Licensing and public nuisance

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Introduction

The regulation of places of entertainment and the control of public nuisance – principally the control of noise – remains a significant and important function administered by local authorities. From time to time interesting cases make the news headlines, where noise features as the main problem – see Figure (1) below.

Regrettably, no data are collected by local authorities on complaints of noise nuisance arising from licensed premises and so it is difficult to gauge the seriousness of the current problem. In a 2006 survey conducted by MORI into local objections to live music, the survey found, not surprisingly, that 77% of all objections to live music licence applications came from local residents and that 68% of those objections related to concerns about noise.

The evidence presented by the Live Music Forum (LMF) to the Home Office, during the government's review of the Licensing Act 2003, suggests that the Act has had a broadly neutral effect on the provision of live music, that local authorities have generally adopted a sensible, pragmatic and even-handed approach, and further, the LMF believes that live music is not, as is often claimed, a widespread source of public nuisance. Some environmental health practitioners with experience in this field may beg to differ.

Licensing Act 2003

The Act has established a single regime for licensing premises which are used for the sale or supply of alcohol, to provide regulated entertainment, or to provide late night P24

Figure 1. Examples of licensed events and premises making the news headlines

P23 refreshment. Parliament's intentions were to encourage a flourishing and varied licensed sector whilst providing safeguards to protect neighbourhoods from subsequent harm and disturbance. Under the Act, local councils, acting as the licensing authorities, must carry out their functions with a view to promoting four statutory licensing objectives:

- the prevention of crime and disorder
- the prevention of public nuisance
- the promotion of public safety
- the protection of children from harm.

Through due consideration of the above licensing objectives in reaching decisions, licensing authorities must take into account their Statement of Licensing Policy, government guidance issued under section 182 of the Act and relevant case law.

With regard to the prevention of public nuisance, the local authority's environmental health service plays a pivotal role acting in its capacity of "responsible authority." It can make representations on new applications on the grounds of noise and can object in principle, or it can ask for suitable conditions to be attached to any premises licence granted. The service can, additionally, ask for a review of any licence on the same grounds. The licensing authority, having due regard to any representations so made, may:

- grant the premises licence subject to conditions deemed necessary to promote the licensing objectives
- exclude any of the licensable activities from the scope of the premises licence
- refuse to specify a person as the premises supervisor; or
- reject the application in its totality.

Public nuisance

The powers bestowed on local authorities to control public nuisances go back to the 1848 Public Health Act, where the concept of statutory nuisance was born and was based upon the codification of a series of common law nuisances. Astonishingly, some public nuisances such as being a "common scold" or a "common barrator" were still offences as late as 1967 before being abolished by the Criminal Law Act and, interestingly, it was not until the passing of Noise Abatement Act in 1960 that noise was classified for the first time as a statutory nuisance.

The question "what is a nuisance?" has for centuries been steeped in confusion and ambiguity. In the celebrated case of *Brand v Hammersmith and City Railway Company* (1867)QB 223, the plaintiffs sought compensation in private nuisance for the noise and vibrations caused by the running of trains near their property. The issue was over whether they had already received compensation for the harm under the statutory scheme provided by the Railway Clauses Consolidation Act 1845. The House of Lords eventually decided that there was a compensatory gap arising from the excessive level of vibrations caused by trains and granted them damages for loss of enjoyment to their property. Chief Justice Earle remarked, rather ominously, that "…the word nuisance introduces an equivocation which is fatal to any hope of a clear settlement…" and added the words that guaranteed him perpetual fame: "…this cause of action is immersed in undefined uncertainty…." However, it is this lack of precision and its flexibility that has given nuisance such utility and durability over the years. In the case of *Hunter v Canary Wharf* [1997]AC 655, the boundaries of private nuisance were firmly fixed to proprietorial rights as against a personal right of freedom from interference. The core part of the case was over whether interference in the reception of television signals caused by the construction of the Canary Wharf tower could amount to a nuisance. Lord Cooke [at 711] spoke of the principle of "give and take": "The principle may not always conduce to tidiness, but tidiness has not had a high priority in the history of the common law. What has made the law of nuisance a potent instrument of justice throughout the common law world has been largely its flexibility and versatility."

