ORAL ARGUMENT – 01/28/04
03-0236
SCHNEIDER V. BATES

LAWYER: This is one of several nuisance cases filed against Houston Ship Channel Industries. The respondents are 78 of the original plaintiffs who all live in close proximity to the defendants operations for more than 2 years before the suit was filed.

The issue in this case today is whether the TC correctly determined that the plaintiffs own pleadings and sworn affidavits filed in this case conclusively established the injuries they complained of were permanent and thus barred by limitations.

HECHT: What is the general status of the litigation? All of it. Is it pretty much in the TC or some up on appeal? Where are all of these cases?

LAWYER: Everything other than what's before the court now has been nonsuited. The other cases - my understanding is that one of them is where J. Brister granted summary judgment on, and that one's been settled. And I'm not aware of the status of any other.

WAINWRIGHT: There was one in the 334th some years ago, Almond v. Crown Central. Do you know the status of that one?

LAWYER: No. I have not come across that in the CA, so I would assume it's either gone away or it's in the TC.

WAINWRIGHT: None of the parties in that case or in this case there's been no consolidation - nothing that you know of in that regard?

LAWYER: No. This court has explained that when a defendant's operations are permanent and they are in constant operation, and a plaintiff's alleged injury from that is continuous and regularly occurs, the damages are considered permanent and the cause of action accrues upon the first actionable injury.

PHILLIPS: What's the logic of not applying the continuing tort theory?

LAWYER: Under Texas law a nuisance by definition is physical harm of property, or physical harm to a person on his or her property, or emotional harm from the deprivation of use of that property.

PHILLIPS: Why is that a good rule?

LAWYER: The purpose behind distinguishing between permanent/temporary nuisance,

which a temporary nuisance basically is just application of the continuing tort doctrine. To require someone to come in to court every two years and bring successive suits, be it for a personal injury, or be it for property injury for things that occur on someone else's land that affects you on your property...

PHILLIPS: I'm not saying if you know you're going to be injured from now on and you're choosing not to move, you're just going to choose to stay there and be injured, you could bring a suit for future damages. But why do we also at the same time have to cut off a cause of action for personal injuries that - whatever you've suffered in the last two years simply because you or your parents or the predecessor, an interest in the property didn't bring that claim 30 years ago.

LAWYER: I don't think we're saying that. It's because the predecessor didn't bring suit. And this is actually the distinction that was made in Nugent v. Pilgrim Pride, where the court held that a cause of action accrues for property damages to a prior landowner. It said that the same claim would not be barred for the new owner's personal injury claims. And basically the unique facts in that case it said that the discovery rule applied. So what happened is the plaintiffs came along, they bought land, they didn't realize there was something going on there, and the court said well technically under the law yes, a cause of action didn't even accrue to you for the permanent injuries to the land. The discovery would save personal injury claims in that case. And our position is not that the discovery rule would not apply to a personal injury claim in this case, or in a nuisance case. By definition what the plaintiffs have alleged in their own affidavit show that they were on notice and basically the discovery rule just wouldn't be applicable in this case.

PHILLIPS: Let's suppose somebody who is living there has a child. Does that child have a claim for injuries if the parents bring it within two years, or if once their disability is _____, they are 18 they bring a claim, or is their claim barred because their parents claim is barred?

LAWYER: Actually all the minors' claims in this case have been nonsuited. Because yes, you have a window of time after the child turns 18.

PHILLIPS: So you don't disagree with the Pilgrim decision, and you don't disagree with some claims arising out of this?

LAWYER: No. There is two areas of the current nuisance law that have really caused a lot of confusion and conflicts in the CA's. One deals with the effect of intermittent weather conditions, and what affect that has on the frequency and severity of a plaintiff's injury, and in turn what affect that has on this determination of whether the injury is temporary or permanent. The other area of conflict has been in what role if any the possibility that a defendant's operations could be abated plays in this analysis?

Now the CA in this case held that because there was one statement in the plaintiff's affidavits alleging that their injuries were worse when the wind was out of the South, when it rained, or when it was humid, that a fact issue existed about the frequency of a plaintiff's

claims that could render this a temporary rather than permanent injury.

