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issues for businesses

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What a lot of noise! Noise and associated environmental issues for businesses



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‘Not only is noise becoming an increasingly topical subject for debate and policy making, it also has the potential to lead to substantial costs for businesses.’

NOISE HAS THE POTENTIAL TO AFFECT businesses in a variety of ways. Noise influences an employer’s obligations and working practices and can give rise to enforcement action from the authorities or neighbouring residents. Whether businesses are creating noise or are on the receiving end of it, it is an issue that is relevant to every industry sector.

Environmental noise, mainly from transport and industry, was perhaps once seen as a neglected environmental issue but it is growing in importance following confirmation of its links to ill health, including high blood pressure, increased stress and poor mental health. Two reports on the subject were released in July this year.¹ The most important of these was published by the Health Protection Agency and is the first government-sponsored review (funded by the Department of Health and the Department for Environment, Food and Rural Affairs (DEFRA)) of environmental noise for many years, confirming the detrimental effects that noise can have on human health. Experts now want the government to set up a permanent committee on noise and to fund further research in this area.

A reminder about environmental noise issues has also come from Europe. The 2002 Environmental Noise Directive was implemented in the UK by the Environmental Noise (England) Regulations 2006. These regulations require the government to produce noise maps and adopt action plans to mitigate noise and protect identified quiet areas.

Not only is noise becoming an increasingly topical subject for debate and policy making, it also has the potential to lead to substantial costs for businesses. The significant expense associated with noise nuisance is exemplified by a recent case where a council was ordered to pay over £70,000 in compensation to residents due to nuisance noise.² These residents all lived near a recycling depot where lorries would leave the site at 6.30am, Monday to Saturday, leading to complaints by nearby villagers and around 50 residents and a successful action for nuisance from noise and vibration for three of the affected residents.

This article looks in further detail at nuisance, control of nuisance noise and

associated health and safety implications for employers. The licensed trade sector has been selected for the focus of this article as an industry traditionally linked closely to noise issues. However, similar principles will, for the most part, be applicable to many different business sectors.

NUISANCE

The essence of nuisance is a condition or activity that unduly interferes with the use or enjoyment of land.³ Noise is a prime example of such a ‘condition or activity’ that could give rise to a nuisance action. Nuisance is a complex area of law and this article only seeks to provide an overview.

There are three types of nuisance: private, public and statutory.

Private nuisance

The common law of private nuisance has been developed by the courts over hundreds of years and is still widely used by claimants suffering from noise problems. Private nuisance arises when the noise unreasonably interferes with a person’s use or enjoyment of land (or some right connected with the land).

‘Reasonableness’ is a key factor in private nuisance and there is a balance between the defendant’s right to carry out lawful activities against the impact on the claimant’s proprietary rights. Factors to take into account include the location of the activity, the timing of the activity, its duration and its social benefit.

If a nuisance is occurring, then aggrieved persons can commence proceedings in the civil courts for an injunction and damages. Injunctions can prohibit the activity altogether, having a major impact on business operations, sometimes shutting them down altogether.

Public nuisance

Public nuisance is a criminal offence. Although similar in its constituent elements to private nuisance, the activity must affect a section of the general public. Public nuisance actions are less common than private nuisance actions, but the criminal nature of the offence means that the implications of an action on a business could be significant.

Statutory nuisance

The statutory nuisance regime was created to provide a relatively quick and supposedly cost-effective method for local authorities to prevent nuisances in their areas.⁴ Only certain activities are statutory nuisances, namely activities deemed by Parliament to warrant particular control.

Under s79 of the Environmental Protection Act (EPA) 1990, noise constitutes a statutory nuisance where it is:

- i) emitted from premises so as to be prejudicial to health or a nuisance; or
- ii) prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or other equipment in a street.

Where a local authority is satisfied that a statutory nuisance exists or is likely to occur under i) above, the authority must either issue an abatement notice or take such other steps as it thinks necessary to persuade the appropriate person to abate the nuisance.

If the authority takes the latter option, there is a period of seven days to satisfy the authority that the steps have been successful, otherwise an abatement notice must be served.

A person served with an abatement notice may appeal to a Magistrates' Court within 21 days of the notice being served. This period is absolute and cannot be extended.

Failure to comply with an abatement notice is a criminal offence, possibly leading to a substantial fine. Businesses will have a defence to a statutory nuisance action if they can prove that the 'best practicable means' were used to prevent or to counteract the effects of the nuisance (demonstrating that this is also a ground of appeal).

Examples of potential remedial actions or 'best practicable means' for licensed premises include the use of a sound limiter on music systems to cut power to the PA system if a certain noise level is breached; self-closing doors to prevent excess noise escaping the premises; or, in more extreme cases, expensive acoustic insulation.

Remedial actions could have significant cost implications for businesses and therefore it is important such issues are addressed.

More details about statutory nuisance can be found on p67, *IHL150*.

ALTERNATIVE POWERS FOR CONTROLLING NOISE NUISANCE

Aside from nuisance actions, other powers exist for dealing with noise nuisance from premises. It is important that businesses remember these additional powers when faced with noise issues.