Although the common law recognises nuisances as being either private or public, in reality these should be seen as separate torts

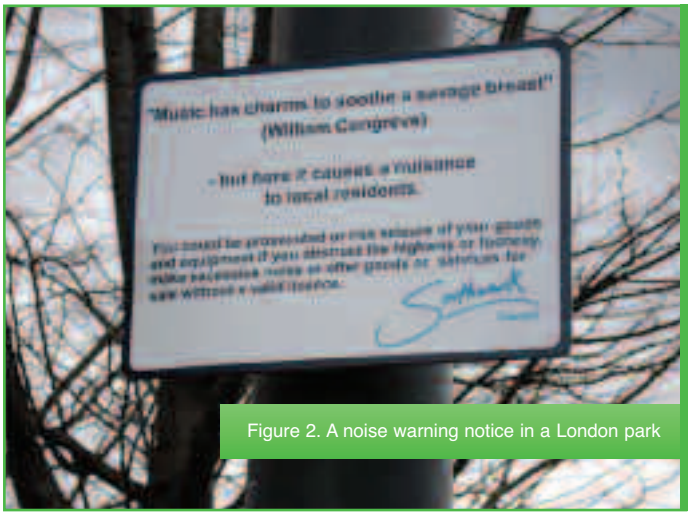

Figure 2. A noise warning notice in a London park

since they protect different categories of rights. A private nuisance involves the interference with someone's right to enjoy his/her own land – i.e. it is a proprietorial right, whereas public nuisance involves the endangering of health, comfort or of property, i.e. it amounts to a breach of rights on a much larger scale than is the case with private nuisance. The leading authority on public nuisance is recognised to be the case of *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169. Here the damage to the locality resulting from explosions at the quarry to extract material was egregious; it amounted to a public nuisance, as distinct from a number of private nuisances suffered by the neighbours. Lord Justice Romer expressed the view [at 184] that: "…any nuisance is public which materially affects the reasonable comfort and convenience of a class of Her Majesty's subjects…It is not necessary to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected...a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence". In the same case Lord Justice Denning [at 190-1] famously expressed the view that a public nuisance is a nuisance which is so: "...widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large".

The law on public nuisance has been further refined by a number of more recent cases. In the conjoint cases of *R v Rimmington and R v Goldstein* [2005] UKHL 63, the House of Lords gave detailed consideration to the common element requirement for a public nuisance. The facts in *Rimmington* were that the accused sent individual, racist hate letters to different individuals, all saying more or less the same thing. The issue of law was over whether these comprised a series of related though separate acts or whether there was a sufficient common nexus between them to amount to a public nuisance. If these were a series of separate acts, of course they could not amount to private nuisances because there would have been no breach of any proprietorial right. Baroness Hale expressed the view that: "It is not enough to point to a collection of private nuisances and to conclude that the point has been reached when they amount to a public nuisance. What is essential is to identify the breach of rights affecting the public at large – or at least a sufficient section of the public. It is the breach of those rights that constitutes the public nuisance."

In the case of *Corby Group Litigation v Corby BC* [2008] EWCA Civ 463, Lord Justice Dyson re-iterated the view that: "The essence of the right that is protected in the tort of private nuisance is the right to enjoy one's property….The essence of the right that is protected by the crime and tort of public nuisance is the right

not to be adversely affected by an unlawful act or omission whose effect is to endanger the life, safety, health etc of the public". This case involved a series of negligent acts and egregious failures by the local authority who were responsible for supervising the remediation of the disused Corby steel works. This was a class action pursued by the families of children born with severe birth defects that resulted from the manner in which the land had been remediated. The High Court found the local authority liable for breaches of statutory duty, negligence and public nuisance.

Finally, in the case of *Colour Quest Ltd and Others v Total Downstream UK plc and Others* [2009] EWHC 540, a public nuisance was found to have resulted from the explosion of the Buncefield oil storage terminal in Hertfordshire. An explosion – unlike the series of events in *Rimmington* – has the important element of contemporaneousness if a public nuisance is to be found. This case is also authority for the view that a particular set of circumstances can amount to both a private and a public nuisance. Mr Justice David Steele [at para 432] opined that: "A private owner's right to the enjoyment of his own land is not a right enjoyed by him in common with other members of the public, nonetheless any illegitimate interference, being the very same interference contemporaneously suffered by other members of the public, constitutes a common injury satisfying the public nature of a public nuisance".

In light of these recent judgements it would appear that a collection of private nuisances can only ever amount to a public nuisance where all of the following conditions are met:

- there is a serious breach of rights endangering the life, health, safety, comfort or property of the public
- a sufficient group or class of the public is sufficiently affected by the nuisance; and
- there is a sufficient common element to make the link between the individual private nuisances.

Home Office Guidance issued under s182 of the Licensing Act 2003

If the law on public nuisance is so clear and well settled, why has the government continued to issue statutory guidance which is so clearly erroneous and misjudged? In section 2.34 of the revised Home Office Guidance, issued in April 2012 on the matter of public nuisance, the document suggests: "It is important to remember that *the prevention of public nuisance could therefore include low-level nuisance perhaps affecting a few people living locally*, as well as major disturbances affecting the whole community" (our emphasis). The courts have continued to emphasise the distinction between private and public nuisance, with the latter characterised as an egregious act resulting in serious breaches of public rights – there is nothing low-level about it! There is evidence that the guidance is beginning to lose its status and credibility with the courts in this regard, as exemplified by the recent appeal case heard in Birmingham Magistrates' Court before a district judge. Although the case of *Crosby Homes v Birmingham City Council* (unreported) is not binding authority, District Judge Zara in her judgement rejected the Home Office Guidance as "a fudge." On this issue the guidance is wrong in law and would seem to be the result of confusion in the minds of those responsible between a public nuisance and any nuisance that affects the public. P26

