SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT KIRKCALDY

[2019] SC KIR 77

KKD-A151/17

JUDGMENT OF SHERIFF AG MCCULLOCH

in the cause

CAROL MORRIS AND JAMES MORRIS
7 St Clairs Entry, Kinghorn, Burntisland, Fife KY3 9SZ

Pursuers

against

ROBERT PATRICK CURRAN AND MARIA JOSEPHINE MCGARRY CURRAN
having places of residence at 6 St Clairs Entry, Kinghorn, Burntisland, Fife; and
7211 Opaekaa Street, Honolulu, Hawaii 96825, USA

Defenders

Act: Middleton (Adv) with McKenzies, Solicitors, Kirkcaldy
Alt: McLaughlin, Solicitor, Kirkcaldy

Kirkcaldy, 5 August 2019

The Sheriff, having resumed consideration of the cause, Finds as follows:-

1. The Pursuers are spouses, and reside at 7 St Clairs Entry, Kinghorn. This property was purchased in 1995 by Carol Morris, who lived there until joined by James Morris in 2010. The property is situated on the ground floor, with number 6 above. There is a pend running from Nethergate giving access to the row of cottages. The area is quiet, near the beach in a popular seaside town. Both Pursuers are now retired.

2. The Defenders are also spouses, presently living and working in Hawaii. They purchased number 6 St Clairs Entry in 2016, as a start of a plan to return to Fife. The property is described by Jo McGarry, the second named Defender, as a vacation rental. It is

used by friends and family, as well as others who can book through AirB&B, an online rental resource.

3. Prior to its purchase by the Defenders, the property belonged to Amanda Poole, who used it as a holiday home from 2012. Her use of it was infrequent. She had caused major architect designed renovations to be carried out, which had caused conflict with the Pursuers, due to the noise and vibration caused by the work. Two glasses had fallen within the Pursuers' house, which Ms Poole had paid to replace. A Saniflo macerator was professionally and correctly installed. Thereafter the first named Pursuer had complained about noise and vibration from the washing machine, so Ms Poole had stopped using it. She had experienced conflict with the Pursuers, who she described as strange, and had sought to avoid it, by visiting infrequently, and when there, not using the toilet late at night, being aware that it would make a noise, although no complaints about the Saniflo were made to her during her ownership of number 6.

4. The Defenders asked a local person to assist with the letting of the number 6. That person was Suzanne Gilfeather. She dealt with cleaning, keys, and any issues that arose. She first became aware of the Pursuers when there was an issue with a missing refuse bin. Thereafter she received a regular series of complaints from the Pursuers. They were concerned at guests arriving, demanding to know at what time they would be arriving, and leaving. Ms Gilfeather felt uncomfortable and intimidated when at the property lest the Pursuers appeared with another complaint. Apart from the fact of guests arriving, complaints included the noise of the washing machine, heavy footsteps across the floor above, leaks from the shower above, and finally the noise from the Saniflo. To remedy the issues, the Defenders had instructed the removal of the washing machine, to be replaced by a dishwasher. Carpets were laid throughout with the exception of the kitchen and

bathroom. Plumbers fixed the leaks from the shower. An engineer was called to check the Saniflo, which had on one occasion made a louder than usual noise. A rag or cloth had been wrongly flushed down, but was removed. She became aware that the Pursuers were keeping a diary of events, which she said made her feel uneasy, as it appeared to her that her movements were being monitored. She was concerned at what she described as an unhealthy interest in her place of work.

5. The Defenders advised Ms Gilfeather of complaints about the Saniflo which had been communicated by the Pursuers. She arranged for a Saniflo engineer, Alan Gordon, to visit and check it over. Ms Gilfeather had a Saniflo in another property for which she was responsible, so was aware of what sound and action they make. To her, that in number 6 was normal. This was confirmed by Gordon. He provided a report (6/1) and spoke to it. As far as he was concerned, as an experienced Saniflo engineer, the unit was working well, within its parameters of time and noise, lasting 6 to 8 seconds for a flush, and about 6 seconds every 45 seconds during a shower. For the latter, the macerator did not operate, merely the pump.