Planning regime

Noise is also a factor in planning control. Planning Policy Guidance 24 (PPG24) gives guidance to local authorities on the use of planning powers to minimise the adverse impacts of noise. PPG24 looks at several different noise sources, including transport, construction, recreational and sporting activities, and landfill sites. The guidance looks at the use of conditions to minimise the impact of noise and suggests that any planning conditions imposed should be necessary, relevant to planning, enforceable, precise and reasonable. Again, the imposition of specific planning conditions is likely to have a knock-on effect on how businesses operate.

However, it should not be forgotten that it is a long-established principle that planning consent cannot authorise a nuisance. A local planning authority may authorise an activity but a court may still impose restrictions (or even a complete ban) if the activity is causing a nuisance.

The interaction of these principles can cause grey areas for landowners. The recent Court of Appeal decision in *Watson & ors v Croft Promo-Sport Ltd* [2009] illustrates this. The defendant was a motor racing operator with planning permission to race on 210 days of the year. The residents of neighbouring properties considered that the noise was excessive, and brought a civil claim in private nuisance.

The case ended up in the Court of Appeal, where it was held that there was a nuisance and an injunction was granted limiting the racing to 40 days of the year, despite the terms of the planning permission.

Noise Act 1996

The Noise Act 1996 (the 1996 Act) is of specific relevance to licensed premises. This Act, that originally only applied to noise emanating from dwellings, was amended in 2006 to include any premises holding a premises licence or temporary event notice.

The 1996 Act covers noise from licensed premises between 11pm and 7am. Local authority officers have powers under the 1996 Act to investigate complaints made about noise that exceeds a permitted level and to issue warning notices where this is the case. Where noise exceeds the permitted level after service of a warning notice, the responsible person at the premises is guilty of an offence.

NOTES

- 1) 'Environmental noise and health in the UK', draft report: http://www.hpa.org.uk/web/HPAwebFile/HPAweb_C/1246433634856 and 'Estimating dose response relationships between noise and human health': <http://www.defra.gov.uk/environment/noise/igcb/healthreport.htm>.
- 2) *Bontoft & ors v East Lindsey District Council* [2008] EWHC 2923 (QB).
- 3) *Clerk and Lindsell on Torts*, 19th Edition, at paragraph 20-01.
- 4) Environmental Protection Act 1990, Part III as amended.
- 5) The Local Authorities Coordinators of Regulatory Services (LACORS) is the local government central body responsible for overseeing local authority regulatory and related services in the UK.
- 6) Guidance issued under s182 of the Licensing Act (LA) 2003 notes that public nuisance is not narrowly defined in the Act and retains its broad common law meaning. Therefore, it could include low-level nuisance perhaps affecting a few people living nearby, as well as major disturbance affecting the whole community.
- 7) Under s51 of LA 2003.
- 8) The Health and Safety Executive also produces guidance to support the Regulations (L108 Controlling Noise at Work) that businesses may wish to refer to for further guidance.

According to the Local Authorities Coordinators of Regulatory Services (LACORS), since the smoking ban was introduced there has been a 'rising tide' of noise complaints due to the increased use of smoking shelters and beer gardens.⁵ For example, Brighton and Hove City council saw complaints rise from one to 60 in a single year. It is extremely important that licensed premises work with their local authorities to ensure that any potential noise problems are addressed before enforcement action is taken.

Anti-Social Behaviour Act 2003

Another power of particular relevance to licensed premises is found in the Anti-Social Behaviour Act 2003 (the 2003 Act). Part 6 of this Act gives local authority officers the power to order the immediate closure of licensed premises. The chief executive officer of the local authority has the power to issue a closure order if they reasonably believe that noise emanating from the premises would be sufficient to constitute a public nuisance and closure is necessary to prevent that nuisance.

Obviously, closure of a licensed premises would have a very significant impact on any business affected in such a way and so the powers under the 2003 Act should not be overlooked.

LICENSED PREMISES AND NOISE NUISANCE

Licensed premises such as pubs and nightclubs can cause nuisance noise to surrounding neighbours and, due to their often close proximity to residential areas, are perhaps more susceptible to this issue than other businesses.

By way of background, under s4 of the Licensing Act (LA) 2003, licensing authorities must carry out their functions with a view to promoting four key objectives:

- 1) the prevention of crime and disorder;
- 2) public safety;
- 3) the prevention of public nuisance;⁶ and
- 4) the protection of children from harm.

These objectives must be considered by licensing committees in making

their decisions and also by the applicant for a new licence, who must state the ways in which they intend to promote the licensing objectives through the manner in which the premises is managed. Troublesome noise could

were from an individual who lived across the road from the premises. The local authority investigated these complaints and an application was brought for a review of the premises licence.⁷ After review, a condition was imposed on the premises

'Where noise exceeds the permitted level after service of a warning notice, the responsible person at the premises is guilty of an offence.'

potentially create a public nuisance and is therefore something that should be considered very carefully by licence holders and applicants.