This court has never held that. If the severity of a plaintiff's injury can vary with weather conditions, but that the injury is otherwise continuing and regularly occurs, such that you would presume that this is an injury that's going to continue indefinitely. This court's never held that that's enough to render it temporary. And in fact in many cases where the plaintiff's injury was contingent wholly on an irregular force, but a constant recurring one, this court has held that damages are permanent as a matter of law.

Although the CA's have reached different conclusions about the effect of weather conditions, we think the better view was announced in the City of Lubbock v. Tice, where the court looked at odors emitted from a landfill and recognized that it wasn't 24 hours a day constant. Because it was affected by the weather conditions and the winds that would blow odor across the land, that the court recognized that because there was no evidence that it only occurred at long intervals, or that this wasn't regularly and constantly occurring, that based on the policies behind distinguishing between temporary and permanent nuisances, it made more sense to recognize that as a permanent injury and estimate all the damages in one suit rather than have plaintiffs coming back in to court every two years simply because they couldn't _____ that the wind was always from the direction of the landfill.

O'NEILL: There seems to have been some disagreement among the CA's as to whether, or maybe just some lose writing, as to whether we should look at the permanent, temporary nature of the injury causing activity, or of the injury. And I know that's a subject of the briefing that we need to clear up some of that confusion. But in Craft v. Langford we spoke in terms of the injuries. So have we already crossed that bridge?

LAWYER: I think so. I think that if you look at what this case said in Kraft and Rosenthall, Baker, Ware, the focus is initially on defendant's operations. Is that permanent? If it is permanent, then the focus shifts to the nature of the injury. And that's when we are concerned with whether the injury is regular and ongoing.

O'NEILL: So if the activity is permanent and there's no question about that, but the injury is along this continuum where it's intermittent but with longer periods between occurrences, it can still be temporary even though the activity itself is permanent.

LAWYER: Yes.

BRISTER: So at your vacation home you would never have a permanent nuisance?

LAWYER: I wouldn't say that. If the conditions that are causing the plaintiff's alleged injuries are regularly and constantly occurring on the property, it doesn't matter if the plaintiff is standing on the property every day. Because again, you're looking at the policy behind this. And that's to relieve the burden on the courts and the plaintiffs and the defendant of having a plaintiff

come in to court every two years when the facts are such that it makes more sense to presume that the injury is going to be ongoing, and that the damages can all be estimated in one suit.

So what we're asking the court here to clarify is, if the defendant's actions are undisputably permanent and the injury that draws from that is regular and constant and ongoing, it doesn't have to be literally constant, it just has to be such that it's reasonable to presume that it's gone on and it will continue to go on.

PHILLIPS: I understand the permanent, temporary distinction. And I understand it as you've articulated it. But what I don't understand is why it has to be that if you don't bring the suit within two years after the nuisance first appears in a permanent injury case, you are barred. Why does that logically follow from the whole scheme? Why isn't just the scheme that injuries that occur more than two years before are permanently barred if it's a permanent nuisance?

LAWYER: If you can the choice of whether to bring a suit for temporary injuries or permanent injuries, regardless of all of this court's prior case law going back to the 1800's that say it's the characteristic that determines this. The plaintiff can't choose well I'm going to just sue for permanent injuries or temporary injuries.

PHILLIPS: And I accept that. It's going to be permanent, if it's going to be temporary the plaintiff really has no choice over that at all. But that being the case how come on a permanent nuisance your suit has to be barred forever rather than you just lose part of your damages if you don't sue soon enough?

LAWYER: It's the exact same policy for recognizing the distinction between the two. If you say that even for a permanent nuisance, one that is going to go on continuously, that oh you can just come in to court and sue for the last two years, we still have successive suits that plaintiff then...

PHILLIPS: You can sue for the last two years and for all the future. All you lose if you don't bring your suit as soon as the nuisance arose is those past damages more than 2 years before. Why is that not acceptable public policy? What is it about the nature of temporary verses permanent that makes it so important that on permanent you bring that suit right at the outset?

LAWYER: I don't really view it as any different than any other statute of limitations when you've got a cause of action that accrues upon an actionable injury, we're not supposed to sleep on a right. You're not supposed to wait 20 or 30 years to come in to court and sue. And so all the policy reasons that support...

PHILLIPS: Temporary nuisance that's been around for 5 years, it's still temporary because it could be stopped. In a multifaceted test why should you be able to get two of the five years of damages?

