Statutory Nuisance – Question and Answer List February 2018 version

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1. What are the fees for an aggrieved person to start proceedings in the Magistrates Court under Section 82 of the Environmental Protection Act 1990?

The most recent fees I can find (for England and Wales) are contained in The Magistrates Courts' Fees (Amendment) Order 2014 (SI 2014/875). In Section 8 of the amended schedule, under "Other civil proceedings" the fee for starting an action which is not specifically cited, and which does not require the leave of the court, is £205. The consensus is that this is a civil matter started by making a complaint (rather than laying an information), despite the ability of the Court to impose a fine as well as making the Nuisance Order. While fees for the normal civil courts and tribunals can be reduced for those on low incomes etc., this does not appear to apply to actions in the magistrates court for such civil matters.

2. Does an Abatement Notice have to specify the premises affected?

There is no prescribed statutory form for Abatement Notices. There some things that have to be included by law, and failure to do so is likely to make the notice a nullity and unenforceable. Other matters are only likely to be of any relevance if they bring the notice within one of the formal grounds of appeal, particularly a material informality, defect or error.

S80(1) of EPA 90 requires the LA to state whether they are simply asking for the abatement/prohibition/restriction of the SN, and/or specifying steps or works. Case law has determined that a "simple" notice does not have to set out any works or steps, the LA can leave the choice of actions to the recipient. Case law has also determined that where works or steps are required, they must be set out in sufficient detail for the recipient to understand what they have to do to comply with the notice. This subsection also requires the inclusion of the time limits for compliance with the notice.

Paragraph 6 of Schedule 3 to the same Act requires the rights of appeal to be set out.

In addition Regulation 3 of the Statutory Nuisance Appeals Regulations 1995 requires details to be given where the AN will not be suspended pending the hearing of the appeal.

S79(1) sets out the categories of SN, and several of these use language such as from premises, or arising from premises. For S79(1)(a) it is premises that are in such a state as to be prejudicial to health or a nuisance. If defects to a vacant premises are causing dampness and disrepair to adjoining ones, it is difficult to see any credible legal argument that it is the "receiving" premises which are a nuisance at common law.

Both the standard text books on SN (Malcolm and Ponting; McCracken) confirm that the key issue is to identify the origins of the nuisance, identify the person responsible for this state of affairs, and serve the notice accordingly

I can find no case law that says that the receiving premises have to be identified in cases of nuisance. For prejudicial to health cases, then there may or may not be two premises involved.

Comment

If the simple type of AN is being used, there should be sufficient information for the recipient to understand what the alleged problems are. A common law nuisance and a statutory nuisance can both exist in the absence of a complaint. Where there are several other premises affected, it could lead to some very odd results if the notice only specified those premises from which complaints had been received. Apart from the obvious drawbacks in policy terms and ASB, it could also mean that a further similar notice would have to be served simply due to vacant premises being reoccupied, or a change of neighbour/complainant. Noisy music late at night may be heard by many more than actually complain, and the notice should refer to the premises on which the nuisance arises. I do not think that there would be a successful appeal based on the argument that the notice was defective by not listing all the complainants, nor have I found any cases that suggest this. Where something came within the definition of public nuisance at common law, by definition there could be a long list of people, premises and places affected.

Which premises are identified will therefore depend on the sub-category of statutory nuisance in question, and whether it comes within the prejudicial to health or the common law nuisance limbs. In certain cases where works or steps are being specified and it is necessary to address a particular pathway, then the receiving premises may have to be identified.

3. A post on EHCNet was raised by one of the attendees subsequently. This post referred to a steel washer manufacturer whose pneumatic press caused considerable noise during the day. The plant was based on an industrial site and a nearby premises had recently been occupied by a office operation which was now complaining. The noise inside these premises was found to be very loud and disturbing. There was a suggestion by the manufacturers that they had warned the incomers. The EHO queried the implications of the duty to investigate complaints only from those living in the area and also whether the character of the area precluded taking action.

The wording of the duty to investigate under Section 79 of the EPA is a red herring. Whether or not there is a duty to investigate is irrelevant if the LA is satisfied that a nuisance exists etc. A nuisance, both SN and at common law, can exist without there being any complaint received.

Common Law Nuisance

Coming to the nuisance is no defence – an old doctrine that has been comprehensively approved and reaffirmed in the Supreme Court (*Coventry (t/a RDC) v Lawrence 2014*). This means that the fact that the noise maker was there before the claimant is essentially irrelevant. If the noise is materially interfering with the use and enjoyment of nearby land now then it is potentially actionable.

