

SOUND INSULATION AFTER BAXTER AND MILLS – A LOCAL AUTHORITY ENFORCEMENT PERSPECTIVE

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1.0 INTRODUCTION

Despite the Law Lords decisions in the cases of LB Southwark Vs Mills & others and Baxter Vs LB Camden¹, the problem of inadequate sound insulation between homes has not gone away. Irrespective of their Lordships decision, noise from the ordinary reasonable use of neighbouring inadequately sound insulated homes will continue to plague the people unfortunate enough to live in them, many of whom do not have the opportunity or freedom of choice to live elsewhere.

2.0 THE PROBLEM

The problem of inadequate sound insulation between homes is typically worst in premises originally constructed as single household dwellings which have been converted into houses in multiple occupation by sub-dividing each storey into separate self-contained flats. Consequently noise generated by the ordinary use of these flats has potential to affect other households, if the sound insulation of the separating structure between the flats is poor.

In Inner London prior to the Building Regulations 1991², statutory control of house conversions was mainly under the London Building Act 1939, which was not effective in respect of sound insulation in converted premises. Some inner London Boroughs tried to secure sound insulation improvements between flats during conversion via the town planning regime, but this was inconsistent between boroughs and generally provided a relatively low improvement in sound insulation. As a result a significant proportion of properties in inner London converted from single to multi-household use prior to June 1992 do not have adequate sound insulation between the dwellings.

As a snapshot of the scale of the problem, in LB Islington between July 1999 and March 2000 an average of 9 new sound insulation cases were established each month, giving a total of 81 new cases for that period. These are cases where the sound insulation was found inadequate, the number of complaints about inadequate sound insulation being slightly higher. Generally LB Islington finds that complaints about inadequate sound insulation reflect the fact that the sound insulation between the dwellings is poor. In all but one case investigated by LB Islington between July 1999 and March 2000, the measured^{3 a, b, c, d} sound insulation values were lower than the individual sound insulation values given in Table 2 of Approved Document E of the Building Regulations 1991². In the exception to this trend, although the sound insulation was measured as higher than the individual values given in Table 2 of Approved Document E of the Building Regulations 1991, the airborne sound insulation was lower than the mean values.

3.0 IMPLICATIONS

Until the decisions in the Baxter & Mills¹ cases, tackling inadequate sound insulation between converted dwellings was fairly straight forward by using either: -

- The "statutory nuisance" provisions of Sections 80 and 82 Environmental Protection Act 1990⁴.

Or

- The implied and specific covenants of "quiet enjoyment" from section 11 Landlord and Tenant Act 1974.

Or

- Common-law action under the tort of nuisance or civil action for breach of contracted covenants for quiet enjoyment.

Typically Local Authorities dealt with complaints of poor sound insulation between homes by serving "abatement notices" requiring remedial works, under section 80 the Environmental Protection Act 1990, on the owner of the premises. The basis for these "abatement notices" was that the inadequate sound insulation amounted to a statutory nuisance as defined by Section 79 (1) (a) or 79 (1) (g) of the Environmental Protection Act 1990.

However following the decisions at common law in the Baxter & Mills¹ cases. Many Local Authorities formed the view, having taken legal advice, that it was decided law that the nuisance limb of statutory nuisance, the common law tort of nuisance and implied or specific covenants of "quiet enjoyment" were now no longer available to tackle inadequate sound insulation between dwellings. The view that the nuisance limb of statutory nuisance was no longer available was primarily formed on the basis that the term nuisance in the definition of statutory nuisance should be given its common law meaning (see NCB Vs Thorne 1974⁵). Therefore for something to be a statutory nuisance under the nuisance limb it has to be a nuisance at common law. Their Lordships confirmed in the Baxter & Mills¹ cases (Lord Millett pg 20) that noise from the ordinary use of premises, when insufficiently attenuated by inadequate sound insulation, which unreasonably interferes with the ordinary use of neighbouring premises, can not be a common law nuisance. Therefore because the term nuisance in the definition of statutory nuisance should be given its common law meaning, inadequate sound insulation could not be a statutory nuisance under the nuisance limb.

