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LEGAL CONTROLS OVER NOISE NUISANCE - DO THEY GO FAR ENOUGH

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1. INTRODUCTION

This paper considers the effectiveness of the various legal controls available to local authorities and individuals in seeking to prevent or abate a noise problem. It will also draw attention to recent and proposed legislative changes and ask "Do they go far enough?"

1.1 Public concern about environmental issues.
This has steadily increased over the years, so much so that two White Papers explaining Britain's Environmental Strategy have been published, one in 1990 [1] the other in 1992 [2]. Concern about noise, or 'any sound which disturbs or annoys' as it is described in the DOE Guide 'Bothered by Noise', is no exception in that complaints to Local Authority Environmental Health Departments, especially about neighbourhood noise, continue to rise. Reasons for this increase are numerous but not least because:

(i) 'Disturbing sounds' can arise from a multitude of sources, often as a result of noise penetration between dwellings or from sources outside the dwelling, from the road or neighbouring garden for example. A Report by the Noise Review Working Party in 1990 quotes a survey by the Building Research Establishment which indicates that most complaints concerned amplified music and dogs followed by domestic activities, voices, DIY activities and car repairs.

One group in particular was identified as being those most bothered by neighbourhood noise, especially in the summer, namely people in the 25 to 34 year old age group living in flats rented from a local authority.

(ii) Noise is subjective affecting people in different ways often causing nervous disorders, loss of sleep or loss of appetite for example.

(iii) Whilst noise levels can be measured to provide objective evidence to present to a Court it has been found that there is little correlation between noise levels and an individual's response to the noise in question. Indeed this seems to be recognised by the Building Research Council which is developing a 'Noise Annoyance Model' i.e. model of human

response to noise taking into account social and psychological factors as well as physical characteristics of noise such as loudness, variability and tonality.

2. LEGAL CONTROLS OVER NOISE NUISANCE

Legal controls over neighbourhood noise are many and are complex, reflecting two different approaches to pollution. The common law via the tort of nuisance and the statutory nuisance provisions contained in part III of the Environmental Protection Act (EPA) 1990 adopt a mainly 'reactive' approach in that the law 'reacts' or is 'triggered' only when a noise problem exists or is 'likely to occur or recur'.

Other legislation, Town and Country Planning Law for example or the Building Regulations take a 'preventative' approach, an approach in keeping with Government Policy as espoused in the 1990 White Paper, namely to prevent pollution at source.
A combination of the above approaches would seem to provide a formidable body of law but how effective is it?

2.1 The Statutory Nuisance Procedure

Resorting to law is often costly and uncertain in its outcome consequently complainants would be advised initially to contact the local authority Environmental Health Department. Under Section 79 of the EPA 1990 nuisance detection is their responsibility. If they are satisfied the noise complained of amounts to a statutory nuisance within section 80 the local authority will generally institute formal proceedings by serving an 'abatement notice' on the person responsible for the nuisance requiring abatement of the nuisance or prohibiting or restricting its occurrence within a specified time.

Failure to comply with the notice "without reasonable excuse" is an offence. A local authority may also, whether or not they take proceedings in the Magistrates Court for an offence do whatever may be necessary in execution of the notice.

This latter power is particularly useful where the noise arises from a domestic party. The DOE and the Home Office in September 1992 issued a joint guidance note entitled 'Control of Noisy Parties' which advises environmental health officers that service of the abatement notice on 'The Occupier' is acceptable where it is not possible to discover the name of the person causing the nuisance. Failure to comply with the notice is not an arrestable offence consequently the only way to stop the noise may be to seize the equipment. This power was recently exercised by Nottingham City Council environmental health officers when a hi-fi

system was seized after a family refused to turn down the volume and ignored an abatement notice[3]. Whilst the EPA 1990 does give Environmental Health Officers a power of entry to premises this requires 24 hours notice to be given in the case of residential premises. Consequently where urgent action is required such as where the nuisance is widespread and/or people's health is being prejudiced through lack of sleep, a warrant must be sought from a Justice of the Peace.

Wide powers are also available under section 81. This allows a Local Authority to take proceedings in the High Court where they are of the opinion that summary proceedings before the Magistrates would be inadequate: for example where the person causing the nuisance has repeatedly ignored abatement notices. Here an injunction would be sought to restrain the defendant from continuing/repeating the nuisance.