LAWYER: It's temporary because it happens so infrequently. And there's not a reason to think that it's a continuing ongoing thing that it's not that you're suing for two years of cumulative damage. You're suing because an incident happened on this date. And you might be suing for the fact that 1-1/2 years later that type of incident happened. But you're not suing for a continuing operations on the part of the defendant.

The question of abatability and the feasibility of abatement is the other issue that has caused a lot of conflicts in the CA's. And most of it's based on this court's holding in Kraft v. Langford that an enjoinable nuisance is not a permanent nuisance. But what actually happened in Kraft v. Langford was the plaintiff asked the jury for permanent damages, which presumes past and future, the jury awarded that and then the plaintiff asked the TC to enjoin the defendant's activities. And what this court held was they are mutually exclusive. You can't have future damages and have injunction. So probably the better language in Kraft v. Langford would have been that activity that has been enjoined cannot be a permanent injury or a permanent nuisance.

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RESPONDENT

TURNEY: I would like to begin with addressing the abatability issue with some hope that it might shed some light on what we just heard. It's important to emphasize from our perspective in this case injunctive relief is a major part of the case. It's our view that...

O'NEILL: What would that injunction look like?

TURNEY: In a general way it would involve things - perhaps, we don't know because we did not get the opportunity to do discovery to find out what all could be done. But from looking at publically available documents, particularly in the regulatory context, it was clear that for the different companies those things might range from something as simple as less idling time for the diesel trucks, perhaps relocating the diesel trucks when they do have to be idling...

O'NEILL: But towards what quantifiable end. I mean to comply with regulations or to abate the nuisance?

TURNEY: To abate the nuisance. To change the operations in a way to ameliorate the conditions that represent the nuisance. That's the purpose of injunctive relief. No question.

HECHT: So you think not having any discovery that the defendant's operations can be changed in such a way that none of the conditions that you complain about continue to exist?

TURNEY: We do. Let me clarify in this respect. It is not our position, that oh we have a silver bullet. We can go out there and every particle of emissions is going to be gone. We fully understand that there will continue to be emissions, and in fact it's certainly possible that there may be some minimal affects on the plaintiffs. Our position is that under the current operations they are

excessive, they can be reduced. That's the critical factor. It's not that abatement means eliminating the companies. That's out of the question. That's never been an issue. It's not that the emissions can be completely eliminated. It's that the problematic conditions, the excessive conditions can be corrected. That is our view.

The decision by this court, Kraft, has already been made a significant issue in the case. In reviewing that it seems to us that perhaps it should be emphasized that under Kraft the law seems to be that if you can get that kind of injunctive relief, then you cannot have a permanent injury. And with that, we got to thinking and if somehow this situation were a little bit different and our claims were not for temporary nuisance, but rather were for permanent nuisance, and the injunctive relief that has been consistently pled throughout, can we doubt for a minute that these petitioners would be in saying plaintiffs cannot have it both ways. They can't fix it and get permanent damages.

OWEN: This has been there for 50 years or so. And it seems to me that when people move in to this area in Harris county, they know it's stinky, they know there's pollution and they pay lower property values for that. It seems like everybody recognizes there's a nuisance in this area, and the marketplace has taken care of that over time. In other words, when you buy a house because it's cheaper there, you know it. You're paying a lot less price than it would be somewhere else. And so it seems like from a long period of time this has been a permanent nuisance. It may be that technology now has reached the point that going forward some abatement can be done to reduce emissions. But does that change really the character of this? How do we fit that under the law?

TURNEY: I think we did. We have never pled for permanent nuisance.

OWEN: You want temporary injuries and an injunction. But my point is, you knew or should have known people buying in this area that there are emissions and you might have to keep your windows closed and you might be sniffling due to allergies, and your furniture might have grime on it, and you pay lower property prices because of that. So that seems like it should have all come out in the wash.

TURNEY: And that's the reason that permanent damages, that is the difference in the loss of market value of the property is not _____, and as a result has not been requested.

OWEN: You're missing my point. The nuisance itself has been around 50 years or more. The nuisance itself. The injuries you suffer are temporary, but they are a result of a permanent nuisance. And the reason that you pay a lower property value is because you know the nuisance factor of this permanent nuisance factor. You're trying to get us to look at the injuries verses the nuisance itself. And up until this point the nuisance seems to me has been permanent and you've paid lower values because of the temporary injuries that you know you will suffer because of the permanent nuisance. Now going forward it may be abatable, but does that change the character of what it's been all these years?