An interesting aspect of the Baxter and Mills¹ judgement (Lord Millett pg 18 – 21) is their Lordships re-iteration that for something to be a common law nuisance it has to result from unreasonable use of premises. The case also reminds us that reasonable use of premises is not fixed and that in deciding whether or not the use of premises is reasonable local factors should be taken into account. This implies that what is acceptable noise in one set of circumstances i.e. with relatively good sound insulation between dwellings may not be in other circumstances, i.e. with relatively poor sound insulation between dwellings. In the past persons faced with re-possession action by landlords on the grounds of noise nuisance or enforcement action by Local Authorities for noise nuisance. Have sometimes argued in their defence that the noise nuisance arose not because of their own unreasonable action i.e. playing loud music, but because the building did not provide adequate sound insulation. Following their Lordships decision it will probably be less easy to mount such a defence, as the occupiers of premises can be expected to take into account the inadequate sound insulation in judging what is a reasonable level to play amplified music.

4.0 DO ANY LEGAL REMEDIES REMAIN FOR INADEQUATE SOUND INSULATION?

The Environmental Protection Act 1990 Section 79(1) gives a list of matters which are statutory nuisances, including: -

- Section 79(1)(a) "any premises in such a state as to be prejudicial to health or a nuisance"
- Section 79(1)(g) "noise emitted from premises so as to be prejudicial to health or a nuisance"

4.1 Nuisance

As outlined above, many take the view that the nuisance limb of statutory nuisance is no longer available to deal with inadequate sound insulation. However, recently Mel Kenyon⁶ has made the point that the nuisance limb of "statutory nuisance" may still be available to tackle inadequate sound insulation. The Control of Pollution Act 1974 case of *A Lambert Flat Management Ltd Vs Lomas* (1981)⁷ has been quoted as precedent⁸ that for noise, the common law standard as to what constitutes a nuisance applies. In addition this case also decided that only the statutory defences laid down in the relevant appeal regulations apply at appeal against a statutory notice and common law defences do not constitute a reasonable excuse for non-compliance with a statutory notice. Of particular note from the *A Lambert Flat Management Ltd Vs Lomas* case are the comments of Justice Skinner that:

"The only relevance of the tort of nuisance in proceedings under section 58 (*section 80 Environmental Protection Act 1990 incorporates and supersedes this legislation*) is to establish the level of noise that exists: it is a measure or standard. Once the level has been established to the satisfaction of the local Authority, the procedure laid down by section 58 (*Section 80 EPA '90*) comes into play. The "person liable" may contest that the noise amounts to a nuisance under regulation 4(2) (a) of the Control Of Noise (Appeals) regulations 1975 (*regulation 2 (2)(a) of the Statutory Nuisance (Appeals) Regulations 1995*), but any defence based on his duties in tort or contract to any person affected by the nuisance is not open to him".

Consequently it has been pointed out⁶ that *Baxter and Mills*¹ were exclusively common law cases where common law considerations of liability and defences prevailed. These cases did not consider statutory nuisance law and therefore do not provide defences for statutory nuisance action against inadequate sound insulation. Furthermore it has been argued⁶ that where a structural defect i.e. inadequate sound insulation, causes statutory nuisance. Then the provisions of section 80 (2)(b) of the Environmental Protection Act 1990 impose responsibility for remedying the statutory nuisance on "the owner" of the premises. Whilst this is a possible method of continuing to use the nuisance limb of statutory nuisance to deal with inadequate sound insulation. This strategy is yet to be tested in the higher courts and many Local Authorities remain unconvinced that a sound insulation case solely based on this precedent would succeed.

4.2 Prejudicial to health

Section 79 (1)(7) of The Environmental Protection Act 1990 defines prejudicial to health as meaning "injurious, or likely to cause injury to health". So how can the "prejudicial to health" limb of statutory nuisance be used to tackle inadequate sound insulation between converted

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flats? The following is the outline of how the prejudicial to health limb of statutory nuisance is used by LB Islington in enforcement action on inadequate sound insulation.

The case of *Coventry City Council Vs Cartwright* (1975)^{10a} considered what could be prejudicial to health and concluded that the "underlying concept of the section is that which it struck at is an accumulation of something which produces a threat to health in the sense of a threat of disease, vermin or the like". Lord Widgery CJ in recognising that these comments were specific to accumulations of matter and that other environmental factors could have different health effects. Further commented that "the words (*prejudicial to health*) are obviously very wide and one should hesitate, in construing the section in proceedings such as present, to lay down boundaries which may in another case prove to be unacceptable". More recently in the case of *Regina Vs Bristol City Council ex parte Everett* (1999)^{10b} the appeal court considered the legislative and a case law history of the term "prejudicial to health". Concluding that the words "injurious, or likely to cause injury to health" are not "restricted to infection, disease or other deterioration of a persons physical or mental condition" and that "there is no justification either in ordinary usage or statutory context for restricting 'health' to freedom from disease or illness". This view reflects the established and internationally recognised definition of health provided by the World Health Organisation (WHO)¹¹, which states:

"Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity".