Lord Neuberger suggested that the result might have been different if the complainants premises was constructed after the commercial activities had started - in this case the house subsequently occupied by the claimants had been there beforehand. However in *Miller v Jackson*, the Court of Appeal held to the old doctrine even though the house had been built later. That case has not been overruled, nor have the other older authorities on this point. It is difficult to even say that this element of the judgment is persuasive precedence, but it gives some indication that the Supreme Court might change tack in future should a suitable case come up to their level.

Coventry is authority for saying in judging the character of an area, existing noise will only be taken into account insofar as it is not a nuisance. The Court also held that the existence of planning permission (or established use rights under the planning legislation) would usually be irrelevant and at most would be one factor among many for the court to weigh up. These parts of the decision effectively kill off lines of argument raised in previous cases.

The Supreme Court also held that in principle it would be possible to claim a right to commit a nuisance as a form of easement over the neighbouring property, but subject to the normal rules – at least 20 years would need to have passed and without challenge to their right to do so. However this is down to the defendant to prove not the claimant, and in this case they failed to do so. It remains to be seen whether in practice a court will be willing to confirm that such a right exists. The crucial legal point is that this does not stop the noise etc. being a nuisance, simply it may not be actionable at common law.

I have also seen opinions that suggest the easement could only be against occupiers who have been there for the 20 year period, but this is arguable. In a more recent case (*Peires v Bickerton's Aerodromes Ltd 2017*), the High Court judge analysed the circumstances when such an easement might arise, and concluded that this would rarely if ever be capable of proof by the defendant.

Important evidence issues will be around whether the operations and noise have been substantially the same, or whether there has been any changes. If the plant used is less than 20 years old, then changes will have been made.

Statutory Nuisance

If the LA is satisfied that a nuisance exists it is obliged to serve an Abatement Notice. The recipient may or may not have a Best Practicable Means defence, but this is a different argument. Indeed the fact that they may have not felt the need to make changes suggests they could struggle to prove BPM using modern technology. If they can't prove this defence then the prescription issue may be irrelevant for an EPA action. This would have to be argued out in court – it raises the possibility that both the LA and an aggrieved person could use SN to deal with something for which there was a common law nuisance that could not in practice be pursued, but for which there was no statutory defence. An interesting point! I suspect some courts might try to look for a way round, and I think in practice the focus would be on the reasonableness of the requirements and the scale of the nuisance. The alternative way of looking at it is that the offenders have got away with it for a long time and may have not upgraded their plant or reduced the noise due to a sense of complacency.

4. Is it still possible to use the statutory nuisance procedure in dealing with problems of noise nuisance caused by inadequate sound insulation?

In all my legal training workshops, I make the point that the law is rarely quite as certain as is sometimes claimed. There are two main reasons for this. Firstly any related legislation may change, as may social views generally, as well as the views of the judiciary. Secondly the issue in question in any particular case may be quite narrow, and it is only the reasons for deciding that issue which will be binding on the courts below. Anything else said by the higher courts will at best only set persuasive precedence. Where the higher court has reached a majority decision, and the judges in the majority have each used different reasoning, it can be very difficult to distil out any binding precedence that has been set. It is therefore common for conflicting decisions on similar issues to arise over time.

My view is that the current law on when or if poor sound insulation can give rise to SN is unclear in certain respects due to such conflicting decisions.

Nuisance

In *Network Housing Association v Westminster CC 1994*, the HA was held to be the person responsible for a noise nuisance under **S79(1)(g)** - it had acquired the freehold of these converted flats and had carried out refurbishment works leaving the premises with poor sound insulation. They had known about the issue for a long time and failed to deal with it. There is a long line of authorities that support the contention that a landowner becomes responsible for nuisances arising on their land if they know about their existence and fail to act.

In *Toff v McDowell 1995*, it was held that every day user can be an actionable nuisance where the lessee of the upper flat shared responsibility for the structure of the dividing floor with the lessee below.

In *Southwark LBC v Mills(Tanner) and Camden LBC v Baxter (No.2) 1999* the House of Lords held that the periodic tenants of a common owner could not sue either for breach of the covenant of quiet enjoyment, nor nuisance where the noise disturbance was caused by poor insulation and the noise complained of was that of everyday living. There is a line of authorities saying that reasonable user cannot be a private nuisance "without more". Lord Hoffman (also involved in the subsequent "*Oakley*" decision) was again concerned about the policy and financial implications for public landlords.

In *Stannard v Pitcher 2002*, the court held that there was an actionable private nuisance for everyday living noise coming from the flat above, following the refurbishment of that flat leading to inappropriate floor coverings and poor stacking arrangements (conflicting use of living rooms and bedrooms). The court granted an injunction forcing the owner of the flat to carry out the necessary works. The claimant was a statutory tenant not an owner.