6. Both Pursuers spoke of the noise from above. They described the Saniflo as sometimes making a noise akin to a motor bike or chain saw, and at other times to a loud growl. A diary of events was kept by the second named Pursuer, produced as 5/30 and 5/31. He had recorded that in 2018, the property above was occupied on 110 days, and a growling noise was heard every day of occupation. The noise was more noticeable to the Pursuers at night. They claimed that it disturbed their sleep. The Pursuers had instructed various professionals to assist in their claim, and the second named Pursuer had carried out measurements of noise. The Pursuers believe that there is inadequate insulation between the two properties. The diary 5/30 contains reference to various types of noise, such as

hoovering, which was conceded by the Pursuers as being a reasonable use of the property; however to them the Saniflo noise was intolerable and not reasonable. To them it had become far more irritating than before. There were also noises from the pipes, like knocking. Prior to July 2017, when there had been a visit from rowdy people to number 6, there had been no problem associated with the operation of the toilet or shower. The Pursuers wanted the Defenders to solve the noise issue from the Saniflo, and if that was done, they (the Pursuers) would put up with the other noises from number 6. The Pursuers, particularly the second Pursuer, have an obsession with activity of any sort within number 6.

7. One of the professional witnesses to attend the property was a building surveyor, Kenneth Wallace. He had attended the properties on one occasion, with a sound engineer. Recordings were taken. He had been in number 7 (a fact denied by the second named Pursuer) when the toilet was flushed in number 6. He could hear the macerator running. He confirmed the terms of his report 5/29 that he did not note excessive noise that would be perceived as being audibly loud to the human ear, either from the macerator or the pipes. He heard nothing unusual, and certainly nothing like a motor cycle or chain saw.

8. At certain times, the noise from the macerator could exceed World Health Organisation guidelines, as measured by Fred Lemieux, a sound engineer. This was so when the macerator ran for more than 30 seconds. If used only for flushing the toilet, it only ran for less than 10 seconds. The pump would run for a few seconds at a time for as long as water was passing through the system. The sound from the macerator was carried both through the air, and by vibration through the floor.

9. A plumber, Peter McArthur had attended at the Defenders' request to examine the macerator. In his opinion it was operating properly. It had no air admittance valve, but this

did not affect the working of the macerator, but would improve the flow of water. One could tell if an item was stuck in the macerator, as it would run for longer as it tried to clear itself. In his opinion, this particular macerator was neither the quietest nor the noisiest he had come across. He heard no knocking from the pipes.

10. The second named Defender has tried to ensure that the property is not used in a way which would cause inconvenience to the reasonable occupants of number 7. The property was to be their holiday home, used also by friends and family. It was on the AirB&B platform, but was not fully let. She had increased the number of lets through that platform in order to generate income due to the court case they were facing. She did not want to have to let it out at all, but the proportion of lets on AirB&B to use by friends or family was 60/40. Her experience of the Pursuers was not positive. She had twice tried to introduce herself, without success, the second named Pursuer once turning his back on her. They had sent a long list of complaints, which she had tried to deal with. These included rubbish bins being put in the wrong place, a noisy washing machine, and footsteps being heard. All these complaints had been looked into, and remedied. Initially the macerator had not been mentioned. It was first mentioned in a letter from agents, then in the Initial Writ served in December 2017. Plumbers were promptly called in to check it out, and repair as necessary. Apart from one finding a rag, or wipes in it, when it had been clearly noisy, all gave it a clean bill of health. It was noticeable that the Initial Writ had contained several allegations of use of the property which was unacceptable to the Pursuers, and went well beyond the present claim, which was restricted to concern about the Saniflo. She believed that the Pursuers, having previously enjoyed the infrequent use by Ms Poole, objected to any greater use of number 6. The insulation between the properties did appear to be poor, as she

could hear the arguments of the Pursuers below, and the sound of their TV. She accepted that the issue of noise was subjective.

11. The Saniflo macerator located within 6 St Clairs Entry, Kinghorn has been properly installed and maintained. It functions as it should. It is a two stage process when used with the toilet. First, solid waste and paper is macerated into liquid, then secondly, the whole waste is pumped out. When the shower is working, it is just the pump that operates. Items have occasionally entered the unit against manufacturer's recommendations, causing the unit to malfunction. Each time, the Defenders or their representative have had the issue resolved. When used properly, it does not in general, constitute a nuisance. The insulation between number 7 and number 6 is of poor effect, which might allow increased noise to reach either property.