Using the WHO definition of health a wide range of factors have been identified^{12 & 13} as relevant to health in the context of the non-auditory effects of noise including:

- Sleep disturbance
- Stress
- Annoyance
- Effects on residential behaviour
- Mental disorder
- Endocrine responses
- Family and social relationships
- Interference with speech communication
- Cardiovascular and physiological effects
- Combined effects with other stressors

Helpfully the case of *Southwark LB Vs Ince* (1989)⁹ specifically confirms that inadequate sound insulation can render a dwelling prejudicial to health, and therefore a statutory nuisance.

In order to use the prejudicial to health limb of statutory nuisance it is not crucial to show that an individual is actually suffering a specific health effect due to noise or inadequate sound insulation. Only that the noise or inadequate sound insulation, would be likely to injure health. Guidance as to how premises should be assessed when considering the likelihood that their condition is prejudicial to health comes from the case of *Cunningham Vs Birmingham* (1997)¹⁴. This case decided that the proper test to apply when judging whether premises are prejudicial to health is an objective assessment, not a subjective assessment. In this context an objective assessment means judging the likely impact on health of the condition of premises or noise, in terms of a fixed standard relating to a notional ordinary person of average health. Any special sensitivities or pre-existing medical conditions that the actual occupier might have and which noise or the condition of the premises may worsen, cannot be included in the objective assessment.

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A doctor's report is not needed to establish that premises are prejudicial to health. The cases of *Patel Vs Mehtab* (1975)^{15a} and *LB Southwark Vs Simpson* (1998)^{15b} addressed the question of who is competent to judge whether premises are prejudicial to health and confirm that evidence from appropriately qualified Environmental Health Officers or surveyors will suffice.

Useful evidence that inadequate sound insulation between premises can render them prejudicial to health may be gathered by interviewing the residents. People living in homes with poor sound insulation commonly report health problems they associate with the noise they experience and work by Colin Grimwood at the Building Research Establishment¹⁶ illustrates this.

Further evidence that the premises is prejudicial to health due to inadequate sound insulation arises if the sound insulation between the premises can be demonstrated as worse than the sound insulation values given in The Building Regulations 1991, Approved Document E, Table 1². Because Regulation 8 of The Building Regulations 1991 asserts that the regulations do "not require anything to be done except for the purposes of securing reasonable standards of health and safety for those in and about the building". Reciprocally and logically, if the sound insulation between dwellings does not meet the sound insulation values given in Approved Document E, Table 1². Then an unreasonable standard of sound insulation exists with respect to the health and safety of occupiers, and the premises is likely to be prejudicial to health.

Commentary on the Building Regulations 1991 published by the Building Research Establishment¹⁷ states that inadequate sound insulation presents risks to health and estimates that approximately 100000 persons per year in the UK are at risk of having their health affected by noise in their home.

5.0 SOUND INSULATION STATUTORY NUISANCE ENFORCEMENT IN PRACTICE

Since November 1998, when the Appeal Court first dismissed Ms Baxter's Appeal, LB Islington has continued to deal with inadequate sound insulation as a statutory nuisance on the basis that it renders the condition of the premises prejudicial to health. LB Islington takes enforcement action mainly in respect of flats in terraced mid to late Victorian houses owned by Registered Social Landlords (Housing Associations) converted in the mid 1970's to late 1980's. Since starting to tackle inadequate sound insulation as a statutory nuisance in the late 1980's, LB Islington has tried to work in partnership with landlords. Sometimes partnership working has broken down and we have had to resort to enforcement action, and on one occasion we had our fingers burnt by losing an appeal against an abatement notice (served before the *Baxter & Mills*¹ cases). When we initially began dealing with sound insulation as a statutory nuisance we found that most of the landlords we dealt with did not understand the corrosive and deleterious effects of inadequate sound insulation on health and quality of life. Typically landlords felt that the occupiers of inadequately sound insulated homes who complained were too fussy, their expectations were unreasonable and it wasn't practicable to achieve significant improvement in sound insulation. However we now find that the Registered Social Landlords we mainly deal with understand and accept inadequate sound insulation as a very significant factor affecting the health and quality of life of their tenants.

