

39 from 39 Webinar Series

Noises and smells – statutory and policy framework

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Topics

- Criminal law tools, including offences under the Environmental Permitting Regs 2016 and ss.33-34 Environmental Protection Act 1990 – Rose Grogan
- Statutory nuisance tools under the Environmental Protection Act 1990 – Katherine Barnes
- Other tools: (i) “agent of change” planning policy (ii) community protection notices and (iii) the potential monetary remedy offered by Part I of the Land Compensation Act 1973 – James Burton

Welcome to the whistle-stop tour of statutory nuisance

Katherine Barnes



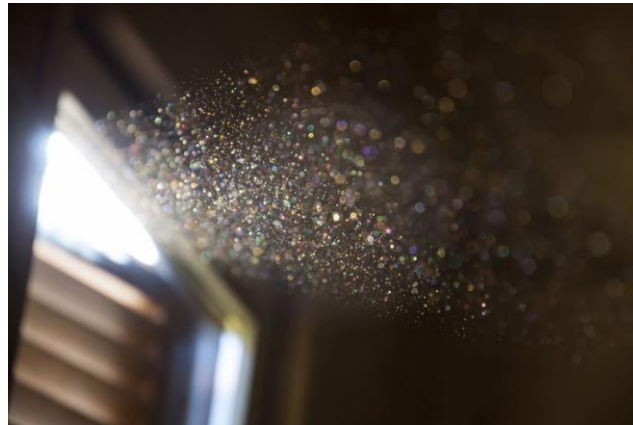
Agenda

- What this talk is (and isn't)
- Part 1: What is statutory nuisance?
- Part 2: Role of local authorities
- Part 3: Legal tools available to individuals



Key provisions

- Sections 79-82 Environmental Protection Act 1990 (Part III)
- Magistrates' Courts Act 1980
- Statutory Nuisance (Appeals) Regulations 1995
- Statutory nuisance: how councils deal with complaints (DEFRA, 2015)
- Environmental permitting and statutory nuisance (DEFRA, 2017)



Part I: What is statutory nuisance?

- Statutory nuisance defined and governed by EPA 1990
- Not to be confused with private nuisance in tort (i.e. claim between private parties, typically seeking an injunction to stop the nuisance and/or damages for loss of property value)
- BUT private nuisance relevant because definition of statutory nuisance builds on private law definition
- In a nutshell, statutory nuisance regime gives local authorities tools to prevent certain types of nuisance. It also gives private individuals the right to seek an order addressing the nuisance from the MC.
- Claims for private nuisance generally concerned with damages and protection of private property rights, while statutory nuisance concerned with stopping nuisance promptly in a cost-effective way. Importantly, do not need property right to complain of statutory nuisance

Part I: What is statutory nuisance?

79.— Statutory nuisances and inspections therefor.

- (1) [...] the following matters constitute “statutory nuisances” for the purposes of this Part, that is to say—
- (a) any premises in such a state as to be prejudicial to health or a nuisance;
 - (b) smoke emitted from premises so as to be prejudicial to health or a nuisance;
 - (c) fumes or gases emitted from premises so as to be prejudicial to health or a nuisance;
 - (d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance;
 - (e) any accumulation or deposit which is prejudicial to health or a nuisance;
 - (f) any animal kept in such a place or manner as to be prejudicial to health or a nuisance;
 - (fa) any insects emanating from relevant industrial, trade or business premises and being prejudicial to health or a nuisance;
 - (fb) artificial light emitted from premises so as to be prejudicial to health or a nuisance;
 - (g) noise emitted from premises so as to be prejudicial to health or a nuisance;
 - (ga) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street [...];
 - (h) any other matter declared by any enactment to be a statutory nuisance;

Part I: Defining a statutory nuisance

- So need to consider whether the “problem” (e.g. noise from premises) is “prejudicial to health” or a “nuisance” under common law
- “prejudicial to health” = “injurious, or likely to cause injury, to health” (s.79(7)). Need expert evidence to establish link to specific health problem
- Nuisance = unreasonable interference with enjoyment of land. In judging reasonableness, need to consider:
 - Nature of locality/neighbourhood
 - Duration, time and frequency
 - Sensitivity on part of complainant
 - Malice