Prejudicial to Health

In *Southwark LBC v Ince 1989* the court held that noise from railway and traffic noise made the premises prejudicial to health under the Public Health Act 1936 due to poor sound insulation. The Council had converted the premises without adequate sound insulation despite the known proximity of both the railway line and the road. (N.B. At that time noise nuisance under the Control of Pollution Act 1974 only related to noise from premises and only contained the "nuisance limb".)

In *Haringey v Jowett 1999* the court came to the conclusion that as external traffic noise was excluded from **S79(1)(ga)** - added in1993 - it could not be now brought back in via an action based on **S79(1)(a).**

In *R (on the application of Vella) v Lambeth LBC 2005* the court dismissed an application for judicial review of the Council's refusal to serve an Abatement Notice on the Housing Association which owned the converted house. The case was based on the premises category of SN, and was again due to noise of everyday living from the flat above and from communal areas, clearly audible due to poor sound insulation. The court followed *R v Bristol CC ex parte Everett* and *Birmingham CC v Oakley* and concluded that this was not within the ambit of the procedure as the state of the premises was not causing disease of the type originally envisaged (in 1855). However the subsequent decision in *R v Secretary of State for the Environment, Transport and the Regions (on the application of Spath Holme Ltd)* was not cited in *Vella.* In that case a unanimous House of Lords rejected the approach taken in *Everett* and *Oakley*, saying that in re-enacted/consolidated legislation, the courts should only concern themselves with the latest version. They

should not conduct the sort of lengthy historical analysis carried out in those cases. This approach is consistent with the minority judgments in *Oakley.*

Comment

In respect of noise nuisance under **S79(1)(g)** based on the nuisance limb, there is still scope to take action if the noise coming through due to poor insulation is not covered by the "everyday user" principles. However what is reasonable use will depend on the facts in each case, and this defence is unlikely anyway to apply in situations where the emitter is in breach of relevant lease or tenancy conditions. Similarly changes to the emitting premises such as by use of rooms or of floor coverings may make the responsible person liable as this could be a common law nuisance and within SN's scope. If the noise levels, duration, timing etc. are sufficient to be prejudicial to health, then the "everyday user" test becomes irrelevant as this only applies to common law nuisance. Noise nuisance was not one of the original categories of SN (added in 1960 and the PTH limb only added in 1990), and noise nuisance can never cause the type of health effects such as infectious disease etc. cited as covered by the premises category.

In view of the decisions in *"Everett"* and *"Oakley"* it is unlikely for now that an action against a common landlord based on PTH under **S79(1)(a)** will get very far, but in my view this does not pose the same restrictions in respect of PTH under **S79(1)(g)**. The decision in *Hounslow LBC v Thames Water Utilities Ltd* shows that the same words can mean different things for different SN categories.

My view is that it remains necessary to investigate such complaints of noise nuisance. Where satisfied that the levels are indeed sufficient to interfere with the complainants' comfort or health; and where the problems are wholly or partly due to poor sound insulation, to go on and consider the specific issues around reasonable user under the nuisance limb, and to then follow the normal approaches in assessing the identity of the responsible person(s) before serving an Abatement Notice.

5. When is statutory nuisance covered by the "local choice" items under Schedule 2 of the Local Government (Functions and Responsibilities) (England) Regulations 2000/2853?

The structure of these Regulations following the creation of Executive (Cabinet) style arrangements is that a few things remain with the full Council (like setting the Council Tax), with all other functions being with the Executive unless they are listed in either Schedule 1 (which can never be given to the Executive) and Schedule 2 (which can be and is down to the individual Council's choice).

In Schedule 2 several things are listed which are relevant to statutory nuisance.

Paragraph 12 - the service of an abatement notice in respect of a statutory nuisance

Paragraph 13 - the passing of a resolution under Schedule 2 to the Noise and Statutory Nuisance Act 1993

Paragraph 14 - the inspection of the authority's area to detect any statutory nuisance

Paragraph 15 - the investigation of any complaint as to the existence of a statutory nuisance

Also of interest are Paragraph 10 (any function relating to contaminated land), Paragraph 11 (any function relating to pollution control or the management of air quality), and Paragraph 17 (Information notices under Section 16 of the Local Government (Miscellaneous Provisions) Act 1976.

This means that you will have to check with a particular Council's constitution as to where these responsibilities lie. If the local choice is to make any or all of these Executive functions, then the amended recording requirements under SI 2012/2089 will apply to relevant decisions.

