent amount of time in the garden at Kevinscot, including during the winter to give the children some exercise. His evidence was that the fans at St Kevins created a relentless droning noise which disturbed the enjoyment of the garden to the extent it was often not a pleasant place to be. He said the fans operated late into the evening and often beyond 11pm. Bottles were disposed of by DLHR staff at anti-social hour and disturbed him and his family. He said the refrigeration unit could be heard kicking in and out all night. The only noticeable quiet periods were in the morning before the restaurant and takeaway began operating.

71. At one point his eldest child (who was nearly 3 at the time) commented on the smell coming from St Kevins, which Mr Tongue described as quite nauseating at times. He said the smell of cooking fat could enter the house if the windows were open. He accepted that the fans were not really audible from inside Kevinscot with the windows closed, though he said any change in their operating levels might be heard. The disposal of empty bottles could sometimes still be heard from inside.

72. Mr Tongue accepted that the noise and smells from St Kevins had not caused him and his wife to terminate the AST in May 2019, or subsequently, as the terms of the AST permitted. Recognising the degree of inertia on his part, he said (consistently with the log entry) that they could live with a level of ongoing nuisance and discomfort.

73. Mr Tongue also said the Mechanical Plant is unsightly and detracts from a beautiful setting. His witness statement concluded by saying:

> *"Nothing seems to have been done to take care of St Kevins remove or disable the equipment and it sits there looming over us and there is always the seed of doubt and concern about the impact if it will be fired up again."*

74. In testimony, he expressed doubt about Mrs Ray being able to easily rent out the property to any new tenant if the same operations as DLHR's previous ones were to resume.

Gordon Jackson

75. Mr Jackson (Mrs Ray's husband) is a retired professional gardener. He was responsible for the design, planting and maintenance of the The Living Green Centre at Kevinscot from the Spring of the year 2000 onwards. He invoiced Mrs Ray for some of that work. He explained how, once the garden was mature, it would attract between 50 to 80 visitors a day during the holiday season. He described it as a place of tranquillity, even though it was less than 50 yards from the High Street, because of the 8 foot high wall on three sides and tall lime trees to the West. It attracted numerous birds and insects as well as some reptiles and amphibians.

76. Mr Jackson was also responsible for making some adjustments to the garden at Kevinscot following the permission for change of use in 2015. He said the adjustments required to make it an "eco-retreat" suitable for disabled people were not extensive as surfaces had been levelled by his earlier work. The adaptations included replacing a slate path with rubber matting.

77. Although he could not be certain, Mr Jackson thought he probably had signed a local petition against Windrush being granted the planning permission for a change of use (from the newsagent) which it later obtained in June 2016. Once that permission was granted, he installed a trellis and grapevine above the adjoining wall to provide some protection against the noise of building works at St Kevins.

78. Mr Jackson said that the noise generated by DLHR's expanded business was "*mind disturbing, almost torture*." He also referred to the garden being exposed to the full blast of the kitchen extractors and to having to listen to the chat of the staff, during their breaks, and inhale their cigarette smoke. In his witness statement he said:

> "*The noise alone was hard for me to bear for too long, but even worse the smell of fried foods filled the air with greasy odours that made me feel sick (I stopped eating meat nearly 50 years ago). I found it almost impossible to work for very long. Grease began to drip and exude from the vents of the obviously cheap and inadequate fans – bearings were adding to the noises."*

79. Mr Jackson explained how he had been present when in May 2018 Mrs Ray invited Les and Lloyd De La Haye and Mr Cote to the garden at Kevinscot. He said it was hard to hold a conversation due to the noise and that cooking odours held in the air. Mr Jackson felt at the time that the visitors were engaging with the problems of smell and noise and expected some effort to be made to improve the situation. However, nothing had since changed.

80. Mr Jackson described the situation as:

> "*Nuisances full on until Covid struck and then on an uncertain limbo. We can't plan ahead with certainty, we can't go forwards. The toll of being subject to cruel and intentional harm inflicted on us and our beautiful project and dreams."*

81. Mr Jackson said that, although not quite "business as usual", tourist visits to Bourton-on-the-Water had picked up since the Covid lockdown and that the village was busy during weekends and holidays

.

Anne Chapman

82. Mrs Chapman has lived in Bourton-on-the-Water for 29 years. Until her retirement she worked for Mrs Ray, a longstanding friend, at The Living Green Centre for 10 years between 2005 and 2015. She worked 5 days a week between 9am and 5pm but there was some flexibility in those hours. She had been involved in the changes to Kevinscot to make it suitable for holiday lets. She described how the former shop had been converted into a beautiful residential lounge.

83. Even though the change of use was not then complete, Mrs Chapman had rented Kevinscot for a family gathering over the Christmas of 2016. She said the feedback from this "dummy run" was positive and her family members had all enjoyed their stay. After the Easter of 2018, Mrs Ray invited her to experience the difference which DLHR's expanded operations had brought about. She said:

> "*I vividly recall feeling horrified by the level of noise and odours that were impacting that space (the "Spirit Corner") and could not bear to stay in the garden for more than about fifteen minutes with the greasy smell lingering in my nose. Retreating into the house, opening the windows for ventilation couldn't be done without the smell permeating that area too."*

84. In addition to the complaint of nuisance, Mrs Chapman talked about certain aspects of the 2017 development of St Kevins "*damaging one of the village's listed buildings*" and combining to "*mar what was once a pretty corner of the village*."

85. Mrs Chapman explained how Bourton-on-the-Water has been getting busier since the Covid lockdown, saying she tried to avoid the centre of the village during the daytime if on a weekend or school holiday. She said that many visitors arrive by coach, with the coach park being out of the centre and about one-third of a mile away from Kevinscot. She said tourist picnicking in the village centre is quite common.

Mrs Ray

86. Mrs Ray made two witness statements. The second was for the purpose of responding to those served by Windrush.

87. Mrs Ray is clearly passionate about the need preserve natural resources in the interests of protecting the environment.

88. Mrs Ray described herself as a natural resources specialist. Her alternative name for Kevinscot is "Living Green". Having acquired the property, she set about creating The Living Green Centre based upon what she described as a old cottage set back from the High Street with a secluded, almost secret walled garden. She explained that by 2015 her plans for the holiday letting of Kevinscot reflected 20 years of thought about how, in the interests of combatting climate change, she wished to encourage visitors to spend longer at the property rather than travelling there for short visits.

89. The idea behind the 2015 permission for change of use was to provide an attractive place for families and friends to stay and have the time for peace and reflection which

was not available to those on something of a whistle-stop tour of Bourton-on-the-Water, when not all of the party might want to spend too much time visiting her garden. Particular emphasis was placed upon making Kevinscot attractive and suitable for those with mental or physical disability.

90. After the grant of permission Mrs Ray set about converting Kevinscot so as to provide overnight accommodation for up to 7 people. She explained in her evidence how this was again done with the interests of the sustainability of the environment in mind. The focus was upon the retrofitting of an existing building in an environmentally friendly manner and with a view to nurturing personal health. For example, the kitchen and upstairs bathroom were fitted out using salvaged or recycled materials rather than newly manufactured items and with the interests of energy and water conservation very much in mind. If it was necessary to buy new fittings then she went for natural materials. Mrs Ray's overall aim was to make Kevinscot "*more therapeutic than a modern house*." The garden at Kevinscot had been slightly modified to accommodate disabled visitors, as explained by her husband Mr Jackson.

91. Mrs Ray explained that, by April 2018 and the commencement of DLHR's operation of the expanded food business at St Kevins, she was ready to launch the holiday let business at Kevinscot.

92. So far as Windrush's development of St Kevins in 2017 was concerned, Mrs Ray said she had not protested against the proposed development (as some residents of Bourton-on-the-Water had) or submitted an objection to the 2016 planning application. She said that she had first raised her concerns about DLHR's business in 2018 when, over the Easter weekend, there was activity and noise at St Kevins. It was that which caused her to access the planning portal of Cotswold District Council and consider the planning position at St Kevins in some detail.

93. Once the Mechanical Plant was in operation Mrs Ray logged the effect of it and submitted to the Council logs and notes for April and May 2018 based upon her and Mr Jackson's visits to Kevinscot. This was around the time she was ready to launch the holiday let business at Kevinscot. The logs contained her detailed comments upon the relentless noise of the fans and the strong cooking smells experienced at the property. Mrs Ray also submitted a nuisance log to the Council for the period between 22 January and 26 February 2019, which was after she had let the property to Mr Tongue.

94. The first set of logs from April 2018 noted that the chip shop was open from noon until 10pm but that the extractor fans continued operating after that time, for example until 10:50pm on 19 April 2018. Mr Ray noted that cooking in the restaurant kitchen was starting at 9am "*now the season is busier*". Mr Ray's nuisance log for early 2019 reflected the Council's request for further observations and her own and Mr Jackson's much shorter visits to Kevinscot. The entries generally focused upon the significant impact of the noise and smell upon the enjoyment of the garden (the first sometimes without the other when the extractor fans were operating even when the kitchen was not being used), though some entries noted the hum from the Mechanical Plant could be heard inside the house.