Music noise continues to be an issue for local authorities

P25 The question that needs to be answered is why did Parliament choose in the Licensing Act 2003 to set the threshold so high by establishing the prevention of public nuisance as one of the licensing objectives rather than the prevention of statutory nuisance, which would have accommodated most forms of noise nuisance emanating from licensed premises? We believe that the current position will almost inevitably invite a successful challenge some time in the future. We envisage circumstances, for example, where a pub with a large outdoor garden may result in localised nuisance to a single neighbouring occupant during long summer nights but which affects no one else. The steps required by the licensing authority to be taken by the business to resolve the problem on review of the licence – such as the introduction of a curfew on outdoor drinking - could conceivably be challenged on the grounds that no public nuisance has arisen, although it would of course be open to the local authority to instigate action under the Environmental Protection Act 1990 to require the abatement of any statutory nuisance should the circumstances warrant it.

The control of noise through licence conditions

The test for the acceptability of licence conditions to control noise should, we believe, be analogous to the advice on the use of planning conditions espoused in *Circular 11/95 The Use of Conditions in Planning Permissions*, that is, that any condition must be:

- necessary
- relevant to the relevant licensing objective of the prevention of public nuisance
- relevant to the licensed premises
- enforceable
- precise
- reasonable in all respects.

Interestingly, recent case law suggests that licence conditions requiring entertainments noise to be "inaudible at the nearest noise-sensitive premises" may in future be considered to be *ultra vires*. In the case of *R v Developing Retail Ltd v East Hampshire Magistrates' Court* [2011] EWHC 618, the court ruled that such a condition was so vague as to be unenforceable.

If noise criteria and noise limits are to be included in licence conditions, these should be based upon criteria suggested in recognised published sources such as the *Code of Practice on Environmental Noise Control at Concerts*, published by the (now defunct) Noise Council in 1995 (currently being revised). Better still would be for licensing authorities to attach conditions drafted by the environmental health service, which incorporate noise criteria enshrined within the council's own published corporate policies. A good example of the latter is the *Technical Advice for Consultants on Sound Insulation and Noise Control Criteria for Entertainment Licensed Premises* published by Dover District Council. The Institute of Licensing is currently developing good practice guidance in relation to licence conditions and operating schedules which may or may not suggest appropriate noise criteria.

On a more general level, licence conditions need to be tailored to the size, style, characteristics and activities taking place at the premises/land requiring to be licensed and licensing authorities should remain circumspect in the use of standard conditions to control noise. Conditions should always be proportionate and due consideration should be given to the non-commercial nature of charity or community based events when drafting conditions.

Recent changes to the Licensing Act 2003

Following a consultation process conducted by the Home Office, a number of significant changes have been made to the Licensing Act. The licensing authority itself, primary care trusts and local health boards are now included as "responsible authorities" and residents who wish to make representations on licence applications need no longer live in the vicinity of the premises seeking to be licensed. The evidential threshold has been lowered enabling licensing authorities to make decisions which are *appropriate* as opposed to being *necessary* for the promotion of the licensing objectives. Changes have been introduced to the Temporary Event Notice procedure, which allows the environmental health service to make objections based upon any of the four licensing objectives. In addition, licensing authorities will have the discretion to apply existing licensing conditions operating for premises which submit a Temporary Event Notice. Finally, possibly the most dramatic and significant change is that licensing conditions relating to music entertainment in small venues, defined as having a capacity of less than 200 persons, are suspended. It is believed that this will affect a large number of small pubs that currently have such conditions attached to their licences.

Conclusion

The prevention of nuisance through the control of noise emanating from licensed premises will continue to be an important area of work for local authority environmental health services. With the suspension of licensing conditions relating to music entertainment in small venues and with the need for licensing authorities to be more focused in their considerations of the circumstances which may genuinely give rise to a public nuisance, we believe it is likely that a greater number of premises in the future will be the source of local noise nuisance complaints, despite their activities being legitimised by the local licensing authority. Surely this was never Parliament's intention in passing the Licensing Act 2003. We believe it is likely that a greater number of actions will be instigated *post factum* by councils to abate statutory nuisances in circumstances where nuisances ought to have been prevented through the licensing regime. Time will tell whether our predictions come to fruition.

Statutory Nuisance Solutions provides legal and technical support and specialist advice to businesses, local authorities, government departments, law firms, planning consultancies etc on all aspects of nuisance. For further information: **www.statutorynuisancesolutions.co.uk**

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Abstract

This paper is based upon a presentation made by David Horrocks to the IOA conference Music to Your Ears – Outdoor Entertainment and Environmental Noise held in London in May 2012.