Even though the Registered Social Landlords LB Islington deal with are all aware of the outcome of the *Baxter and Mills*¹ cases. We continue to achieve comprehensive sound insulation improvements, often from a very low starting point, without having to fight tooth and nail all the way. In several recent cases we have achieved independent ceiling works, to a standard better than floor treatment 1 of Approved Document E², in less than four months.

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from initial complaint to completion of works. This was achieved by using the prejudicial to health limb of statutory nuisance and by taking a partnership based approach to working with the Registered Social Landlord and reserving robust enforcement action for those circumstances where an owner is completely unprepared to deal with the problem. We have found that by engaging with the owner at an early stage of the investigation and keeping them advised of our actions and the outcome of our investigations. We have helped Registered Social Landlords in our district to move inadequate sound insulation higher up their hierarchy of priorities and to accept that resources need to be expended on resolving this problem.

In particular we have found that by objectively measuring^{3 a,b,c,d} the inadequate sound insulation as part of our assessment process and using this information to design the schedules of work for our abatement notices. So that the modified structure will achieve the

sound insulation values of Table 2 of Approved Document E of The Building Regulations 1991², and communicating this effectively to Registered Social Landlords. They seem better able to understand the problem and accept the need to carry out work, than if we only relied on a subjective assessment of the sound insulation. Registered Social Landlords have told us that this is because by objectively measuring the sound insulation as part of our assessment process they feel confident that:

- The Local Authority is taking an independent and neutral view of the matter and not pandering to the possibly unrealistic expectations of tenants.
- The target standard for improvement of the sound insulation is specific, measurable, attainable, realistic and practicable.
- If the works required are properly executed, there is no need to re-assess the sound insulation to determine compliance with any abatement notice served.
- That the works required by the Local Authority are not a "belt and braces" or "over the top" scheme. Instead the schedule of works is a carefully considered scheme derived by taking reasonable steps to ensure that it is the minimum necessary to adequately restrict or abate the nuisance, and therefore the works are cost effective.
- The likelihood of the owner being required to carry out a succession of remedial works to abate the statutory nuisance is less than where subjective assessments are used on their own. Because subjective assessments may exhibit greater variability due to acoustic and non-acoustic factors than objective measurement.

LB Islington receives very few complaints about inadequate sound insulation from private renting tenants. No specific reason for this is known, although one hypothesis is that the wide spread use of assured short hold tenancies has undermined the security of tenure of private sector tenants, which coupled with a rapid turn over of tenants in the private renting sector, discourages tenants from complaining.

The number of complaints LB Islington receives about inadequate sound insulation from long leaseholders and shared freehold owner-occupiers of flats in converted premises is increasing. These cases can be very difficult to resolve, as complex lease or shared freehold arrangements can obscure who is liable for the work. In addition the owner-occupiers who complain are sometimes reluctant for work to be executed on their side of a wall or floor/ceiling partition and are often unaware that they may be responsible for such work or at least a pro-rata share of the costs.

We have received a small number of complaints about inadequate sound insulation in purpose built premises constructed after June 1992. Investigation of these complaints showed that the measured sound insulation was significantly worse than the values in Table 2 of Approved Document E, The Building Regulation 1991². In each case this was due to the contractor not following the approved design and substituting other construction, use of materials more lightweight than specified and poor standards of work.

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When deciding to continue to deal with complaints of inadequate sound insulation by using the statutory nuisance provisions of The Environmental Protection Act 1990 after the decisions in the Baxter and Mills¹ cases. LB Islington took into account the precedent set by the case of Lowe and Another Vs South Somerset District Council (1998)¹⁸. This case confirms that an abatement notice only has to adequately identify the matter giving rise to the problem and that it is a "statutory nuisance". There being no specific requirement for an abatement notice to distinguish which, or if both, of the nuisance or prejudicial to health limbs apply. This case concerned noise and Mr Justice Gage commented that it was a matter of degree whether noise was injurious or likely to be injurious to health or a nuisance, and noise that was allegedly a statutory nuisance would therefore always be a nuisance. He also commented that if a Local Authority was challenged and defeated on the grounds that the noise was prejudicial to health, they were entitled to fall back on the argument that the noise was a nuisance.