95. In her letter dated 8 March 2019 to the Council's Environment and Regulatory Services Department, enclosing the later logs, Mrs Ray referred to the Mechanical Plant having been installed without planning permission and said:

> "*The noises from De La Haye's Restaurants activities are persistent and relentless seven days a week. The extractor noises begin about 30 to 40 minutes before opening and continue about 30 to 40 minutes after closing. The external refrigeration unit compressor comes on and off day and night. Even on Christmas day these nuisances occur. A low whine buzz can be heard in the house too. Late at night residents have been disturbed by pouring of empty bottles into the waste bins near the kitchens- this does not indicate any sensitivity or concern for neighbours.*
>
> *The impact of the noises, is that our garden can not be a place of relaxation, there is no peace. It is hard to hold a normal level conversation or enjoy bird song. The noises are irritating and impact on concentration and well being.*
>
> *Our garden was designed as a haven for the environment and was like an oasis for all the years happily alongside the previous food businesses.*
>
> *Depending on weather conditions the cooking odours are strong across the garden and nearly always are noticeable at our eastern boundary. The heavy smells of greasy fats, chips and meats and fish are horrible. It is not possible to hang washing outside or have windows open for the house.*
>
> *As a sustainably designed building we had designed for climate change by having natural air conditioning- being able to open windows is essential. The High Street side of our property can also often have very strong smells of frying and grease. The levels of odours coming our way seem to vary with wind conditions- but always tend to impact us as the extraction is too low level and does not take odours up into the moving air. Other businesses in the village use high towers.*
>
> *The mode of operation is not suited to a rural village setting- it has completely changed this area of the village and smells can be experienced over 300 metres away. Even on Christmas day these nuisances were impacting the quiet enjoyment of our residential property.*"

96. The letter went on to express Mrs Ray's concerns that the problems would increase as DLHR's business became busier during the year on summer days and weekends.

97. Mrs Ray was not cross-examined upon her nuisance logs and the letter appears to be a fair summary of the chronicle in the logs, though it must be remembered that after November 2018 the enjoyment of the garden was to be exclusively that of the tenants under the AST and that her later log was based upon shorter visits to Kevinscot.

98. Mrs Ray also referred to the meeting in the garden of Kevinscot in one evening in May 2018 with her husband, Les De Lay Haye, Lloyd De La Haye and Mr Cote. She said it was a beautiful evening but it was hard to hold a conversation due to the noise and that the cooking smells were being held in the air as it was a still evening. Her evidence was that the issue of noise and smell was obvious to those present but that Les De La Haye seemed rather dismissive of her situation, suggesting that the garden wall could be raised and a screen of trees planted. She said that he mentioned having received poor advice and putting some blame of the professional involved but said he was

obviously proud of the project and that her impression was that it would be hard for him to swallow the idea of spending money on a solution.

99. In her testimony, Mrs Ray explained how she had been "*in a state of limbo*" when she entered into the AST in November 2018. This was because she was in an uncertain position when the letting out Kevinscot for short holidays, on the basis it provided a tranquil retreat, risked her getting bad reviews on Tripadvisor or the like. A visit to Kevinscot by a representative of the holiday letting agency Sykes Holiday Cottages, on 21 May 2018, supported these concerns as she says the representative was concerned about the effect of the noise and odours on guests staying there. Mrs Ray described the position created by DLHR's operations as wholly unacceptable. She referred to the "*strong contrast between the Living Green project and the De La Haye concept*."

100. The marketing related costs which Mrs Ray incurred in connection with the proposed holiday letting of Kevinscot are reflected in her claim to special damages summarised in paragraph 37 above and addressed in greater detail below.

101. Mrs Ray accepted that her claim for the loss of rental income prior to November 2018 (with a start date of February 2018) fell to be adjusted downwards to match the start of the nuisance period on 1 April 2018. She also appeared to accept that any recoverable damages should be fixed by reference to a loss of profits rather than a loss of gross rental income.

Defendant's Witnesses

Mr Les De La Haye

102. Mr Les De La Haye is a successful businessman living in Jersey. He explained that he has had a holiday home in Bourton-on-the-Water for over 15 years and that he knew the place very well having visited it for around 40 years. He said the village has never been tranquil and that it is busy from 10am to 6pm or 7pm every day with up to 30 coach loads of tourists, as well as those travelling by their own means, visiting during holiday periods. Some tourists would arrive at around 9am. In addition to the tourists there are early morning deliveries to the numerous cafés, restaurants and other business meaning that "*the bustle starts at 6am*". He said it is "*common knowledge that the village gets too busy and that it is now a tourist village which attracts people and noise.*" He explained that his home was next to the busiest pub, the Kingsbridge Inn, which he considered to have the noisiest of the numerous extraction fans in the village.

103. Mr De La Haye also explained in his witness statement how he had engaged the services of a specialist interior designer to develop the kitchen at St Kevins who had worked closely with architects engaged on the redevelopment. His aim was to buy the best equipment as he wanted to keep the operation of the kitchen as clean and quiet as possible.

104. He explained how the two upright air extraction flues for the chip shop had replaced an older and much bigger and noisier extractor. The new ones had modern filters fitted and were needed for the operation of the takeaway. However, Mr De La Haye explained that Windrush had been let down by the builder who had installed the two air

extraction units and one air intake unit on the restaurant kitchen roof when the plans had provided only for only one extract duct. It seems that the kitchen designers had concluded that there was insufficient space for the internal ductwork necessary for the efficient operation of a single extraction unit. Mr De La Haye regretted that at the time he had been very much distracted by an issue of ill-health within the family which, he having explained it, I accept he was "*very much up to his eyes with*". He rejected the general suggestion that his attitude was one of proceeding with the redevelopment regardless of the planning consequences and referred to the engagement of Evans Jones and his track record of building a block of flats in nearby Moreton-in-Marsh without local complaint as indications of his desire to do things properly.

105. Mr De La Haye agreed to go to the garden of Kevinscot in May 2018 at the invitation of Mrs Ray to listen to her concerns. He said that the noise from the Mechanical Plant did not seem excessive and no different to other noise generated by businesses on the High Street.

106. I have already explained that I found Mr De La Haye' evidence reliable on his account of how, following the unsuccessful appeal against the Enforcement Notices, Windrush and Evans Jones were working constructively with the Council to find a satisfactory solution to the outstanding planning issues over the Mechanical Plant.

Mr Cote

107. Mr Cote confirmed that he began working at the Windrush Restaurant on 5 February 2018. He had applied to be Head Chef but soon after he joined it became apparent that the General Manager already in place was not qualified to take on the challenges of running the expanded business. Mr Cote therefore officially took over that role on 10 April 2018. He later became Managing Director of DLHR in December 2018 and remained in that position until 18 March 2020.

108. Mr Cote had 20 years' experience in the hospitality sector when he joined DLHR. He explained that, from the time he joined the business, he was responsible for HR, staff training, food supply and bill-paying aspects of DLHR's business. He said that the largest number of staff at any one point was 65, thought he average was around 55 and fewer in winter. Between them the restaurant and takeaway had around 12 chefs during high season.

109. Mr Cote's evidence, which I accept, was that from the start of the expanded business DLHR wanted to do the right thing by its neighbours.

110. He was present at the meeting with Mrs Ray and Mr Jackson, also attended by Les and Lloyd De La Haye, in the garden of Kevinscot in May 2018. His evidence was that the noise from the fans on that occasion was barely noticeable and he could not smell any odours during his visit.

111. Mr Cote said that in Bourton-on-the-Water "*everyone knew everyone*" and that, acting with Lloyd and Les De La Haye, he was anxious to accommodate neighbours' concerns. This included operating the intake and extraction units at 40% power (his evidence was that it was at level 4 on dial going up to 12 so that it may have been less than 40%)

following the survey undertaken by NC in April 2019, in order to reduce the level of noise generated by them. He had been involved in the quite complex testing undertaking by NC which involved experimenting with the settings more generally and took some time.

112. He said that 40% output was the lowest level of power for efficient operation of the air extraction unit. Mr Cote said he reduced the operating hours of the extraction units by postponing their start from 7am to 8am and bringing forward their shutting down from 11pm to 10pm.. Mr Cote regarded these as temporary measures, made in the light of the NC findings, which were taken in the context of the more complex issues raised by the need for planning and listed building consent. At the time DLHR's business ceased the proposal of encasing the roof intake and extraction units with a chimney (one of NC's recommended mitigating measures) was under discussion. He also arranged for the refrigeration unit, which was the only item of the Mechanical Plant to make a noise during night hours, to be moved away from the boundary wall. The air extraction filters were expensive, good quality and changed regularly. The extraction and intake units were well-serviced.

113. Mr Cote had taken care to establish procedures to avoid the staff making noise at anti-social hours. This included preventing empty bottle disposal between 6pm and 8am. He said that he was there throughout opening hours and, although his office was upstairs, there was CCTV to check that systems were being observed. He accepted that the system might sometimes have failed.

114. Mr Cote was evidently a conscientious restaurant manager as demonstrated by his involvement in the decision to bring in NC to investigate the noise issue and to act upon their recommendations. It was clear that he felt Mrs Ray objected to the existence of the restaurant and wanted it gone.

Expert Evidence

115. At the Costs and Case Management Conference on 8 February 2022 permission was given for the parties to rely upon expert evidence upon acoustics and noise levels and to call their expert as a witness.