FINDS IN FACT AND LAW:

1. That the noise and vibration generated by the operation of the Saniflo macerator unit installed behind the WC located in the shower room within the subjects known as 6 St Clairs Entry, Kinghorn does not constitute a nuisance to the Pursuers in their capacity as owners and occupiers of the subjects known as 7 St Clairs Entry, Kinghorn.

2. Therefore repels the second plea in law for the Pursuers, and sustains in part the first plea in law for the Defenders; dismisses the action, and continues the cause until 15 September 2019 at 10.00am for a hearing on expenses.

NOTE

[1] This is a case brought by the downstairs proprietors of an old cottage property in Kinghorn, against the upstairs proprietors, seeking first, a declarator that the operation of a

Saniflo macerator is a nuisance to the Pursuers, and second, if successful in obtaining the declarator, and the Defenders not remedying the issue, for an interdict against use of the Saniflo. I heard from several witnesses over 3 days, then had helpful submissions from Counsel for the Pursuers, and from the agent for the Defenders. It was agreed that at this stage, the court should only be concerned with the declarator sought, as the question of interdict would not arise until a declarator had been obtained, and opportunity for the Defenders to do something about it, and that they had failed to solve the problem. Such matters might be for another day.

[2] The first witnesses were the Pursuers. Mr Morris is a retired solicitor, who married Mrs Morris a few years ago, and moved in with her at 7 St Clairs Entry, Kinghorn. Mrs Morris is a retired court shorthand writer, with whom I am acquainted due only to her performance in that role. I would expect that most sheriffs would be so acquainted with her, and possibly also with Mr Morris. Both Pursuers gave evidence. Mrs Morris had lived in the property since 1995. At that time, an elderly lady had lived in number 6, above. The property had been sold to Ms Poole in late 2010, and considerable renovations were carried out, which included the moving of the bathroom to the other side of the house. A Saniflo macerator was installed at that time. The renovations resulted in the upstairs shower-room now being above the downstairs bedroom. Mr Morris moved in in 2010. According to the Pursuers all was well until they began to have issues with the occupants of number 6. Mr Morris kept a diary of these issues, believing from professional experience that it was appropriate to do so. By reference to the diary (5/30) he could pinpoint noise and other inconveniences. In May 2017 there had been a leak, and the occupant had contacted the owner. A cleaner (probably Ms Gilfeather) had arrived to take photographs of the affected area. The next entry was from 5 August 2017, of "noise" from 6.00 to 11.00pm, followed by

showering "at length" with a mechanical noise "louder than previously and more disruptive". Further entries on 6 August record late night showering, with a mechanical growl persistent. The entry for 7 August records "early morning noise; guests depart". There was another leak on 12 August, followed by the "toilet making a dreadful noise" and a "loud clanging noise" from the kitchen area of number 6 the next day. Mr Morris spoke to all the entries, confirming that there was some noise every day that number 6 was occupied. He made reference to the cleaner "making usual noise". He spoke of the disruption to daily life, and sleep patterns due to the loud and lengthy noises from above. To him, they were intolerable. He accepted that tenement or flatted living placed occupants close together and some noise was inevitable. Although he had recorded all noise events in the diary, he was only concerned with plumbing issues. He was of the view that the Saniflo was much louder from 2017 after a rag or similar had become stuck; prior to that event, he described it as a distant humming noise, insufficient to wake one up. He was concerned about noise from the pipes which he described as "Water hammer". He also believed that the insulation between the flats had been compromised by the Poole's renovation work. He indicated that if the Defenders were to make alterations to the Saniflo, they would be able to tolerate the other noises. He conceded that after carpets had been laid, there had been a reduction in noise from above. He also conceded that he was unhappy about the use of the property be those who had rented through AirB&B, as such users changed the character of the area. He disputed the conclusions in the reports from Mr Gordon and Mr McArthur, the plumbers who had attended, and also disputed some the findings of his own expert, Mr Wallace. He could not accept the comment, subsequently confirmed in evidence by Wallace, that the noise was not excessive. He preferred the sound engineer's report which he believed clearly demonstrated that the noise from the Saniflo was intolerable. It was suggested to Mr Morris

that his noting of every noise, and coming and going was a sign of an obsession, which he denied, stating that he had just recorded facts. His position was that he had suggested putting in new insulation, but the Defenders had refused to share the cost. This litigation was the only way forward, other than moving.