As discussed in the sessions, as housing functions are not listed in either Schedule, they will always be with the Executive. However the wording of Schedule 2 means that an Abatement Notice served with respect to poor housing will be subject to the local choice arrangements. The open question is whether decisions to enforce an AN will always be Executive ones whatever arrangement is made with the listed functions - as the very specific wording in Schedule 2 stops at service of the notice.

Colleagues should also be aware of the requirements of the Openness of Local Government Bodies Regulations 2014 (SI 2014/2095), which impose similar recording requirements for delegated decisions that affect the individual, which apply whether the function is an Executive one or not.

6. Why is the occupancy status of the complainant relevant in determining whether there is a statutory nuisance?

To be a SN, the matters in question must be at least one of PTH, a Public Nuisance at Common Law, or a Private Nuisance at Common Law (they may fit into more than one category). They must also fit with one of the 18 extant categories of statutory nuisance (13 in Northern Ireland). If the matters alleged amount to a Private Nuisance, then case-law says that only the "amenity" type of such nuisances are within scope. This means that the noise, dust, etc. from one property must materially affect the use and enjoyment of a neighbouring property. The main Common Law remedy is damages based on the temporary or permanent reduction in value of the receiving land, not any harm caused to the individual occupants - this would have to be sought through an action for Negligence.

The House of Lords confirmed in *Hunter v Canary Wharf 1997* the old principles that a Private Nuisance action could only be brought by someone who had the rights of exclusive possession of the affected land - it was their loss of value that was in

issue. So owners and tenants with such possession of the land are covered, but most categories of licensee are not. A licensee cannot sue for a Private Nuisance, whatever the level of disturbance they are suffering. (There is no such property requirement for an action in Public Nuisance if the matter falls into that category, but an individual can only sue in such cases if they can show harm over and above that caused to others affected).

This leaves two open questions in relation to SN - can a Council serve an AN where the only complainant/person affected is a licensee etc., and can such a person be a "Person Aggrieved" under S82? The argument turns on whether in such cases there is a nuisance but one that is currently not actionable by the individual, or that an affected property right is an intrinsic part of there being a Private Nuisance at all. The latter view is more consistent with the existing case-law. The Council can consider what additional evidence there may be to show the affect on the owner's property rights, and could also try and argue that it can look forward under "occurrence" of the SN in future when mode of occupation might be different.

The question marks are bigger still as to whether such a licensee can effectively use S82 proceedings where the matters amount to a relevant Private Nuisance. By definition they can only argue from the basis of the effects on themselves rather than others, and they have no property rights to defend. This section also only deals with nuisances that exist or which will recur. They may well be "persons aggrieved" in a wider sense of the words but they still have to prove that there is a Private Nuisance within the ambit of the SN procedure that affects them.

While the AN does not have to state whether the Council is relying on PTH or nuisance, it is important for the decision-maker to be clear as to which of these are alleged. The question will be highly relevant in any appeal or prosecution, and it will affect the evidence that the Council will need. Given that most ANs are based on nuisance, and most of these relate to Private rather than Public Nuisances, the issue of the complainant's occupancy may be relevant. My advice is that practitioners should be at least aware that this question exists, so as to be able to deal with it should the arguments be raised.

7. Can I use an assessment using HHSRS under the Housing Act 2004 as evidence of premises being prejudicial to health and a Statutory Nuisance?

The short answer is with care, and subject to several limitations. These are two different codes with separate criteria and with their own case law.

For the premises category of SN, the effects of the *Everett* and *Oakley* decisions means that only things like disease caused by the state of the premises are within scope. For example, this means that a Category 1 Hazard under HHSRS in respect of trips and falls would not be relevant for SN purposes. The question of excess cold is more debateable. It would depend on the reason for the hazard - I think it would be more difficult to use SN where there was no heating system as against where the

heating system was defective and incapable of properly heating the premises. Poor thermal insulation may cause dampness and mould growth, as well as making the property colder. Leaking roofs, other dampness, broken and ill-fitting windows may all contribute to issues under both codes.

The other big limitation is that under HHSRS the hazard is assessed against the most vulnerable group, and with some reference to the current occupant. PTH under the SN procedure has been held to be an objective test - the effects on occupants generally.

On the plus side a HHSRS hazard is assessed on harm over the next 12 months, but there is no such limitation in respect of SN. Empty properties have been held to be PTH without specific reference to any period they are vacant - as long as there is no legal prohibition on them being reoccupied.

In presenting any such evidence, I would advise care in presentation to avoid confusing magistrates and allowing the defence to argue that the case has not been proved in respect of the SN requirements.