116. Mrs Ray's expert was Mr Clive Bentley, an acoustic consultant and partner in Sharps Acoustics LLP, whose Report is dated 30 May 2022. Mr Bentley is a partner of Mr Sharps who made the Sharps Report. Mr Bentley said he had read the Sharps Report and discussed the matter with Mr Sharps. His own Report confirmed his view that the findings and conclusions in the Sharps Report were valid ones. This included the conclusion that, when in operation, the Mechanical Plant was "*giving rise to a significant and demonstrable nuisance at all times when the plant was operational*." Mr Bentley agreed that the assessment work undertaken for the Sharps Report "*clearly indicates that the noise from the plant would be likely to be considered to be a statutory nuisance and that there would have been a significant adverse effect from noise from the source at the time …….*"

117. The Sharps Report approached the issue of noise generation from the Mechanical Plant by reference to certain observations or standards within local and national guidance in

the context of planning matters. These were the Cotswold District Local Plan adopted in August 2018 ("**Local Plan**"), the National Planning Policy Framework dated March 2010 ("**NPPF**") together with the National Planning Practice Guidance updated to July 2018; the Noise Policy Statement for England ("**NPSE**"); and the World Health Organisation ("**WHO**") Guidelines on the assessment of environmental noise. The report also referenced British Standard 4142:2014 ("**BS4142**") in relation to the rating and assessment of noise from installations such as the Mechanical Plant.

118. Mr Sharps said he took the measurements set out in the Sharps Report from the garden of Kevinscot over the period the evening of Friday 29 March 2019 and the morning of Monday 1st April 2019. The precise location of his measuring equipment was not apparent from the copy of the report in the trial bundle, though during his testimony Mr Bentley identified the point as being close to the rear boundary wall with St Kevins. The measurements were said to be in accordance with BS4142, which is directed to assessing the impact of sound generated by equipment (or manufacturing or industrial processes) against the background sound level. The former is described in terms of a "rating level" which is determined by first identifying the "specific sound level" (i.e. the level of a steady sound normalised over a period of one hour and denoted by the index symbol 'LAeqT', where 'T' denotes the duration of the period) which is then corrected by given decibel factors for any impulsiveness, tonality, intermittency or other character that may attract attention. The latter, the background sound level, is the level exceeded for 90% (i.e. almost) all of the time and is denoted by the index symbol LA90. Measurements of the background sound level were taken before and after the Mechanical Plant was operational (i.e. in the morning and late evening).

119. Section 4 of the Sharps Report set out the findings of the BS4142 assessment of the Mechanical Plant as follows:

BS4142 assessment

Results	**Receptor**	**BS 4142 Clause**	**Commentary**
Background Sound Level: daytime	37dB $L_{A90,60mins}$	8.1 8.1.3	This is the typical L_{A90} value either side of mechanical plant ON (daytime hours).
Specific Sound Level	54 dB $L_{aeq90,60mins}$		This is the measured sound level established site surveys.
Acoustic feature correction	+3 dB	9.2	Meaning the nature of the mechanical noise is readily distinctive relative to the

			existing noise climate. The noise is not intermittent or tonal.
Rating Level	57 dB	9.2	This is the specific sound level, with any acoustic feature corrections added.
Excess of Rating Level over Background Sound Level	57-37=20 dB	11	A difference of around +10 dB or more is likely to be an indication of a significant adverse impact. Typically, the greater the difference, the greater the magnitude
Context		In addition to being defined as "significant adverse impact" by BS4142, the sound levels from the new mechanical plant during the day is above the World Health Organisation criteria outside (and consequently inside) dwellings with windows open.	
Impact		Significant Adverse (and above)	
Uncertainty		None	

120. Only the WHO Guidelines, among the other published policy and guidelines identified in the Sharps Report, set out numerical values against which the epithetical language of noise used in the other documents (such as the "*unacceptable risk to public health*", "*significant adverse impacts on health and quality of life*", the impacts of "a*nnoyance*" and "*sleep disturbance*" and "*noticeable and disruptive*") might be assessed. The NPSE uses the concepts of the "*no observed effect level*" (NOEL); the "*lowest observed adverse effect level*" (LOAEL) and a "*significant observed adverse effect level*" (SOAEL).

121. The Sharps Report addressed the WHO Guidelines as follows:

> *"2.22 This document contains the most comprehensive and up to date guidance on the assessment of environmental noise.*
>
> *2.23 The WHO Guidelines are particularly applicable in relation to the NPPF, NPSE and PPG-N advice since they consider impact in terms of health effects (health being defined in its widest sense discussed above – including annoyance during the day (defined as 0700 to 2300 hours) and sleep disturbance at night (defined as 2300 to 0700 hours).*

2.24 The WHO Guidelines contain a matrix of "guideline values" for effects from noise within different environments. These guideline values are set at the lowest level that produces an adverse effect, that is, the "critical health effect". As such the values suggested in the Guidelines are thresholds below which effects such as annoyance can be assumed to be negligible. As such the WHO guideline values are equivalent to the NPSE LOAEL.

2.25 Unfortunately, the WHO Guidelines do not provide advice as to what constitutes a "significant" effect; it is necessary to consider other guidance in this respect.

2.26 The guideline values are set out in a table in the Executive Summary of the document. The WHO guideline values for moderate and serious annoyance during the daytime and evening are Laeq16hrs = 50 and 55 dB, respectively.

2.27 The WHO guideline values are I levels, that is, they are applicable at the external I of residential properties."

122. The assessment in the Sharps Report of the impact of the noise generated by the Mechanical Plant as "*Significant Adverse (and above)*" reflected the WHO Guidelines expressed in the language of the NPSE.

123. Windrush did not serve any expert evidence as permitted by the Order of February 2022. Instead, it referred to noise measurements recorded in the Report by NC dated June 2019 following their site survey on 17 April 2019 and (in relation to background noise only as the activities of DLHR had by then ceased) the second revision of a Noise Impact Assessment by Scotch Partners ("**SP**") dated 12 March 2021.

124. The BS4142 assessment undertaken by NC was reflected in Table 4 of their Report as follows:

Description	**Assessment Levels**
Ambient Sound Level, dB $L_{aeq,T}$	48.3
Residual Sound Level, dB $L_{aeq,T}$	44.8
Specific Sound Level dB $L_{aeq,2min}$	45.7
Tonality, dB	0.0
Impulsivity, dB	0.0

Other character corrections, dB	0.0
Rating Level, dB $L_{Ar,Tr}$	45.7
Background sound level, dB L_{A90}	40.0
Rating Level – Background Sound Level	+5.7
BS4142: 2014 Outcome	Indication of adverse impact

125. In light of their assessment of the impact of the Mechanical Plant, NC said:

> *"The assessment of the sound levels measured at the complainants property, using BS 4142:2014 advocated assessment methodology yields an indication of a likely adverse impact, and therefore mitigation requirements should be considered."*

126. Section 6 of the NC Report identified the mitigation requirements which included the use of quieter fan units; the construction of a chimney stack around the inlet and outlets; the construction of additional duct work around the inlet and outlets; and a redesign of the roof and fan units.

127. The SP Report referred to recorded noise measurements taken between 12 January 2020 and 19 January 2020. The reference to 2020, rather than 2021, appeared to be a mistake as the text of the report referred to noise levels being affected by the "*ongoing Coronavirus pandemic*". It observed that ambient and maximum noise levels could be expected to be higher when not influenced by the pandemic-based restrictions upon normal life.

128. The SP Report, based upon measurements taken in 15 minute samples, noted that *"[t]he lowest background noise measured during the daytime and night-time periods was 38 dB L_{A90}."* It said this fairly steady lower value was the result of the noise of flower water from the nearby River Windrush.

129. Mr Bentley gave evidence about the Sharps Report, the NC Report and the SP Report, as well as some of the provisions of BS4142.

130. Mr Bentley demonstrated his competence in noise related issues and his expressions of opinion were clear and generally well-reasoned, though at times he did show a tendency to promote the Sharps Report despite certain weaknesses within it. One obvious shortcoming in Mr Bentley's evidence was that he was not the author of the Sharps Report, had not been responsible for taking the measurements recorded within it, and had not visited the site either when the Mechanical Plant was operating or subsequently.

131. Ms Jabbari was also able to highlight that in certain respects Mr Sharps had not complied with section 12 of BS4142 and the information to be contained ("*as appropriate*") in any report upon the assessment of sound from commercial premises. These include setting out a description of the sources of sound (main ones and specific ones), of the measuring equipment used, details of its location and justification for that location, and of the calibration of the measuring equipment during operational tests. Mr Bentley accepted some of these criticisms though he said it was "*entirely appropriate*" for Mr Sharps not to have set out the particular sources of sound. I found that answer less convincing.

132. Mr Bentley said he had given expert evidence on about 40 to 50 occasions. About 15 to 20 of those would have involved issues of public nuisance though this was the first time he had given evidence in a private nuisance case.

133. The following are the salient points which emerged from Mr Bentley's evidence:

i) He accepted that the references in the Sharps Report to the Local Plan and NPPF shifted focus towards planning matters and said he probably would not have referred to them if he had been the author of the report.

ii) He volunteered that BS4142 should not be relied upon as if determinative of whether or not a nuisance through noise has been established. Paragraph 1.3 of BS4142 states: "*The determination of noise amounting to a nuisance is beyond the scope of this British Standard*".

iii) He said that the graph in section 3 of the Sharps Report reflecting measurements taken over one hour on a Sunday evening, showing readings of around 54 dB to 55 dB when the Mechanical Plant was operating which reduced noticeably when it was switched off, was more meaningful than the graph in the SP which did not reflect the operation the Mechanical Plant.

iv) He said that readings in the Sharps Report showing noise levels when the Mechanical Plant was off during periods earlier in the morning and later in the evening (as well as showing noise levels when it was on) and which was relied upon to support the figures reproduced in the table in paragraph 124 above, were more reliable than those appended to the NC Report. This was because the readings recorded in the NC Report showed that very few of them were "representative" of the background noise level in that the majority were affected by construction or other extraneous influences upon sound. Mr Bentley said that the Sharps Report figures represented readings taken over one hour compared with only 8 minutes worth of representative readings in the NC Report.

v) He recognised that Mr Sharp's acoustic feature correction of +3 dB (which Mr Bentley described in terms of a "*penalty*") was based upon a subjective assessment of the noise generated by the Mechanical Plant. As the Sharps Report described the correction as being "*readily distinctive relative to the existing noise climate*" (language which tracks that of paragraph 9.2 of BS4142), and Mr Sharps had not made a subjective correction for the other characteristics of tonality, impulsivity or intermittency recognised by BS4142, Mr Bentley accepted that Mr Sharps appeared to be saying that the noise from the

> Mechanical Plant was the only source of mechanical noise within what BS4142 defines as "ambient sound". As Mr Bentley explained by reference to paragraph 3.2 of BS4142, ambient sound is the average noise level over a certain period of time created by all sounds ("*usually composed of sound from many sources near and fa*r") added together.