[3] Mrs Morris also gave evidence, confirming much of what was said by her husband. Her position was that things had changed when AirB&B tenants started using the flat above. Some were unruly, and had caused damage to the macerator. Things had never been the same since. Before the Defenders had bought the property, it was hardly used, so the noise was tolerable. Now it was much worse, due to the frequency of use. Having had a heart attack in 2016, she found the noise intolerable. It was dreadfully stressful not knowing who was there, or when they might be coming in late. Everything could be heard, including conversations. When the Saniflo was running, the noise was so great that one thought the ceiling must be coming down. When there had been a washing machine, she had had to hold the mirror in the bedroom due to vibrations. She reluctantly conceded that the removal of the washing machine was an accommodating thing to do.

[4] To support the Pursuers position the sound engineer or acoustic consultant, Fred Lemieux, was called. He is a skilled witness, as borne out by his CV, 5/33. A colleague had prepared a report of the findings (5/28) and he adopted that as his evidence. He had taken measurements in numbers 6 and 7, to show the decibel level when the Saniflo was in operation. He commented that the locus was in a very quiet area, so background noise was negligible. Any unexpected noise was noticeable, such as a passing vehicle. When the macerator was on, the noise fluctuated to highs of 52dB, 55dB and 40dB, measured in the Pursuers' bedroom. The macerator pump was operated by running the taps and flushing the toilet. The pump operated intermittently and was clearly audible with significant

contribution from structure-borne noise. The pump ran for 120, 60 and 30 seconds for these measurements. As would be expected the readings were higher when taken in the bathroom above. The average noise levels met current BS8233 guidelines, but exceeded World Health Organisation (WHO) guidelines which indicated that in a residential setting, 45dB should not be exceeded. Further, the Institute of Environmental Management and Assessment had also produced guidelines for noise impact assessment. This indicated that if noise activity increased by more than 5dBA, a major adverse impact was likely. Thus the macerator, for part of its running time was capable of producing a level which was considered to affect sleep, and thus health. The addition of insulation would make a significant difference, and although the macerator unit sat on an insulating pad, that on its own was insufficient. The whole unit could be surrounded by a box of acoustic material which would reduce the noise, but to what level Mr Lemieux was unable to say. He accepted that by day, the noise would be acceptable, but at night, when run for a while, it could interrupt sleep and exceed WHO guidelines. The reading of 40, which was below the WHO limit, was obtained when the macerator had operated only twice. He had heard no other noises during his time there, certainly nothing akin to a motor bike or chain saw, or growl. He described the sound as like a blender.

[5] The surveyor called by the Pursuers (Wallace) had not heard any untoward noise during the operation of the macerator. He had been in both numbers 6 and 7 during its operation. He also considered that there should be an air inlet valve fitted to the system, and its absence was causing a malfunction. This was contradicted by the evidence of Alex Gordon, who explained that an air inlet or admittance valve should not be attached, lest waste was discharged through it, and by Peter McArthur who advised that the absence of an air admittance valve did not affect the operation of the macerator. Wallace thought

that the whole system would vibrate more than it should if no air admittance valve was fitted, and this might explain why vibration and pipe knock was sometime heard. He suggested improving the insulation between the floors with the addition of pugging. Alternatively, the use of modern acoustic matting would help, as would the fitting of a resilience bar to the ceiling of number 7, with sound-block board attached. Mr Gordon had 40 years plumbing experience, and 25 years of experience as a Saniflo service engineer. He was self-employed. There were 4 such engineers in Scotland, out of 174 across the UK. He understood that there were about 6.5 million macerators in use in the UK, many in the lettings area. They were ideal for the domestic market, allowing properties to be developed. They were used where the traditional 4 inch waste pipe was unavailable. In the present case he was of the view that it was properly installed, and working well. On one of his two visits, he had removed rags, or wipes, from the unit, which is designed to deal with paper, water, and "natural" waste. None of the professional witnesses had heard any examples of water hammer from the pipes during their visits. Neither had Ms Gilfeather, nor the second Defender.