TURNEY: I would not say that anything that happens now changes the conditions before. But I would say that that's the nuisance issue. Damages from nuisance are different. They can be permanent nuisance, represents property value, market value of the property. Temporary nuisance represents perhaps rental value, but more typically physical conditions, health affects conditions that occur on an ongoing basis. And it would be our position that for example, if someone as you suggested moves out to that property, and even if they understand that because let's say it's in an industrial area as opposed to the specific conditions that might not occur on the particular occasions when they are out there. And three or four times a year after they move out there, they find themselves going to the doctor with sinus infections or things of this nature, is not clear to me at all, in fact it's certainly not our position to no they've lost that, because those conditions had been that way for a long time.

And that's one of the other issues that we think has not gotten sufficient attentions and that is, during the temporary period which we're seeking to evaluate, it's not like these plants operate in an absolutely consistent fashion day in and day out all the time. There are upsets. There are maintenance situations where of necessity conditions are different and emissions are different. Somebody fouls up. The whole situation, someone goes out to the property, they look at it, gosh this isn't bad, they move in and after a couple of weeks they see 29 diesel trucks parked over there idling and they say who knew that was going to go on? Those are the types of conditions that render the complaints on which our litigation is based as a temporary nuisance. And the argument from the other side that it's for all purposes a permanent nuisance and correct.

HECHT: Nobody cites an out of state case except for two, I think. Are you aware of whether other jurisdictions are wrestling with these issues or not?

TURNEY: No. We have not found any case that is on _____ with this situation. In that regard, we also would note that there is another critical distinction with respect to the temporary permanent dichotomy in this case that warrants attention. And that is, in all the cases relied on by the petitioners so far as we can tell, the emphasis is on a single operation and a single defendant. And we have not found any cases that suggest that the same rationale would necessarily apply. And we're thinking particularly of the Tice case, and a couple of others. We have not found any case that suggests that particularly at this stage of the litigation, without an opportunity to do discovery, that the piggy-backing of the separate facilities is not something that has to be looked at more closely.

PHILLIPS: Are you saying that after a few years of discovery, some of the defendants might turn out to be a permanent nuisance and some are temporary? I saw your argument, but I couldn't tell where it leads, the fact that there are so many defendants.

TURNEY: The only answer I know how to give is, we can't tell. It is certainly conceivable that when all of the discovery is developed, the situation with respect to these companies will turn out to be markedly different.

PHILLIPS: If this were a permanent nuisance, say you did five years of discovery and

that's what it turned out that some of them were permanent nuisances, do you agree that you have no cause of action for that at this time?

TURNEY: For permanent nuisance we do.

PHILLIPS: So you concede that. The state of the law at least as to that affect you're not challenging?

TURNEY: That's right. That's why it wasn't pled.

O'NEILL: Would you agree that light or noise pollution would be permanent?

TURNEY: That's a little bit of a mixed bag. With respect to the light situation, that obviously is going to tend to be more uniform. And the critical question in that regard is abatement. Is there something that is reasonably available that could change those conditions that equity would dictate ought to be done?

O'NEILL: Isn't that going to vary from plaintiff to plaintiff whether it's temporary or permanent based on how often it affects them.?

TURNEY: Conceivably my impression would be that - and I guess what you're saying is some plaintiffs might be severely bothered by the light, and the light is much more excessive at their particular residence that someone else, and certainly that's a possibility.

O'NEILL: It's undisputed that light is there 24/7. And it's not really abatable. So would you say that's permanent?

TURNEY: I'm not sure how we can say that it's been conclusively established that those conditions are not abatable. They are not abatable it's true in the sense that it is necessary for those premises to be lighted. But that is not dispositive of the question of whether it can be lighted in an adequate way, but one does not have the same level of impact on the plaintiffs. So that's the critical distinction in that regard.

With respect to the noise it's somewhat similar. There is a certain amount of noise that is indigenous to all industry operations, and it would be our view that that type of noise probably would represent a permanent nuisance.

I think it's important though that the noise issue also extends to off normal type situations, unusual noises, at least described as whether it's precisely accurate or not - explosions, periodic loud bangings and things like that. And again in the case of some of the defendants that might extend to the trucks. You know when you have a whole convoy of trucks going in or out at a particular time, maybe it's once a day, maybe it's once a week. The point is that to perhaps a greater extent than the situation of the light, the noise is a variable type of factor.