134. That last point was made in response to a question from me. I had noted that Mr Bentley did not accept the need for Mr Sharps to have set out in his report a description of the sources of sound. Mr Bentley had referred to the graph in section 3 of the Sharps Report to say: "*if one noise is significantly louder than others then it dominates*". Mr Bentley accepted that Mr Sharps was unlikely to have been personally present when the readings reflected in that graph were taken.

THE LEGAL PRINCIPLES.

135. Mrs Ray's allegation that the emissions of noise and odours from the Mechanical Plant unreasonably interfered with the use of enjoyment of Kevinscot during the nuisance period underpins the third issue identified in paragraph 39 above.

136. That allegation in substance reflects the well-established definition of a private nuisance as an interference with the reasonable enjoyment of a neighbouring property, as that has emerged from the authorities.

137. *In Lawrence and another v Fen Tigers Ltd and others* [2014] UKSC 13; [2014] AC 822, Lord Neuberger said:

> "3. A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, "a useful test is perhaps what is reasonable according to the ordinary usages of making living in society, or more correctly in a particular society".
>
> 4. In *Sturges v Bridgman* (1879) 11 Ch D 852, 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, nor merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out.
>
> 5. As Lord Goff said in *Cambridge Water Co v Eastern Countries Leather plc* [1004] 2 AC 264, 299, liability for nuisance is:
>
> > "kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land, under which 'those acts necessary for the common and ordinary use and occupation of land and

> houses may be done, if conveniently done, without subjecting those who do them to an action': see *Bamford v Turnley* (1862) 3 B&S 66, 83, per Bramwell B."
>
> I agree with Lord Carnworth JSC in para 176 below that reasonableness in this context is to be assessed objectively."

138. The decisions in *Cambridge Water v Eastern Countries Leather* and *Bamford v Turnley* were also relied upon by Lord Millett in the earlier decision of the House of Lord in *Southwark London Borough Council v Mills* [2001] 1 AC 1, 20C-21A, for the proposition that the concept of reasonable use (exceeding the bounds of which will expose the user to a nuisance claim) is one of "*give and take*" or "*live and let live*". His lordship emphasised that liability in nuisance is not some kind of strict liability which arises whenever property is used in a way which harms the neighbour. He also said that is not only nuisances (in fact rather than law) that are "*trifling*" which will not be actionable but also those that give rise to a "*sensible interference*" in the circumstances. So far as the latter is concerned, a substantial interference with the neighbour's use and enjoyment will not be actionable if it is the consequence of acts which are necessary for the common and ordinary use and occupation of land and which are done with proper consideration of the interests of neighbouring occupiers.

139. This shows that the concept of a reasonable user extends beyond consideration of the user's activities as if he is splendidly isolated in the enjoyment of his own property. It is also about what the neighbour might reasonably be expected to put up with. Although Mr Wignall and Ms Jabbari did not refer to the decision, I note that the Court of Appeal has observed that "*the broad unifying principle in this area of the law is reasonableness between neighbours*": see *Fearn and Others v The Board of Trustees at the Tate Gallery* [2020] EWCA Civ 104, [36]. In that case the court also clarified that the "*necessity*" of the defendant's acts, which provides him with a defence despite the loss of amenity of the claimant's land, does not mean that the land would be incapable of occupation without the acts being done at all. Instead, necessity in this context draws its meaning from the common and ordinary use and occupation of land. That is why an assessment of the locality is all important.

140. The objective elements of the test to determine whether or not what the neighbour considers noisome is in law an actionable nuisance, imported by the concept of a reasonable user having regard to the locality, also mean that the court will approach the question of what the neighbour might reasonably be expected to put up with by applying the standards of the average person. On this aspect, a number of subsequent cases have applied the test formulated by Knight Bruce V.-C. in *Walter v Selfe* (1851) 4 DE G & Sm 315, at 322, where he put the point as follows:

> "… ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, nor merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?"

141. One of those later cases was *Emms v Polva* [1973] EDG 906 where Plowman J found that the plaintiff (a playwright whose work required a high degree of concentration) was more sensitive to noise than the average person and accordingly he expected a higher degree of quiet than would the average person. Nevertheless, even making allowance for the claimant's greater sensitivity, the judge found that the noise created by the defendant's operations did constitute a nuisance.

142. In the note of its decision in *Whycer v Urry* [1956] JPL 365 the Court of Appeal said the test in *Walter v Selfe* was not satisfied in circumstances where the plaintiff's business and profession as an ophthalmic optician and occulist meant that his work was of an especially delicate character; and a claim in nuisance was not available to him as a result of the noise and vibration caused by the defendant's dancing school on the floor above.

143. In *Whycer v Urry* the defendant had been running his dancing school for at least two years before the claimant took up occupation of the floor below. As Mrs Ray's proposed holiday let business had not begun to operate by the start of the nuisance period, I asked Ms Jabbari whether she took any point about Mrs Ray's concerns being nascent ones so far as the impact of the noise and smell from St Kevins upon that yet-to-be-established business was concerned. Ms Jabbari confirmed she did not and in my judgment that was the correct position to adopt when the authorities focus not upon the history (if any) of the claimant's use of the neighbouring land but instead upon whether the defendant is unduly interfering with the use which the claimant would like to enjoy. Whether or not that use is a reasonable one to be protected against such interference should not necessarily depend upon it being an established use before the defendant's activities commence, even though that will often if not usually be the case.

144. Past use of the parties' respective properties must, however, feed into an assessment of the locality (the Bermondsey versus Belgravia point) for the purposes of conditioning their respective expectations when applying the principle of give and take. Similarly, the previous grant and implementation of planning permissions (and any conditions attached to them) for the development of those or other properties in the neighbourhood will be relevant to that evaluation, as the Supreme Court confirmed in *Lawrence v Fen Tigers*. However, the decision of the majority in that case was that the grant of planning permission for the development of the defendant's property, which then leads to the alleged nuisance, cannot be a major determinant of the issue of liability.

145. In my judgment, it must follow that the absence of planning permission for the installation of the Mechanical Plant cannot be determinative of the issue of liability against Windrush. Whether or not a particular property development was permitted by the planning authority and whether or not, as developed, the property is the source of a nuisance to a neighbour are different questions. The unlawfulness which supports a claim for private nuisance lies in the effect that the particular use of property has upon the neighbour even if there is nothing else unlawful about it. I therefore can and should assume that Mrs Ray would have brought this claim even if prior planning and listed building consents had been given for the installation of the Mechanical Plant.

146. Mr Wignall relied upon the decision of Luxmoore J in *Vanderpant v Mayfair Hotel Company Ltd* [1930] 1 Ch 138, another case where the test in *Walter v Selfe* was applied. That was a case where the plaintiff complained of acts of alleged nuisance through obstruction of access to his house and noise resulting from the defendant's

construction of a large hotel, including a kitchen, on the adjoining site on a street in Mayfair. The judge held that a nuisance through noise had been established and granted injunctive relief accordingly, saying "*the question of the existence of nuisance is one of degree and depends on the circumstances of the case*." He had found that, before the defendant's development of it, the hotel site had been "*part of the gardens of Devonshire House, and undoubtedly the place was exceptionally quiet and peaceful*." The kitchen part of the development adjoined the plaintiff's house and was ventilated by a series of windows which faced the house and were almost invariably open. Mr Wignall said that the present case, like *Vanderpant*, was one of intensification of use in circumstances where Windrush had been guilty of all take and no give.

147. By her skeleton argument, Ms Jabbari also addressed the principle governing a landlord's liability for his tenant's acts of nuisance. She cited the judgment of Lord Neuberger in *Lawrence v Fen Tigers Ltd (No. 2)* [2014] UKSC 46; [2015] AC 106, at [11]-[12], for the proposition that such liability must rest upon the landlord either participating directly in the commission of the nuisance or upon the landlord being taken to have authorised it. As his lordship explained, the latter basis of liability obviously requires something more than the simple act of letting the property from which the tenant creates the nuisance.

148. Mr Wignall rightly pointed out that the Defence had not taken any point that Windrush should not be held liable for any nuisance created by DLHR. He observed that the Defence did not refer to any tenancy between the two companies, referring instead to Windrush having *"permitted [DLHR] to occupy"* St Kevins, and that no lease had been disclosed. Ms Jabbari confirmed in her closing submissions that she was not pursuing any point by reference to the principle in *Lawrence v Fen Tigers (No.2)*. Otherwise, it would have been necessary to consider the terms of the lease (if any) between Windrush and DLHR and the part played by Windrush (if at all) in connection with the installation of the Mechanical Plant.