The EPA, section 82, also provides for an individual aggrieved to initiate summary proceedings by 'laying an information' before the Magistrates. Alternatively an individual may seek an injunction by relying on the common law of nuisance.

2.2 Factors affecting the effectiveness of the statutory nuisance provisions.

2.2.1 The need to establish that the noise complained of amounts to a statutory nuisance within section 79(g):

"noise emitted from premises so as to be prejudicial to health or a nuisance".

This is not easy to establish. The burden of proof is on the plaintiff, either the local authority or the individual. Moreover the law is not interested in noise which annoys (despite the DOE description given ion their guidance note) but only noise which can be proved to be "prejudicial to health or a nuisance".

Unfortunately, the courts have not adopted the World Health Organisation's definition of "prejudice to health" as "something which affects a person's well being,"[4] consequently it is difficult to establish prejudice to health in the absence of noise induced hearing loss - which is unlikely to occur where neighbourhood noise is concerned.

That leaves the nuisance aspect.

Caselaw [5] is quite clear that noise must amount to either a private or public nuisance with respect to the common law to qualify as a statutory nuisance. Hence evidence must be brought by the plaintiff to prove that the noise is, or has caused either: 'Undue interference

with the complainant's use and enjoyment of his land', as in the recent case of a 20 year old woman who repeatedly played the same record very loudly for 2 hours at a time, over six weeks[6] or the pensioner who regularly blasted his neighbour with classical music.[7] **OR** affects a large number of people, a domestic party perhaps.

2.2.2 The need for corroborative evidence

In establishing a nuisance the complainant or local authority is not helped by the subjective nature of noise. Corroborative evidence is therefore important. It can take several forms, evidence from persons other than the complainant e.g. other neighbours or it could be in the form of objective evidence i.e. noise levels measured by local authority officers or other experts

However, whilst such measurements are a valuable evidence noise level alone is not the sole factor. Other factors are considered by the court including the duration of the noise, the time it occurs and the locality. This was summed up by Pollock, C B in Bamford v Turnley [1862] 3 B&S 66 who said:

"That may be a nuisance in Grosvenor Square which would be none in Smithfield Market, that may be a nuisance which is permanent which would be no nuisance if temporary or occasional only".

This is in line with research which shows that an individual's response to the noise in question is dependent in social and psychological factors as well as the loudness, variability and tonality of the noise. Indeed in Halsey v Esso Petroleum Co Ltd [1961] 2 All ER 145 and in Taff v McDowell [1993] NPC 114 the Judge visited the site to encounter the alleged nuisance and assess it for himself.

The issue of locality has been raised on numerous occasions by the defendants. For example in a recent case involving a cockerel crowing in the early dawn[8] it was argued that as the noise in question was such as should be expected in a rural area. The argument was rejected, however, in that the noise in question unreasonably interfered with the plaintiff's sleep. The circumstances of that case does show how emotive the issue of noise nuisance is and how the law has the difficult task of balancing the rights of occupiers to enjoy their property as they wish.

2.2.3. Enforcement: which remedy?

Even if a nuisance can be established enforcement can be problematic.

Most persons suffering from neighbourhood noise want it stopped. Even if summary action is successful a fine may not be sufficient to stop the nuisance despite the fact the level was

raised in October 1992 to a maximum of £5000 with £500 a day for every day the nuisance continues. As Michael Beloff QC [9] puts it: "The average citizen does not want to sit in his garden assailed by the strident notes of an electrical organ with an award of £500 per year. He wants to sit quietly in his garden". Often defendants may be in no financial position to pay a fine or it may be inappropriate where for example remedial work is needed to a property in order to remedy the lack of sound insulation between dwellings.