6.0 FUTURE DEVELOPMENTS

The current regime for assessing the fitness of dwellings for human habitation¹⁹ is under review. A new Housing Hazard Rating System is proposed for assessing the fitness for habitation of dwellings based on minimum standards for health and safety. At present the Housing Hazard Rating System includes the facility to include the sound insulation of a dwelling as a part of the assessment²⁰. Should the facility to include sound insulation remain in the Housing Hazard Rating System this will allow owners access to financial assistance through the Housing Grants system, subject to a test of financial resources, to deal with the problem.

The Human Rights Act 1998 due to come into force on 2nd October 2000 incorporates the European Convention on Human Rights into United Kingdom law. This includes:

Article 8; which establishes a right of respect for "privacy, family life and home".

and

Article 1 of protocol 1; which establishes a right "to the peaceful enjoyment of possessions and protection of property".

This legislation may be helpful in challenging inadequate sound insulation, but at present is uncharted water.

7.0 CHEAP SOLUTIONS

Effective sound insulation works are not cheap in simple monetary terms, but provide good value with regard to health and quality of life.

Ordinary construction skills and materials when properly utilised can be as effective as dedicated proprietary acoustics products. Generally the cheaper solutions give less improvement in sound insulation than the more expensive. The cost of effective sound insulation work usually reflects the complex structural work executed to a high standard necessary to significantly improve sound insulation between dwellings. As a rough guide, in what the author has found to be an approximate ascending order of effectiveness, floating floor works cost £45-55 per metre², suspended ceiling works are approximately the same and independent ceiling works cost £50-60 per metre².

The following would help to reduce and better manage the costs of improving sound insulation in existing housing:

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- Only treat habitable rooms i.e. those used or likely to be used for sleeping i.e. bedrooms and living rooms, and exclude kitchens, bathrooms, hallways and other less noise sensitive areas of dwellings.
- Aim for a minimum reasonable standard suitable for protecting health i.e. the individual Building Regulation sound insulation values from Table 2 of Approved Document E². Where the stacking or layout of rooms with similar noise sensitivity is adequate, then the individual Building Regulation sound insulation values can usually be achieved by either ceiling or floor works, or by treating one side of a wall, not both.
- The programming of sound insulation works with other schemes of major works.
- Risk assessing premises and treating the worst first i.e. using date and method of conversion and construction data to estimate likely sound insulation performance relative to other premises.

Whilst the claimed cost of dealing with inadequate sound insulation was a very significant factor in their Lordships decision. Very little, if any, account was taken of the benefits of improving inadequate sound insulation. Professor Berglund et al¹² have commented with respect to noise that "due to different levels of knowledge about the costs of control action and health effects, there is a tendency to overestimate the cost of control action and underestimate the benefits". A comprehensive cost benefit analysis would help determine the priority for providing adequate sound insulation and impartially weigh the outlay of resources with the return that results. Any cost benefit analysis for providing adequate sound insulation should include:

1. The identification and accurate costing of effective remedial works.
2. An accurate estimate of the number of properties with inadequate sound insulation and the number of persons affected.
3. The identification of the benefits and savings from providing adequate sound insulation i.e.
 - Improved health.
 - Better quality of life.
 - Better neighbour relations.
 - Increased property values.
 - Improved fire resistance between dwellings.
 - Improved thermal insulation.
 - Extending of premises life.
4. The comparison of the health, safety, quality of life and property effects with and without remedial works.
5. The comparison of the cost of remedial work with the benefits that accrue.

8.0 CONCLUSIONS

1. The problem and effects of inadequate sound insulation between dwellings continue and have been unaffected by their Lordships decision.
2. The problem and effects of inadequate sound insulation are often little understood by those fortunate not to live in homes with poor sound insulation.
3. The remaining legal remedies are complex and untested in the courts. However the problem is sufficiently widespread and with significant enough impact to warrant continued use of existing legislation to determine if such methods are viable.

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4. The costs of remedying inadequate sound insulation are rarely objectively weighed against the benefits that accrue.
5. New legislation to resolve the current legal uncertainties and provide a clear and equitable framework for remedying inadequate sound insulation to homes not subject to Building Regulation control is needed urgently.

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