PHILLIPS: If there is some refinery process that requires a loud noise every two weeks, say for 30 minutes, maybe that's inherent in the shut down or something like that. And is that permanent or temporary? It's been going on for 30 years, but it just happens occasionally. But to abate it would be at least under current technology radical change in the way it operates.

TURNEY: To the extent that it's abatable, then I would argue that it may represent a temporary nuisance for that reason alone.

PHILLIPS: Well let's just assume it's not. This is just something that happens. It doesn't happen very often, but it happens regularly.

TURNEY: And you get in to those difficult issues: how often is too often? how regular is too regular? I would agree that there is a point where probably a consensus could be reached that this represents a permanent nuisance. Certainly on this state of the record, I'm not prepared to say what that would be in this case.

PHILLIPS: It seems to me the foundation of your case is we just don't know yet. There's too many defendants, too much happening out there. And the TC abused its discretion in not letting us know.

TURNEY: Certainly that is a key portion of our position. And I think that's what the CA concluded.

PHILLIPS: That's a high burden to show the TC abused that discretion.

BRISTER: What the CA said is because the plaintiffs sometimes in their own affidavit said it's continuous, and sometimes said well it just arises sometimes. That created a fact question. You don't need to do discovery from your own clients. Right? Didn't they base it on what was in the client's affidavits?

TURNEY: I think that's correct.

BRISTER: So you didn't need to discovery. You just ask them that.

TURNEY: In that regard our concern is with the spin that's been placed on the conversational language that was used in those affidavits. The first thing that's critical in that respect is that the affidavits do clearly predicate all those nasty words seized on by the other side as circumstances when the wind is blowing at least generally from the direction of the plants. And that falls clearly within the scope of the Youngblood case cited in all the briefs, and Gulf Coast Sailboat case that's cited in the briefs.

O'NEILL: But over a period of years the wind is going to blow a certain way regularly. So when you're looking at the affidavits that said the conditions are for example ongoing and occur

frequently, would it be fair to summarize your position as yes, that could indicate permanent injury as a matter of law unless we can get discovery to show that it would be abatable?

TURNEY: No. Not completely. And the reason that I say that is Gulf Coast Sailboats. We're not prepared to say that this court fouled up when they n.r.e. that case. Our argument would be that the conditions being articulated by our clients and that are involved in this case are not markedly different from those found to be a temporary nuisance in the Gulf Coast Sailboat case. It's our view that the posture of the other side is essentially - when the Youngblood case and the Gulf Coast Sailboat case were nre, that somebody just fouled up. And that's got to be fixed. And that's on the basis primarily of the Tice case which this court did not get the opportunity to review.

I would have to say that we would argue that point on that basis as well as the abatability issue.

PHILLIPS: I'm interested in your point that the TC abused its discretion in not giving you more time for discovery before taking all these claims out by summary judgment. But obviously that's a very high burden for you to show. And I'm trying to get more of a feel than the brief showed for what you did.

TURNEY: Let me perhaps correct myself. It's not our view that we're in a position of having to argue that the TC abused its discretion with respect to that or any other particular issue in this case. In fact as we see it under Kraft and under other decisions, it is the burden of the moving party for summary judgment to disprove for example the abatability issue. It is our view that from a fact standpoint we can much better sustain and defend our position if we have the opportunity to do conventional discovery with respect to the operations of various defendants.

PHILLIPS: So your main point is they didn't meet their summary judgment burden. And your subsidiary point is that we disagree with that contention.

TURNEY: Our position is they did not meet their burden. And we could have done even better in explaining our position if we would have had the opportunity to do discovery.

O'NEILL: As to the statements that are in the plaintiff's affidavits, there is no more discovery needed on that point for us to determine as a matter of law whether this is permanent or temporary?

TURNEY: I disagree.

O'NEILL: Again abatability aside. We've got Gulf Coast Sail Boats and the City of Lubbock seems to be different. Would you agree with that?

TURNEY: I would agree that it is difficult to reconcile...

O'NEILL: If we were to go with the City of Lubbock route, if we agreed with that case

for example, then we could determine based on these plaintiffs' affidavits as a matter of law permanent verses temporary abatability issue aside?

TURNEY: Probably so.