An injunction prohibiting the nuisance may be more appropriate but only local authorities may use the provisions of the EPA to seek such a remedy an individual will have to take action in the County Court relying on the common law. Whilst injunctions are being sought more and more in cases involving environmental pollution it must be remembered that an injunction is a discretionary remedy and the court may award damages in lieu. The advantage however of succeeding to obtain an injunction is that breach could result in a custodial sentence being imposed - a remedy which in some cases may be more effective than a fine. For example the woman harassing her neighbours by repeatedly playing the same record despite an injunction was jailed for 7 days by Teesside County Court. A pensioner however released after serving a sentence of 21 days imprisonment immediately breached the injunction banning him from playing his radio too loud and was given a further jail sentence of 56 days.

3. NUISANCE CAUSED BY POOR NOISE INSULATION BETWEEN DWELLINGS

It has been noted that as a group tenants of flats suffer from noise nuisance caused by their neighbours. In this situation if the nuisance is due to unreasonable behaviour by their neighbour the direct methods of control, described above can be used. However research has shown that NORMAL USER can give rise to a nuisance due to poor noise insulation between dwellings. This was the situation in the case of Sampson v Hodson Pressinger [1981] 3 All ER 710. In that case the defendants, namely the tenant causing the nuisance (first defendant) and the landlord were both found liable by the Court of Appeal in nuisance notwithstanding that the tenant used the premises in the normal way. The Court held that due to the conversion work carried out by the landlord's predecessor in title , the property itself was not fit to be used in a normal way. The present landlord was also liable for breach of the covenant in the lease granting quiet enjoyment. Whilst he had not carried out the conversion work he had taken the reversion from the original landlord with the knowledge that the defective conversion work was causing a disturbance to the plaintiff.

The plaintiff was a tenant of a flat in a converted house under a 99 year lease. Conversion work was carried out on the flat above converting the flat roof, immediately above the plaintiff's sitting room, kitchen and bathroom into an attractive tiled terrace and french

windows put into the wall of the defendant's sitting room to open onto the terrace. The terrace was used in the normal way, for example by inviting friends onto it, but because the tiles had been improperly laid, whenever anyone walked on the terrace the noise of treading feet penetrated into the flat below and conversations could be heard. The judge visited the premises and was of the opinion that the noise caused unreasonable interference with the plaintiff's use and enjoyment of the property. The County Court Judgement awarding damages of £2,000 against the landlord, in lieu of an injunction was deemed appropriate in this case as that was the wishes of the plaintiff. Strictly speaking said Everleigh LJ there could be an award of damages against both the defendants and had the plaintiff not withdrawn his claim against the first defendant he would have made an award against her. He added that this was a case however in which she would have been entitled to a complete indemnity from the original landlord.

The Sampson case was considered again by the Court of Appeal in Taff v McDowell [1993] infra. This case once again concerns a house converted into flats. The occupier of the basement flat called a noise transmission expert who gave evidence that:

(1) the floor between the two flats contained no form of sound insulation of any kind;

(2) the original owner of the flat, who had let it to the defendant, had removed carpet and sanded the floor. With the covering removed the passage of sound via the floor would be such that ordinary use of the ground floor flat would transmit a level of sound to the basement flat at such a level as to constitute a nuisance to the occupier.

(3) If the original covering was restored to the floor of the ground floor flat, it would be likely that the sound transmissions in respect of impact sound, for instance footfalls, would be within, but just within the 1985 Building Regulations governing such matters.

(4) The transmitted sound from speech, radio and TV would not be within those standards even with the covering restored.

Consequently a nuisance was successfully established. Damages were awarded in lieu of an injunction against the owner of the ground floor flat, the Court being of the opinion that it was not justified in restraining ordinary user of the premises. In assessing damages the Court gave consideration to the cost of remedying the problem, in this case the fixing of a hung ceiling, the diminution in the enjoyment of the flat caused by the necessary drop in the ceiling height and the alteration of window architrave's etc, and the diminution of enjoyment of the flat over the years due to the noise nuisance.

The freeholder in this case was the Crown, the original landlord a Limited Company, having been struck off the Register of Companies. The Crown was not held to be in breach of the covenant granting quiet enjoyment as unlike the landlord in the Sampson case the nuisance was not the result of any positive act by them. This is in line with Malzy v Eicholz [1961] KB 308 the headnote of which reads:"A lessor is not liable in damages to his lease under a covenant of quiet enjoyment for a nuisance caused by another of his lessees because he knows that the latter is causing a nuisance and does nothing about it. There must be active participation on his part to make him responsible for the nuisance."