ANALYSIS AND CONCLUSIONS

149. I now address the issues identified in paragraph 39 in the light of the evidence and the relevant legal principles.

Issue 1: The character of the locality

150. Determination of this issue is a necessary first step in approaching the question of liability raised by Issue 3 below. That issue is not to be approached in the abstract but instead by reference to an assessment of the locality which, as the authorities show, informs the court's decision as to the degree of protection to be given to Mrs Ray's use and enjoyment of Kevinscot applying the principle of neighbourly give-and-take.

151. On my assessment of the evidence, the description of the immediate locality of the properties contained in the Defence is an accurate one. I accept Mr Les De La Haye's description of Bourton-on-the-Water which in fact was corroborated in large part by the evidence of Mrs Ray and Mrs Chapman. Sitting within the Cotswolds AONB, and one of the obvious stopping points, the place might be described pejoratively as a tourist trap. The plans and aerial photos of the locality, showing the density of the buildings

and their various uses, suggest to me that Mr Jackson's creation of a place of tranquillity in the garden of The Living Green Centre would probably not have been possible without its high stone wall. Yet there is more to a locality than the configuration of particular buildings within it.

152. In relation to warmer weekends and holiday periods, I was struck my Mrs Ray's mention in her evidence of visitors sitting on what she called "*a green beach*" in the centre of Bourton-on-the-Water. That gives some impression of how busy it can become with the influx of tourists and day-trippers. Mr Tongue also said that some of his and his family's stays would coincide with such busy times. Mr Jackson and Mrs Chapman explained how visitor numbers were getting back to their pre-pandemic levels.

153. When allowing Windrush's appeal against the refusal of permission for a change of use of the former newsagents in July 2017, the Planning Inspector described the locality as follows:

> "*7. The commercial centre is based around the High Street and it is a picturesque, high quality environment that appears to attract a high number of tourists and visitors. It offers mainly independent stores rather than retail chains with a predominance of gift shops and visitor attractions. The Council's evidence indicates that there are around 78 units within the commercial centre and of those the majority comprise comparison uses (35 units). This number appears to have fallen slightly from that recorded in 2012 and only 5 convenience units were recorded in 2016.*
>
> *8. Furthermore, the commercial centre is, not unsurprisingly, focused on tourist and visitor trade and as such there are a high number of tea rooms, coffee shops and restaurants. However, there are very few vacant units and a supermarket is being constructed within close proximity to the commercial centre.*
>
> *9. The appellant states that the proposal is part of a larger scheme in which he seeks to upgrade the property as a whole, providing a restaurant with associated take-out facilities. The adjacent restaurant was undergoing refurbishment at the time of my site visit. If this were to occur – and there is no evidence to suggest this is not the case – there would be no increase in the overall percentage of hot food takeaway units within the commercial centre. However, I recognise that this could not be guaranteed.*
>
> *10. Nonetheless, the Council indicates that there are approximately 5 existing hot food takeaways within the centre. The proposal could increase this to 6 but within a commercial centre of around 78 units I do not regard this as representing an excessive concentration of hot food takeaways. There is no dispute between the parties that a hot food takeaway use can be an appropriate use in a town centre."*

154. In her skeleton argument and submissions, Ms Jabbari highlighted other published documents containing similar descriptions of the place. These included the Cotswold District Local Plan 2011-2013 (referenced by the Sharps Report); the Decision of Inspector Boffin dated 7 June 2016 (on permission for Windrush's change of use from

newsagent to takeaway); and Inspector Wharton's Decision dated 19 August 2019 rejecting Windrush's appeal against the Enforcement Notices.

155. The SP Report also described the busy nature of the centre of Bourton-on-the-Water in addressing the various sources of noise within it as follows:

> "*2.1.2 The site is in a prominent location in the centre of Bourton-on-the-Water which is a popular tourist destination. The immediate neighbour to the property, and that which is closest to the new plantroom, is the Cotswold Motoring Museum & Toy Collection. There are no residential properties in close proximity to the new plantroom, although there are Bed & Breakfasts and self-catering accommodation and the Manor House nearby.*
>
> *2.1.3 Noise sources in the area include road traffic noise; noise from building services serving the existing property and surrounding commercial properties; people passing the site by foot and the sound of the water flowing on the River Windrush which has a weir just before it flows under the bridge on Sherborne Street (close to the property).*"

Issue 2: The level of noise and/or odour emissions caused the Mechanical Plant during the nuisance period.

156. The level of noise generated by the Mechanical Plant is informed by the expert evidence whereas the level of smells created by it is purely an issue of fact.

157. The Sharps Report and, therefore, the evidence of Mr Bentley is susceptible to criticism which goes beyond a failure to include the reporting items indicated by section 12 of BS4142. Section 11 of that British Standard provides that it is essential to place the sound being measured in its context.

158. In my judgment, the Sharps Report is vulnerable to the criticism levelled by Ms Jabbari which is that the background sound level of 37dB was based upon readings taken early in the morning and late at night, when the Mechanical Plant was off. No request was made of DLHR to switch it off during working hours so that the daytime background sound level, including from other activities, could be measured. It is therefore unsurprising that (as Mr Bentley recognised) Mr Sharps appears to have concluded that the only mechanical sound within the ambient sound was that made by the Mechanical Plant. That in turn leads to a question mark over his inclusion within the rating level of 57dB of an acoustic correction of +3dB (the maximum penalty for "other sound characteristics") to reflect his subjective assessment of the distinctive noise of the Mechanical Plant relative to the existing noise climate. Mr Sharps did not explain that correction further and, not having visited the site and witnessed the operation of the Mechanical Plant for himself, Mr Bentley could not explain it beyond agreeing with that conclusion suggested by me.

159. The NC Report fully complied with the reporting requirements of section 12 of BS4142. NC said that the background sound level was 40dB. That was based upon readings taken during daytime trading hours with the fan units switched off. Although Mr Bentley said there were only 8 minutes worth of truly representative readings, in my

judgment NC's analysis is not undermined by the fact that there were other readings which they said were not representative of background sound levels because of the impact of other noise such as construction works. The SP Report had recorded the background sound level during the lockdown their readings as ranging between 38dB (taken in the reading) to just under 50dB.

160. NC did not impose any acoustic correction penalty to their rating level of 45.7dB for the Mechanical Plant. They explained that their decision not to do so was based on their observation undertaken at the monitoring location and discussions with Mr Neil Shellard of the Council's Technical Pollution Team.

161. The Sharps Report and Mr Bentley suggested a difference of +20dB between the rating level and the background sound level whereas NC's figure was +5.7dB.

162. On my assessment of the evidence - factual and expert and that provided in the reports of NC and SP – I am not persuaded that the +20dB figure advanced in the Sharps Report is a reliable one. In my judgment, the NC readings are to be regarded as more reliable in reporting the noise impact of the Mechanical Plant. In saying that, I recognise that the NC Report states that during their survey of April 2019 (on which their readings were based) the extractor fans were run both at 100% output and the "*normal operations*" level of 40-60%. It was the absence of a distinctive tonal quality at that lower output, as opposed to 100% power, which led NC not to include an acoustic correction penalty.

163. As Mr Sharps recognised, it is not easy to translate figures based upon BS4142 categorisation into the language of the other published policies and guidelines on which he relied. Adopting the terminology of the WHO Guidelines identified by him, the technical evidence indicates that, from the Spring of 2019, the Mechanical Plant was the source of "moderate" (50dB) rather than "serious" (55dB) annoyance or, using NPSE speak, having an effect somewhere between LOAEL and SOAEL. I accept that its adverse impact was likely to have been greater (though not as significant as suggested in the Sharps Report) before NC were instructed. Of course, even NC accepted that even their figure of +5.7dB supported an indication of likely adverse impact and the need for mitigating steps to be taken.

164. The level of noise is not just a matter of expert evidence as the witnesses of fact spoke to it. Given the subjectivity in the views expressed by them, I address that evidence in the context of Issue 3 below: whether or not it amounted to a nuisance.

165. The level of odours emitted by the Mechanical Plant is solely a matter of factual evidence. The most reliable source of such evidence is Mr Tongue who occupied Kevinscot (as a second home) for the greater part of the nuisance period.

166. On the basis of Mr Tongue's evidence, I accept that the Mechanical Plant created strong odours of cooking which, depending upon weather conditions, could linger in the garden of Kevinscot and, during the summer months, sometimes enter the open doors and windows of the house. These odours could be particularly strong near the boundary wall with St Kevins. Their presence did materially detract from the enjoyment of the rear garden at Kevinscot. The odours would have been at odds with the continued use of the garden as part of The Living Green Centre as a place of calm contemplation.

Issue 3: Did the noise and/or odour constitute a nuisance?

167. Mr Wignall made the point that the expert evidence does not determine the merits of Mrs Ray's claim in nuisance. This is obviously correct when the expert evidence could not address the issue of odours and the issue of noise was addressed by reference to standards for the determination of noise contained in a document (BS4142) which expressly states that the issue of nuisance is beyond its scope. Mr Wignall's point was that the expert evidence on the issue of noise is useful in gauging whether or not his client's complaints were justified and he said that none of the acoustic reports undermined her position. It was the evidence of the witnesses of fact which ultimately determined whether or not the claim was sound.

168. On the factual evidence, there was clearly a significant difference of perception between parties' respective witnesses as to the level of noise and odour generated by the Mechanical Plant.