[6] At the conclusion of the evidence, I was addressed by Counsel for the Pursuers, and the agent for the Defenders. For the Pursuers, it was submitted that the court should repel the Defenders' first plea, and sustain the Pursuers' second plea. Declarator should be granted in respect of the first crave, with the second crave being reserved until the Defenders had failed to remedy or abate the nuisance. I was then referred to *Watt* v *Jamieson* 1954 SC 56, where at p58 the court had held that

> "The critical question is whether what he was exposed to was quam plus toleribile when due weight has been given to all the surrounding circumstances of the offensive conduct and its effects. If that test is satisfied, I do not consider that our law accepts as a defence that the nature of the use complained of was usual, familiar and normal. Any type of use which in the sense above subjects adjoining proprietors

> to substantial annoyance, or causes material damage to their property, is prima facie not a 'reasonable use'".

Thus it would not be a defence to say that use of the macerator is usual, familiar or normal. In the present case it is more than the Pursuers should be expected to tolerate. Further, from p57 of Watt, it is clear that the matter must be viewed from the standpoint of the Pursuers as reasonable persons, and should be a serious disturbance or substantial inconvenience. The locality principle applied, so that what might not be a nuisance on an industrial estate, might become one in a quiet residential area. I was urged to follow the objective and authoritative evidence of Lemieux, rather than the opinions of others, whose evidence was given from a position of ignorance. This included the Pursuers' own experts, other than Lemieux. The evidence of Lemieux was that the macerator had on occasion produced a level of noise and vibration which exceeded the WHO limit, and that the level was higher, significantly so, than the level said by the Institute to have a major effect on a building. This had not been challenged, and instead the Defenders' line of defence had been to attack the character of the Pursuers. When assessing the matter, the court had to take into account that the properties are situated in a quiet residential area, and that the noise was frequent. The reasonable person would be expected to tolerate noise occasionally, but the noise might become intolerable if it occurs frequently. The evidence suggested that the noise occurred whenever the subjects above were occupied. The had been occupied on 103 days between August 2017 and August 2018, and then 72 days up to end January 2019. Further, something noisy and frequent may be tolerated during the day, but the same noise might exceed the threshold by night. It was the second Pursuer's position that the noise was a nuisance by day and by night, as the macerator was operated at all times, but if the court was to determine that it was only a nuisance at night, the court could so declare. Finally, the

court must consider what was said about the level of the noise, taking the evidence from the Pursuers, and Lemieux. The WHO guidelines were clear. In 2009, they were set at 42dB, and two readings exceeded that figure, indicating the possibility of health impact. Additionally, he had spoken of the IMEA guidelines, where any increase of 5dB over the background level had a material adverse impact. In his readings, the increase was 12 and 17. Thus there was clear independent evidence that the sound levels from the macerator were above those that the Pursuers should reasonably be expected to tolerate. The Pursuers suggested possible remedial measures, to indicate that something could be done to remove the problem. In the first place, the flat above could be reconfigured back to the previous layout. Secondly, it was the Pursuers' evidence that the noise became significantly louder from summer 2017. This suggested that the macerator could be repaired or replaced, and noise would return to a quieter, tolerable level. Finally, soundproofing could be improved, perhaps to create an acoustic barrier around the unit itself.

[7] The Defenders accepted the authority of *Watt* v *Jamieson* as apt to this case. However they noted that the interdict sought was without restriction, with no attempt to restrict hours of use, or actual levels not to be exceeded. The court had to proceed on the evidence before it, particularly that of the Pursuers. No other witness had heard noise akin to a motor bike or chain saw. It was notable that the second Pursuer had recorded every noise, visit or event in a diary. Perhaps he had become obsessed with the use of the flat above. The court case had started off with several complaints, but the pleadings had been narrowed down to the noise from the Saniflo macerator. The Defenders had been accommodating and had resolved all other complaints. The current complaint was just an attempt, they believed, to end the use of the flat as a rental property. However, all parties were hamstrung by the nature of the buildings. They were old, with poor soundproofing

between them. The macerator only made the noise that macerators make, and was not excessive. Other than the Pursuers, no witness spoke to excessive noise, or defective operation of the macerator. The Defenders' agent was critical of the Lemieux findings. He had measured them by day, and had conceded that the background noise at night was less than by day. It was his evidence that two readings would exceed the WHO night time guidelines, but would that mean that the noise was "plus quam tolerabile"? And would a night time reading always exceed WHO guidance? Clearly it was for the Pursuers to make out that the noise from the macerator was at all times intolerable, and this they had patently failed to do. They had grossly exaggerated the issue, and appeared to have conflated all noise into a problem with the macerator. The action should be dismissed.