The Sampson precedent has also been relied upon by the London Borough of Southwark [10] when that local authority served an abatement notice on a private landlord requiring the installation of sound insulation. In the subsequent appeal against the notice the court affirmed that it had been correctly served. That point having been established the landlord undertook to comply. In reversal of roles the London Borough of Southwark was held liable for nuisance when a council tenant took action alleging sound insulation in council properties was inadequate resulting in disturbance by intrusive noises arising out of normal usage of the flat above. The result was that the Council complied with a court order to remedy the problem.

4. PLANNING LEGISLATION

In respect of new development (including a change of use) close co-operation between environmental health and planning departments can avert a potential noise problem. For example:

(i) planning permission can be REFUSED for a potential noise emitting use in a residential area on the basis it would be detrimental to the amenity of the area, e.g. The London Borough of Newham [10] refused planning permission to a Housing Association for the conversion of seven houses to flats. One of the reasons for refusal was that the applicants had made no provision for sound insulation between flats in contravention of the Borough's planning policy for the provision of minimum sound insulation. This decision was upheld in the High Court which held that provision of sound insulation between dwellings created by conversion is a 'material consideration for planning purposes'.

(ii) by attaching CONDITIONS to any grant of planning permission providing they are necessary, clear and enforceable, in line with DOE Circular 1/85. A condition that adequate sound insulation is provided could be useful in preventing noise nuisances of the type in the Sampson case.

5. RECENT DEVELOPMENTS, DO THEY GO FAR ENOUGH?

5.1 Building Regulations 1991, Resistance to Passage of Sound, E1 E2 E3 (1992 edition)
These amended Regulations enforced under existing Building Control Procedures are a step in the right direction in that they RECOMMEND minimum airborne sound insulation criteria for floors and walls and minimum impact sound insulation criteria for floors in an attempt to minimise internal noise transmission. The Regulations have been extended beyond new buildings to include where there has been a material change of use e.g. barn conversion, shop to a house, or conversion to flats and that is to be welcomed. Do they go far enough? The criteria laid down are firstly only 'Recommendations' and secondly research has shown that even when met 30% of the occupiers are still disturbed. This is not surprising as to quote the Regulations:

"The Building Regulations do not require anything to be done except for the purpose of securing reasonable standards of health and safety for persons in or about the building". The references to 'reasonable' and to "health and safety" are reminiscent of the statutory nuisance criteria i.e. "prejudice to health or a nuisance" which are difficult to establish. Should the BRE produce a noise annoyance model this would enable the noise insulation criteria to be reconsidered.

5.2 The Noise and Statutory Nuisance Bill 1993
The Department of the Environment issued a response to the recommendations of the Noise Review Working Party. These in turn resulted in a Noise and Statutory Nuisance Bill which was brought from the House of Lords on 17 May 1993. In summary it:

(i) extends the statutory nuisance procedure to include various kinds of noise nuisance arising in the street;

(ii) makes noise emitted by a vehicle, machinery or equipment in a street a statutory nuisance;

(iii) allows local authorities (outside London) to adopt provisions relating to the installation and operation of audible intruder alarms and enable them to deactivate alarms where necessary. The Bill also makes provision to rectify an omission in the EPA 1990, namely the power to enable local authorities to charge premises in England and Wales to recover expenses where they have been incurred in abating a nuisance-a provision which had been part of the Public Health Act 1936.

If enacted would this piece of legislation go far enough? Again the answer must be, No. This Bill still relies on the nuisance concept with all the problems that entails in particular it leaves the burden on the plaintiff to establish a nuisance at law. The Noise Review Working Party did suggest that consideration should be given to the creation of a strict liability offence, but even then retained the link with the nuisance concept by stressing that the concept of nuisance should continue to be the basis of action by local authorities. It is submitted that reversal of the burden of proof would redress the balance away from those whose actions cause noise which disturbs their neighbours more equitably towards those who suffer from unwanted sound.

The Working Party recommendation that priority should be given to an examination of the possibility of establishing Neighbourhood Noise Watch Schemes could be beneficial in educating some people of the need to consider their neighbours for resorting to law is not always the answer.

6. REFERENCES

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