169. In particular, I have noted the different views expressed by those who were present at the meeting in the garden of Kevinscot one evening in May 2019. This was before DLHR took steps to ameliorate the level of noise by acting upon the mitigating steps advised by NC (as explained by Mr Cote). Mrs Ray and Mrs Jackson said it was difficult to hold a conversation and that cooking odours hung in the air. The evidence of Les De La Haye and Mr Cote (and the witness statement of Lloyd De La Haye) was at odds with this. I have to decide the present issue in circumstances where the witnesses were not cross-examined upon their markedly different perceptions of the alleged nuisance on that occasion.

170. The evidence shows that the operation of the Mechanical Plant did bring with it an increased level of noise and odours when in operation (and sometimes the odours would linger after the fans were switched of). The noise would have been greater in the first part of the nuisance period (when Mrs Ray and Mr Tongue prepared their nuisance logs) before NC undertook their survey. I also accept Mr Tongue's evidence that, despite Mr Cote's efforts to avoid it, the disposal of empty bottles at anti-social hours could sometimes be heard from both the garden and inside the house. All of this would have been a source of some annoyance and inconvenience to anyone living or staying at Kevinscot.

171. However, I have already noted that Mrs Ray and Mr Jackson clearly approached the problem with the discriminating senses nurtured from their creation and operation of The Living Green Centre. I am also satisfied that, their opposition to the Mechanical Plant having been grounded upon their assessment of its impact in the first half of the nuisance period, their perceptions became fixed despite the temporary measures taken by DLHR in conjunction with NC to reduce the operating noise levels. This is illustrated by Mrs Ray's desire to have it removed even though it is no longer operating. It should also be noted that the Sharps Report and Mr Bentley's evidence did not address the level of sound experienced by someone living in Kevinscot (the house). Indeed, the report made clear that the values in the WHO Guidelines are "façade levels", applicable to the outside of residential properties.

172. In deciding whether or not the noise and smell amounted to a nuisance it is important to note that, although the Particulars of Claim (see paragraph 23 above) expressed the allegation of nuisance in impersonal terms so far as the use and enjoyment of Kevinscot during the nuisance period was concerned, the claim is brought only by Mrs Ray as a non-occupying owner.

173. It follows that, in circumstances where Mrs Ray was not living at Kevinscot in 2018 and had no intention, either then or subsequently, of enjoying personally the amenities it offered as a (nuisance-free) residence, comprising the house and garden, the court's focus must be upon the alleged interference with her use of the property as a holiday let and her enjoyment of the rental income from such letting. Mr Wignall and Ms Jabbari both recognised that Mr Tongue and his wife might have brought their own claim for nuisance (the AST of their second home having commenced 6 months into the nuisance period of very nearly 2 years duration) but had not done so. I note that any such claim would have fallen to be addressed in the light of Mr Tongue's acceptance of Mrs Ray's position that their rent was a discounted one because of the noise and odours.

174. Mrs Ray's claim is presented in terms of the letting to Mr Tongue being an act of mitigation of a loss resulting from her inability to market Kevinscot as a holiday let and a reflection of her concern that, should that tenancy end and the Mechanical Plant resume operation, it "*will be very difficult to find tenants willing to tolerate the nuisance, save at a very discounted rent*."

175. The claim is one that Windrush has unduly interfered with Mrs Ray's profitable use of Kevinscot, though I recognise of course that it rests fundamentally upon the loss of the less tangible amenity value of the property (by which I mean, again, both the house and garden).

176. This is therefore a claim by the freeholder and intended lessor or licensor of the affected property. When contrasted with a claim in nuisance based upon inconvenience or discomfort to the actual occupier of the same property (whether freeholder or tenant as opposed to a short-stay licensee whose redress would instead be a claim to a complete or partial refund of the holiday rental and perhaps an unfavourable on-line review) such a claim to my mind raises a key point about the application of the test of private nuisance recognised in *Lawrence v Fen Tigers*.

177. The point goes to the level of reasonable enjoyment (i.e. her profitable deployment) of Kevinscot in respect of which Mrs Ray is entitled to seek protection by the law of nuisance in circumstances where she was, despite the alleged nuisance, able to let the property to Mr Tongue and his wife during the nuisance period. Adopting the alternative formulation in that case, can Windrush be said to have unduly interfered with Mrs Ray's enjoyment of Kevinscot when she was able to let the property as a holiday home to tenants who were prepared to tolerate a degree of discomfort and inconvenience even though the noise and smells would have been incompatible with her marketing it as an eco-friendly holiday let offering the particular amenity of a tranquil, fresh-air garden?

178. In *Walter v Selfe* the claim in nuisance had been brought by both the owner (William Walter) and his tenant (Charles Pressly) under a 7 year lease of the house, offices and garden affected by the defendant's brick-making activity on the adjoining land. Recognising that the Vice Chancellor's observations in that case (at p. 321) about the

freshness of air reasonably required for physical comfort were ones directed to the position of Mr Pressly as occupier, does Mrs Ray's letting of Kevinscot to Mr Tongue mean that her claim based upon harm to the proposed holiday let business should be treated as one inadequately grounded upon "*mere delicacy or fastidiousness*"? Or does the reduced rent agreed between them, compared with the letting rates which Mrs Ray says she could have achieved through holiday rentals, mean that a defence based upon undue fastidiousness is one that fails to recognise that there has been an interference with the business which Mrs Ray could reasonably have expected to run from Kevinscot?

179. As I address further below, Mrs Ray's claim to special damages rests upon the difference between her ability to let Kevinscot under the AST and her inability to proceed with the holiday let business on which she had incurred wasted expenditure. Mr Wignall said Mrs Ray's entry into the AST of November 2018 was done in mitigation of the loss of the alternative, more valuable letting opportunity. However, before questions of loss and mitigation arise, the cause of action to sustain a claim based upon private nuisance must first be established as a matter of principle by reference to the test recognised in *Lawrence v Fen Tigers*.

180. Ms Jabbari submitted that Mrs Ray's entry into the AST was prima facie evidence that her reasonable use of Kevinscot as a holiday rental property had not been interfered with by the operation of the Mechanical Plant. She said that the proposed use of Kevinscot as a retreat for disabled guests was a highly sensitive one which put Mrs Ray on the wrong side of the line indicated by the decision in *Walter v Selfe*. Mr Tongue was a better example of the 'reasonable occupier' than those which Mrs Ray had in mind.

181. I have not found it easy to reach a decision as to whether Mrs Ray meets the test of a private nuisance identified in *Lawrence v Fen Tigers*, at [3]. The degree of elasticity introduced by notions of "give and take", "live and let live" and "reasonableness between neighbours" perhaps means that there will inevitably be some element of doubt in any decision as to what a neighbour should have to put up with. However, the decision in *Fearn v The Board of Trustees*, at [38], confirms that decision "*does not turn on some overriding and free-ranging assessment by the court of the respective reasonableness of each party in the light of all the facts and circumstances*" but should instead "*represent in the round the law's assessment of what is and is not unreasonable conduct sufficient to give rise to a legal remedy*."

182. In particular, I have kept well in mind that Mrs Ray's complaint is about a loss of amenity to which Mr Tongue and his wife were in effect (and at a price), reconciled; and that both the favourable rent payable by them, which might have provided an answer to any separate nuisance claim brought by them, and the inability of the short-term licensees (who Mrs Ray had intended to benefit from the particular amenities offered by Kevinscot) to bring any nuisance claim might only serve to confirm that the loss is one that should indeed support her own claim in nuisance.

183. Nevertheless, I have concluded that Mrs Ray has failed to establish the nuisance alleged against Windrush.

184. My decision that the cause of action in private nuisance has not been made out rests upon two related points. The first is my decision on the first issue, as to the character

of the locality, and the second is based upon Mrs Ray's ability to let Kevinscot under the AST. Together, these point to the conclusion that Windrush did not during the nuisance period violate Mrs Ray's ownership rights in a way that supports her claim.

185. As to the first point, it is clear from the evidence adduced by Mrs Ray that her plans for the holiday letting of Kevinscot were built upon the previous tranquillity of its garden situated sufficiently close to the centre of Bourton-on-the-Water as to provide ease of access to the village's attractions for disabled guests. However, I accept Ms Jabbari's submission that, for the purposes of testing whether there was undue interference with Mrs Ray's property rights, it was not reasonable for her to expect that a tranquil eco-retreat could exist in that location free from any impact of DLHR's commercial operations. The character of the neighbourhood was inconsistent with the calm and meditative location which she wished to provide for her guests. Looking at her ownership position in isolation from neighbouring activity, clearly it was not objectively unreasonable for Mrs Ray to contemplate using Kevinscot in that way but, for the purposes of applying the law of nuisance and adopting the language in *Walter v Selfe*, the standards she had created for her the holiday let business mean that the allegation of nuisance has been presented from a position of "*delicacy or fastidiousness*".

186. The question is one of degree and dependent upon the circumstances of the case. In contrast with the position in *Vanderpant v Mayfair Hotel* the evidence shows that Kevinscot is located in what for many years before 2018 was a busy tourist spot. As the owner of Kevinscot in the years prior to 2018, Mrs Ray had built her own business benefiting from the substantial footfall of tourists. The fact is that tourists require food outlets. Although I accept her case that DLHR's activities resulted in an intensification of odours, Mrs Ray herself said in evidence that she would sometimes smell the cooking of chips at the Windrush Restaurant run by the company's predecessor. I accept Les De La Haye's evidence that those fumes would have exited through the big and noisy extractor that was previously in use.