[8] I found the Pursuers to be largely truthful in their evidence, but that it was often exaggerated to the extent it became rather unreliable. I considered that they had become totally fixated on the noise from above, as evidenced by the recording of every arrival and departure, every flush of the toilet and just about every footstep (pre carpets). This made them appear to be obsessed with what went on upstairs, and I am satisfied that they would like the Defenders to stop letting the flat out altogether, as that would return things to the way it had been with the Pooles, and before. They have become oversensitive to noise, as evidenced by the comments of all the other witnesses who heard the Saniflo and shower in operation, save perhaps Mr Lemieux. I accept the evidence of all the other witnesses, for the Pursuers, and for the Defenders, including the second named Defender. I consider that, short of removing the Saniflo, and/or installing considerable sound proofing, the Defenders have done all that they could be mitigate any noise impact from their property. The technical evidence from Mr Lemieux was interesting. He had recorded the noise for the toilet and shower over several hours, and gave the peak levels. Two of these briefly

exceeded WHO guidelines. In the context of the number of readings taken, over a period, the fact that only two readings exceeded WHO guidelines is significant.

[9] I accept that the case of *Watt* v *Jamieson* is of assistance. That case involved two flatted properties in the Edinburgh New Town, with the downstairs proprietor carrying out an industrial process which sent noxious fumes up the chimney, and entering the upper flat. It can easily be seen that such an activity would be a nuisance. In the present case, the Pursuers have proved that on infrequent occasions, the use of the macerator and pump may have woken them from sleep at night. It can be heard at other times of the day, in the same way as a TV can be heard in a neighbouring property, or footsteps heard walking across an uncarpeted room, or a lorry passing outside. It is part and parcel of living in a flat in a town. It cannot be said that the use of the Saniflo causes a nuisance per se; it at best can be said to be an occasional annoyance, particularly at night. I do not consider that this occasional annoyance reaches the standard required to be considered as a nuisance in law, having regard to its nature, and all the surrounding circumstances. It is not substantial or material. The assessment of what might be reasonably intolerable is taken from an objective standpoint of the victim's perspective rather than that of the alleged offender or the actual victim. In this case, I have found that the Pursuers have become obsessed with the noise from above. It is likely that that obsession is what keeps them awake at night, straining to hear the next whoosh from the pump. As was said in a case involving water pollution and offensive smells (*Robertson* v *Stewart and Livingstone* 1872 11 M 189 at 198), and equally applicable to noise, "The expression 'abatement of nuisance'…means such diminution of pollution and smell as to render it such as ought fairly and reasonable to be submitted to." This implies that there is a level of noise that the reasonable person has to tolerate. Silence is not a right to be enjoyed by downstairs proprietors. I consider that the Pursuers have

considerably exaggerated their evidence regarding the noise of the macerator, given the evidence of other witnesses, including their own experts. That Mr Wallace, an experienced surveyor considered that the noise was nothing out of the ordinary, when heard from the bedroom of number 7, was persuasive. I am sure that there are steps that could be taken, as Ms Poole did for neighbourly reasons, to mitigate such night time noise that can occur, such as no use of the Saniflo between certain hours, or no showers between certain hours, or the installation by both parties of better sound proofing between the joists; but as the Pursuers have failed, in my opinion, to make out that the noise from the Saniflo macerator is intolerable and thus a nuisance in law, I am not able to grant the declarator sought. Accordingly, the action is dismissed. The Defenders first plea in law is directed against both the declarator, and the interdict. As the proof was solely directed to the declarator of nuisance, and that has been unsuccessful, there can be no application for interdict. Accordingly, that plea is sustained in part, being the part addressing the declarator. Apart from the request to certify McArthur and Gordon as skilled witnesses who prepared reports for the Defenders, I was not addressed on expenses. Accordingly, a hearing on expenses has been set down.