Control of nuisance through licensing hours

LA 2003 allows for flexibility in licensing hours as a tool to cut down on noise nuisance. Part 8 of LA 2003 also gives considerable powers to the police to control noisy licensed premises. LA 2003 also contains a greater flexibility than previous licensing laws to review licences following complaints about noise. This provides the police and local authorities with a framework for tackling noise from premises at an early stage.

Recent case law

A recent case that has been heard in the High Court, *Hope and Glory Public House Ltd, R (on the application of) v City of Westminster Magistrates' Court*, deals in part with public nuisance from noise. It is understood that the case is to be appealed to the Court of Appeal and serves as a useful recent example of how public nuisance claims in relation to noise (emanating, in this case, from licensed premises) are dealt with.

Hope and Glory concerns The Endurance public house in Soho, run by Hope and Glory Public House Ltd. Problems resulted from the fact that the pub became extremely popular, in particular for drinking outside between the hours of 6 and 11pm. This led to over 70 complaints in relation to noise caused by customers drinking outside in the evenings. The bulk of the complaints

licence that 'no customers be permitted to take drinks from the premises in an open container after 6pm'. The licence holder objected to this (not unreasonably, many would say!) and appealed to the Magistrates' Court, which upheld the condition. The High Court hearing was an application for judicial review of the earlier decision of the District Judge sitting in Westminster Magistrates' Court.

Counsel for the public house submitted that, as the nuisance only affected a few people living locally, it was not a public nuisance. The High Court decision provides a useful discussion of the relevant case law in this area, in particular, considering whether there is an effect on a sufficiently large number of members of the public by reference to one act or a series of acts, or whether such effect was sufficiently widespread or indiscriminate.

Counsel for the public house argued that as Soho is a noisy place, full of entertainment centres with a high ambient noise, residents of Soho ought to be expected to put up with such noise. (Counsel's argument that this had not been taken into account was met with the response that although not specifically mentioned, the issue had been considered at first instance.)

Hope and Glory provides a useful summary of the issues that may be considered in noise nuisance cases and it will be interesting to see how it is treated by the Court of Appeal, should it progress that far. It also highlights the difficulty in distinguishing between statutory nuisance

as set out in s79 of EPA 1990 and public nuisance for the purposes of LA 2003.

NOISE-RELATED HEALTH AND SAFETY IMPLICATIONS

Noise does not only pose a potential nuisance issue. There are also significant health and safety issues related to noise that all employers should be aware of.

The Health and Safety Executive estimates that over 1 million employees in Britain are exposed to levels of noise that are putting their hearing at risk. This highlights the fact that many employers (and businesses) are also affected.

Obviously, there are certain businesses where higher noise levels are prevalent in the workplace, such as factories, workshops, construction sites, pubs and nightclubs, and live music venues with high levels of ambient noise, to name but a few. Businesses should therefore ensure they consider the core legislation outlined below as a minimum.

Health and Safety at Work Act 1974 (the 1974 Act)

Employers have a general duty under s3 of the 1974 Act to safeguard the health of their employees.

The Control of Noise at Work Regulations 2005⁸

The aim of these regulations is to ensure that workers' hearing is protected from excessive noise that could cause them to lose their hearing and/or suffer from tinnitus.

Some of the obligations of employers under the regulations are outlined below.

- i) An employer who carries out work liable to expose employees to noise at or above

the 'lower exposure action value' must carry out a noise risk assessment. If the risk assessment indicates that there is a risk to the health of employees who are liable to be exposed to noise, the employer must ensure these employees are placed under health surveillance that includes testing of their hearing.

- ii) Employers have a duty to ensure the risk from the exposure of employees to noise is either eliminated at source or reduced to as low a level as is reasonably practical. Where levels are above the 'upper exposure action value', risk should be reduced by implementing a programme of organisational and technical measures, such as new working methods, design of workplaces, work stations and rest facilities, and work schedules.
- iii) Where an employee carries out work that exposes them to noise above the 'lower exposure action value', personal hearing protectors should be made available on request.

The 'lower exposure action value' referred to above is a daily or weekly personal noise exposure of 80 decibels (dB(A)), while the 'upper exposure action value' is 85 dB(A). There is also a maximum exposure limit of 87dB(A), taking into account any reduction in exposure provided by hearing protection.

It should be noted that estimates of noise exposure must be based on reliable data that is representative of the actual work situation.

An example that shows the reach of these regulations is given in a recent article in a licensed trade magazine referring to

noise inspections in bars that found levels reaching 108dB(A), which is louder than a pneumatic drill! Tips for licensed premises in particular include making staff wear ear plugs, reducing staff exposure time to high noise levels, introducing softer furnishings to absorb noise and if possible, redesigning bars to include quieter areas. Those employers who do not comply risk potential action by the Health and Safety Executive. Employers should also bear in mind that they run the risk of personal injury liability if employees suffer hearing damage, with claims able to be made up to three years from the date the injury becomes known.

CONCLUSION

Noise is becoming an increasingly important issue, as evidenced by the government-backed research. Whether businesses are creating nuisance noise or are on the receiving end of it, it is an issue that is relevant to every industry sector and should not be ignored.

It has the potential to give rise to court proceedings or other regulatory action and has important health and safety implications that businesses must be aware of.

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