187. The conclusion that DLHR's operations during the nuisance period are not actionable by Mrs Ray is also supported by the fact that for 16 of the 21 months in question Kevinscot was occupied (as a second home) by Mr Tongue and his family. Testing this second point using the approach in the authorities, they are to be taken to be average occupiers for the purposes of assessing whether or not there was a material interference with the standard of comfort ordinarily to be enjoyed by the occupier of the neighbouring property. Again, I recognise that Mrs Ray's claim is predicated upon the longer-term letting to the Tongue family as being very much a second best option and indeed an act of mitigation of the loss of her holiday let business. However, at the liability stage, what is required to be shown is a material interference with the amenity of Kevinscot to be enjoyed by her. In circumstances where Mrs Ray was able to let the property having drawn the issues over DLHR's operations to their attention, the Tongue family's occupation provides reliable insight as to the standard of comfort reasonably to be expected by any other part-time occupiers of Kevinscot according to the "*plain and sober and simple notions*" to be adopted for that purpose.

188. Mr Tongue's evidence was to the effect that he and his family could live and work around the noise and smell. Standing back, Mr Tongue's evidence can be said to encapsulate the concept of "*live and let live.*"

189. More general support for the conclusion that the occupation of Kevinscot under the AST demonstrates that there was not an unreasonable interference with the amenity of the property during the nuisance period comes from the fact that Mrs Ray has decided not to terminate the AST after the period came to an end (as I address further below in the context of her damages claim). This point has its limitations in the context of liability but Mrs Ray's decision to continue letting Kevinscot under the AST, in the reasonable exercise of her property rights, provides an indication that those rights were not unduly interfered with in the period before. This is particularly so when (as I find below in connection with the relief claimed by Mrs Ray) the mere presence of the now inoperative Mechanical Plant does not create a sufficient threat that the alleged nuisance will resume to justify a mandatory injunction.

190. It follows in my judgment that Mrs Ray has failed to establish liability for nuisance.

191. Had I reached a different conclusion about the materiality of the interference with amenity of Kevinscot then I would not have been persuaded that Windrush had a good defence to Mrs Ray's nuisance claim based upon the principle of "sensible interference" recognised in *Southwark LBC v Mills*. Windrush would in my judgment have satisfied the first limb of that defence on the basis that DLHR's operations during the nuisance period represented a "*common and ordinary use and occupation*" of St Kevins. The property had been operated as a restaurant before that time and the Council had given permission for the former newsagent to be used as a fish and chip takeaway. However, I consider that Windrush would have failed to make good the second limb of the test, in that the Mechanical Plant was not installed with proper consideration of the interests of neighbours in mind. Mr De La Haye's evidence about how Windrush was working with Evans Jones to find a satisfactory solution to the air extraction and ventilation issues raised by the service of the Enforcement Notices, following Windrush's unsuccessful appeal against them, demonstrates this point.

Issue 4: Relief

192. My conclusion that Mrs Ray has not established her claim in nuisance means that it is not strictly necessary to address the relief sought by the Particulars of Claim but I do so in the interests of completeness.

Damages

193. Mrs Ray's first head of special damages is for the loss of rental income from holiday lets in the sum of £20,960 for the period February 2018 to November 2018 (and the entry into the AST). In her evidence Mrs Ray accepted that this claim would have to be reduced to reflect the point that the nuisance period did not commence until 1st April 2018.

194. The second head of damages is said to reflect a continuing loss of £400 per month from her entry into AST in November 2018. That was said to be the difference between the rent payable under the AST and what she says she would have obtained from more profitable short-term holiday lets. As already noted, her entry into the AST was said to be an act of mitigation of the loss of the higher income she would otherwise have

received. Mr Wignall identified the relevant figure for the net loss as being £17,600 down to the date of trial.

195. The third head of loss is made up of the marketing costs incurred by Mrs Ray in promoting the abandoned holiday let business. Paragraph 23(3) of the Particulars of Claim identified the relevant sum as £3,220 which Mr Wignall, by reference to the relevant invoices, corrected to £4,030.

196. The fourth head of loss was the sum of £4,266.20 being the amount of business rates paid by her in respect of Kevinscot for the period between February 2018 and the entry into the AST. Again, the period should be corrected to reflect the start of the nuisance period on 1 April 2018.

197. The fifth and last element of special damages reflected utility bills and other outgoings, including an insurance premium, in the period between February 2018 (which again falls to be corrected) and November 2018. Allowing for the fact that a couple of the bills related or partly related to a period preceding the commencement of the nuisance period, Mr Wignall drew my attention to the invoices (and one bank statement) in support of a claim for £3,567.94.

198. Mrs Ray's approach to loss raises a number of significant questions.

199. Her first witness statement explained how in, March 2016, Sykes Holiday Cottages had indicated that a gross rental income of between £20,425 and £27,670 might have achieved from the letting of Kevinscot for 37 weeks a year, with additional short breaks, depending upon whether it slept 4 or 7 people. In May 2018, Sykes indicated an expected income range of between £23,819 to £26,327 based upon 34 weeks of occupancy, rising to £27,580 with short breaks.

200. The claim to the specific sum £20,960 under the first head of loss was not explained further in Mrs Ray's witness statement. Indeed, her first statement approached the lost rental income on a different basis. This was that her experience as a landlord of rental properties since 1976 (including under other current assured shorthold tenancies of properties within the Cotswolds AONB) led her to have a strong grasp of a reasonable and achievable rent for Kevinscot under an assured shorthold tenancy where the property was not affected by the activities of DLHR. Her evidence was that in those circumstances Kevinscot could have been let for at least £1,400 per month rather than the £1,000 (ignoring the charge for broadband) agreed with Mr Tongue. This led Mrs Ray to say: "*I therefore lost at least £1,400 per calendar month between April 2018 and November 2018 and at least £400 per calendar month since on the basis of assured shorthold tenancies.*" The monthly figure of £400 marries with the quantification though not the expressed basis of the second head of loss.

201. As Ms Jabbari correctly observed, the way Mrs Ray expresses it is not the pleaded basis of the claim to lost rental income. The £20,960 figure broke down to a figure of £2,328.88 per month, not £1,400 per month. Ms Jabbari also made the point that the language of the two advertisements from 2018 and 2021 for the unfurnished letting (at £1,495 per month and £1,650 per month respectively) of two 4 bedroomed properties in Bourton-on-the-Water, relied upon by Mrs Ray, raised doubts about whether they were true comparables for Kevinscot.

202. In his closing submissions, Mr Wignall said that the £20,960 figure was justified by taking the Sykes' figure of £27,580, deducting 11 weeks of rental (from the notional 34) and adding back a week for a Christmas letting. He also referred to a Rate Card which Mrs Ray had prepared in November 2017 and which, he submitted, supported a claim to approximately £20,000 under the first head of loss on the basis that Kevinscot could have been let at a rate (fluctuating according to the holiday season and time of year) which averaged out at £1,000 per week over 20 weeks. In her witness statement Mrs Ray said she could have expected to earn between £24,975 and £48,544 per year from the holiday let business based upon a conservative estimate of 37 weeks per year occupancy.

203. Despite Mrs Ray's confirmation in re-examination that she intended to rely upon her Rate Card and its weekly holiday let rates of between a low of £675 and a high of £1,312, the substantially different notional letting figures behind the first and second heads of loss and the limitations upon (and different presentations within) the evidence in support of the claim create real doubt over the true measure of any loss suffered as a result of the (presumed) nuisance created by Windrush.

204. For example, the figures in Mrs Ray's Rate Card (and Mr Wignall's analysis of the £20,960 figure) were based upon the Sykes' figures for 7 guests at Kevinscot. Yet, in explaining her aspirations for Kevinscot as a luxury holiday let, she volunteered that "*if you go for higher numbers you get the wrong type of people*". Mrs Ray also accepted that, as at April 2018 and the start of the nuisance period, she had not secured any holiday let bookings. She had received an inquiry in late April 2018 from one person who had previously stayed at Kevinscot and who was interesting in taking one room for 5 nights in June but felt honour bound to draw attention the problems created by DLHR's operations.

205. I address below the further point that Mrs Ray's first and second heads of loss are predicated upon a loss of gross holiday let income when she would have had ownership expenses to pay out of that income. For the period after November 2018 the expenses which Mrs Ray would have to had to meet out of the holiday let income (in particular business rates and utility bills) are to be compared with those that have been passed on to Mr Tongue and his wife under the AST. For the purposes of any calculation of loss over that period, Windrush would be entitled to seek a credit for expenditure (or, in the case of the business rates, the comparable expenditure) which Mrs Ray has been spared as a result of entering into the AST.

206. That period, for the purposes of second head of loss, is a continuing one which is said to have carried a loss of £8,400 down to March 2021 (when the Particulars of Claim were drafted) rising to £17,600 by the time of trial. On the logic of Mrs Ray's case, it will continue at the rate of £400 per month until the Mechanical Plant is removed.

207. As Ms Jabbari observed, the calculation of loss takes no account of the fact that from 23 March 2020 (the Prime Minister had warned against non-essential travel one week earlier) Mrs Ray's holiday let business would have been blighted by the various restrictions and measures imposed as a result of the coronavirus pandemic. Judicial notice can be taken of the fact that between 23 March 2020 and 12 April 2021 Mrs Ray would not have been able to operate a business offering self-contained holiday accommodation: see the "Timeline of UK government coronavirus lockdowns and restrictions" at www.instituteforgovernment.org.uk. At first sight, it should follow that

Mrs Ray should be treated as benefiting from the rent received under the AST, during that period of over a year, when she would not have been able to have obtained any alternative holiday let income.