O'NEILL: So there wouldn't need to be anymore discovery to make that determination if we were to go with the City of Lubbock? In other words, you don't need any more discovery from the plaintiffs on that piece?

TURNEY: Not from the plaintiffs.

O'NEILL: So then the only relevant discovery you would need, you would argue then would be on the abatability piece?

TURNEY: In terms of discovery that is correct. But the concern that we have with respect to the affidavits, is the petitioners are effectively taking the position they are based on inferences from those affidavits. Our position is again, that language was used in a conversational sense. By the terms it was limited to conditions when the wind was prevailing from the companies. We think there may be some questions, but we agree if the court were to conclude that Tice is correct, and that Gulf Coast Sail Boat was erroneously decided and that the Youngblood case was erroneously decided and those case should not have been n.r.e., then in large, large measure our position would rest on the abatability issue.

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REBUTTAL

PHILLIPS: Respondent makes most of the fact that all the cases you cited actually went through a trial and we have the record. Is it the case that it's a little unusual to get a summary judgment at this stage of a nuisance proceeding?

LAWYER: Not every case that we have cited is following a trial.

O'NEILL: So help me plug in the abatability piece. An argument has been made that if the effects can be lessened through injunctive relief that that indicates that perhaps the injury is temporary and they need more time to be able to determine that.

LAWYER: The CA held that there was a fact question about the feasibility of abatement in this case. And for that reason summary judgment was improper. There are two things wrong with that. But the main thing wrong with that is the feasibility of an injunction is never a fact issue. An injunction is an equitable remedy that the TC can decide to grant. It's not anything that ever goes to the jury. So what the plaintiffs have really complained about here is that well if we could have gotten more discovery, we could have told the TC in more detail what we were going to ask them

to do, and then the TC could have determined if it was going to grant injunctive relief. A TC's decision about whether or not to grant injunctive relief is reviewed for abuse of discretion as is the question of whether a TC should have granted, allowed more time for discovery before summary judgment is granted.

In this case, the TC had before it from the plaintiff's expert's affidavits very detailed information about the types of injunctive relief. The plaintiffs would be looking for if they found what they were looking for with their discovery.

O'NEILL: They gave the example of the idling. There could be injunction saying you can't idle your engines more than X period of time. Let's say that were the case. Let's say there was evidence to show that if the defendants were enjoined from allowing their trucks to run more than X period of idling time, that would be enough to lessen the effects of the operation so that it wouldn't be a nuisance anymore. Would that effect would be temporary, permanent in nature of the plaintiff's claims?

LAWYER: It would because what would be important in looking at that would be is this the type of injunctive relief that a TC is going to grant an injunction on that will abate it. The theoretical idea that anything that is manmade could be abated, a court could say turn the switch off on the plant, or the court could say reduce your idling time.

O'NEILL: But their argument with that is, that there is a continuum there as well. They don't necessary have to shut it down, but you could put restrictions that would be enough to abate the nuisance without shutting it down.

LAWYER: It's with the TC's discretion in this case to look at this list of things and make the decision - the courts not going to micromanage these things. So even if the plaintiffs say well if we had all this other discovery maybe they could pave this, maybe they could reduce idling time. They could pave this. They could use different types of...

BRISTER: Would there be any nuisance ever that couldn't be lessened a little?

LAWYER: Absolutely not.

BRISTER: So that would swallow the whole rule.

LAWYER: Absolutely. And especially in this case, a lot of the things that the plaintiffs have set forth and said well they could use bag houses, they could use this and that, these are reasonable things, these are all things that are regulated by the...

O'NEILL: I understand that argument. I'm just trying to plug in this language about if it's abatable that's some indication that it's temporary. And I don't know what that means. It's a

characteristic of temporary. I'm having a hard time understanding what that language in Kraft means in a broader context.

LAWYER: I believe the better reading of Kraft is, because an injunction had issue, because court had exercised its discretion to say I'm going to permanently enjoin the plaintiff's activities, it couldn't have been a permanent _____. That's not the case we have here.

O'NEILL: But you would say more as a matter of election of remedy, than as the nature of the activity?

LAWYER: Yes. I think it's putting the cart before the horse to say that because anything could theoretically be abated by a TC, whether by a reasonable measure or not, that that would affect the determination in the instance of whether it's a permanent or a temporary nuisance.