208. However. Mr Wignall submitted that the Government restrictions with their known impact upon the holiday letting business, including the likely reluctance of many vulnerable persons to take holidays even when restrictions were relaxed, were irrelevant to Mrs Ray's ongoing claim for damages. He said this was because the entry into the AST was an act of mitigation of a loss arising before outbreak of the pandemic and the subsequent pandemic and resulting restrictions did not mean that the ongoing loss of £4,000 per month was not suffered.

209. In my judgment, that submission ignores the basic point, applicable to a claim for damages said to be accruing on a monthly basis, that there was no loss at all during the relevant period. The basis for generating rental income from self-contained holiday accommodation simply did not exist. It also ignores the fact that Mrs Ray had not, pre-pandemic, bound herself to a tenancy which would inevitably continue during what later became the period of lockdown. She could have terminated the AST by giving two months' notice at any time after April 2019. If the reward of a higher net rental income from using Kevinscot as a holiday let was there to be won then during the relevant period then she would have done so. It must be remembered that Covid-19 was more effective than the Council's enforcement action in abating the (presumed) nuisance by putting the kibosh on DLHR's business in late March 2020. No noise and odours were emanating from St Kevins from that time onwards but the fact is that Mrs Ray could not lawfully have secured any holiday visitors before April 2021. To hold Windrush accountable for the suggested loss of a higher holiday let income during the year in question would offend the basic compensatory principle underpinning an award of damages.

210. Ms Jabbari said that Mrs Ray's failure to terminate the AST once restrictions upon offering self-contained holiday lets had been lifted, and Kevinscot was free of the alleged nuisance from St Kevins, also served to undermine Mrs Ray's claim of continuing loss for the period after April 2021. Ms Jabbari said that Mrs Ray's claim to recover the marketing and start-up costs of the holiday let business (her third head of loss) was vulnerable to the same point as there is no reason why those costs should be treated as written off when the business could have got off to a delayed start.

211. I agree with those submissions. For the purposes of these proceedings against Windrush, in my judgment it is not met by Mrs Ray saying that even now she is faced with a position of uncertainty created by the risk that the alleged nuisance through the use of the Mechanical Plant might resume. The Defence served by Windrush on 25 June 2021 told Mrs Ray that DLHR had gone into liquidation in July 2020, that Windrush had decided to sell St Kevins and would not resume use of the Mechanical Plant without first giving her reasonable notice to the Claimant and/or before obtaining the necessary planning consent. That was enough to enable her to resume the holiday let business.

212. I have already explained how Windrush also gave the Undertaking on 6 July 2022 and expanded upon it on the last day of trial. In these circumstances, an award of damages against Windrush on the basis that the previous operations of DLHR continue to disrupt

Mrs Ray's holiday let business would be unjustifiably punitive rather than properly compensatory in nature.

213. Drawing the above points together, the true position on Mrs Ray's damages claim against Windrush is that she lost the chance of securing a holiday let rental income for the period between April 2018 and 23 March 2020 (i.e. the nuisance period).

214. As to the presumed holiday let income, Mrs Ray did not treat the marketing costs incurred by her in promoting the holiday let business as items to be offset against that income. Likewise, as she explained in her witness statement, her approach to utility bills and other outgoings for Kevinscot (from 1 April to 2 November 2018) were sought to be recovered on the basis that they were borne solely by her and not covered by the anticipated holiday let income. However, in my judgment, that observation simply highlights that she cannot claim damages reflecting the loss of the anticipated gross rental income from a holiday let business (under her first head of loss) and also damages in respect of the expenses she would have incurred to obtain that income (under the third, fourth and fifth heads of loss). Mrs Ray seemed to accept this in cross-examination. The same point applies to her claim to recover the initial marketing and website costs so far as her claim to the loss of additional rental income after November 2018 (the second head of loss) is concerned. As Ms Jabbari submitted, the claim is essentially one for loss of profits and that involves making proper deductions, not additions, for the expenses that would have been incurred in generating the lost income.

215. Mrs Ray's evidence was that after Kevinscot had been converted for the holiday let business she continued to pay business rates on the same basis as when it operated as The Living Green Centre. The Council's Non-Domestic Rates Bill for 2018 showed that Kevinscot had a rateable value of £9,400 on the basis it was a "*shop and premises*" and that the charge for the period 1 April 2018 to 31 October 2018 was £2,717.04.

216. Mrs Ray makes no claim for damages in respect of a business rate liability after the date of the AST. Yet had she proceeded with the holiday let business she would have continued to pay business rates on the property (albeit on a different rating basis than for a shop). She would have needed to meet the liability for business rates out of the income from the short-term holiday lets. She would also have had to pay the property insurance premium and the utility bills. Under the terms of the AST, by contrast, Mr Tongue and his wife covenanted to pay the Council Tax in respect of Kevinscot. Mrs Ray said this was around £2,500 per annum. The broadband and utility charges (though not the insurance) are also the responsibility of the tenants under the AST.

217. It follows that Mrs Ray's responsibility for such outgoings would have fallen to be offset against the damages sought for the complete loss of rental income for the period between April and November 2018 and the partial loss of it for the period after November 2018.

218. These points about the way the damages claim has been presented and the true nature of the claim being one for a loss of profit attributable to the prospect of securing holiday let income (for the nuisance period, when no bookings had been secured for the early part of it) leave me in real doubt about the measure of loss suffered by Mrs Ray as a result of the alleged nuisance. In respect of the period between November 2018 and March 2020 (inclusive) the value of the AST to Mrs Ray, not only in the rent received and liability for certain outgoings passed to the tenants, is also to be offset against the

claim to lost income (though I recognise it would not be right to include a credit for the council tax liability borne by them in addition to any greater allowance for the notional business rate liability to be borne by Mrs Ray when the two liabilities are of the same ilk).

219. The nuisance period was almost 2 years in duration. On my general assessment of the evidence, including the popularity of Bourton-on-the-Water with visitors, I would have accepted that during that period Mrs Ray could have secured a gross rental income of, say, £45,000 based upon her being able to let Kevinscot for 25 weeks in the period April 2018 to March 2019 and for 30 weeks between April 2019 and March 2020, before lockdown, and having regard to the range of figures identified in her Rate Card (as well as her note of caution about letting for the maximum number of occupiers). Her ownership liabilities of the kind identified in her fourth and fifth heads of loss (allowing for the uncertainty as to what the business rate liability would have been when it appears to have been approximately £5,400 p.a. on the previous rateable value) together with any recurring marketing costs of the kind identified in her third head of damage would then fall to be deducted from that income. On the basis of the pleaded Particulars, this indicates that approximately £16,000 would fall to be deducted as expenses incurred to generate the £45,000. Then, for 18 months of the nuisance period, the value of the rent received under the AST would fall to be deducted: £18,000.

220. Deductions of £16,000 and £18,000 against a notional income of £45,000 indicate that the true measure of loss suffered by Mrs Ray as a result of the (presumed) nuisance was the region of £11,000. As Mrs Ray was not in personal occupation of Kevinscot, I would not have been persuaded to award general damages for the less tangible loss of amenity reflected in the annoyance and discomfort caused by the nuisance.

Injunction

221. I have already noted that Mr Wignall made it clear that Mrs Ray's claim for mandatory injunctive relief, for the removal of the Mechanical Plant, was the real reason she had pressed on with the Claim.

222. At the hearing I remarked that the terms of the Defence and of the Undertaking were such that the pursuit of the injunction was akin to *quia timet* relief against Fullers as Windrush's intended purchaser of St Kevins (the terms of the Undertaking providing that Windrush would remove the Mechanical Plant before selling to anyone else).

223. Mr Wignall submitted that, notwithstanding the terms of the Undertaking, the court should act robustly so as to eliminate any risk of the Mechanical Plant being used in the future.

224. Had I found in favour of Mrs Ray on the issue of liability, I would not have been persuaded to grant the mandatory injunctive relief sought by her. I have already noted (see paragraph 145 above) that Mrs Ray's claim in nuisance, and the grant of any relief on the claim, is not to be determined by planning considerations. Although Mr Wignall pointed to the existence of the Mechanical Plant as evidence of the commission of a criminal offence through Windrush's failure to comply with the Council's Enforcement Notices, the grant of the injunction would need to be justified by a finding of an appreciable risk that the nuisance (as established for the nuisance period) will resume in the future. The basis for it would be the avoidance of a prospective nuisance through

the *use* of the Mechanical Plant rather than a breach of planning law constituted by its continued presence at St Kevins.

225. The terms of the Contract of Sale with Fullers and of the Undertaking (as extended at the final day of trial) are in my judgment completely at odds with a finding that the alleged nuisance would be likely to arise (or even that it could well arise) in the future. In those circumstances, I would not have been persuaded that it was just and convenient to grant injunctive relief going beyond what Windrush had offered in the Undertaking.

DISPOSAL

226. It follows that Mrs Ray's Claim must be dismissed.

227. This judgment has been handed down remotely by email circulation to the parties. The handing down is adjourned for the purpose of extending the time for any application by Mrs Ray for permission to appeal and also for the determination of any consequential matters which cannot be agreed by the parties. Any application for permission to appeal should be filed by 4pm on 13 September, with any written submissions in opposition being filed by 4pm on 20 September 2022. Written submissions on any consequential issues should be made by the same deadlines, with Windrush's being filed first. In the absence of any further direction for an oral hearing (whether attended or remote) any application for permission to appeal and other outstanding consequential matters will be determined by me on the papers. In my decision on any application for permission to appeal I will make provision for the date for filing an Appellant's Notice under CPR 52.12(2).