Part I: Exclusions from the definition

- Various exclusions from the definition of statutory nuisance (s.79(1A)-(6))
- Generally where the “problem” is dealt with by another regulatory regime (eg contaminated land controlled via Part IIA EPA 1990)
- Need to consider carefully on case by case basis
- Note also s.79(10): “A local authority shall not without the consent of the Secretary of State institute summary proceedings under this Part in respect of a nuisance falling within paragraph (b), (d), (e), (fb) or (g) [...] if proceedings thereof might be instituted under Part I or under regulations under section 2 of the Pollution Prevention and Control Act 1999”
- So, if proceedings could be brought under the EP Regs 2016, then LA needs consent of SS to institute summary proceedings (but not to serve abatement notice: *Ethos Recycling* [2009] EWHC 2885

Part II: Role of local authorities

- Duty of LA to inspect its area from time to time to detect any statutory nuisances (s.79(1))
- Duty to take such steps as are reasonably practicable to investigate a complaint of statutory nuisance (s.79(1)) (Sch 3 gives right of entry)
- If the LA is satisfied that a statutory nuisance exists, or is likely to occur or recur, the LA shall serve an abatement notice (s.80(1)). The notice outlines the steps required to address the nuisance. NB Role of professional judgment by EHO in making this decision (standard of proof is balance of probabilities) (See s.80(2) and Sch 3 for notice requirements and s.160 re service)
- Where the statutory nuisance is noise from premises, the LA has an alternative option of taking such other steps as it thinks appropriate to persuade the person to abate the nuisance

Part II: Role of local authorities

Role of LAs where recipient fails to comply with abatement notice

- LA can prosecute for offence under s.80(4): “If a person on whom an abatement notice is served, without reasonable excuse, contravenes or fails to comply with any requirement or prohibition imposed by the notice, he shall be guilty of an offence”. Criminal standard of proof. “Best practicable means” defences available for some types of nuisance (s.80(7)-(8)) (NB Written charge to be issued within 6 months of the date of the alleged offence – Crim PR 7.2(10))
- LA can “abate the nuisance and do whatever may be necessary in execution of the notice” (s.81(3)). LA entitled to expenses reasonably incurred (s.81(4))
- LA can seek an injunction to secure the abatement of the nuisance if it is of the opinion that summary offence proceedings would afford an inadequate remedy (s.81(5)) (Only appropriate in extreme cases)

Part II: Role of local authorities

Right to appeal against abatement notice

- Section 80(3): “A person served with an abatement notice may appeal against the notice to a magistrates’ court [...] within the period of twenty-one days beginning with the date on which he was served with the notice”
- NB Strict time limit
- Grounds of appeal in Reg 2. In summary:
 - no statutory nuisance
 - material defect in abatement notice and/or its service
 - requirements of notice disproportionate to abate nuisance
 - best practicable means used to abate nuisance (for certain types of nuisance)
 - re noise, requirements of notice go beyond controls imposed under other regulatory regimes

Part II: Role of local authorities

Right to appeal against abatement notice

- General position is that requirements of notice suspended until determination of appeal, unless nuisance injurious to health or likely to be of limited duration so that suspending notice of no practical effect (Reg 3). For LA to mark notice accordingly (NB considerable discretion in this regard)
- Remedies (Reg 2(5))
 - Quash
 - Vary
 - Dismiss appeal
 - Such order it thinks fit re costs of works (Reg 2(6))

Part II: Role of local authorities

Right to appeal against abatement notice

- Civil jurisdiction of Mags (MCA 1980 and Mags Court Rules 1981)
- Appeal by way of complaint (Sch 3)
- Importance of liaison between parties and directions hearing
- Request District Judge
- Court has discretion to such order as to costs as it thinks just and reasonable (s.64(1) MCA 1980)



Part III: Action by individuals

- Entitlement to issue proceedings in MC under s.82 “by any person on the ground that he is aggrieved by the existence of a statutory nuisance” (typically where LA decides no statutory nuisance)
- Proceedings can be brought by companies as well as individuals. Legislation designed to assist tenants of housing in unacceptable condition
- If the MC is satisfied that the alleged nuisance exists, or that although abated it is likely to recur:
 - shall make order requiring D to abate nuisance and/or carry out works necessary to prevent recurrence of nuisance (criminal offence for failing to comply but with BPM defence available – s.82(8))
 - Power to impose fine up to level 5
 - Power to award compensation up to £5,000 for PI, damage or loss arising from nuisance (s.131 Powers of Criminal Courts (Sentencing) Act 2000 – see also R v Liverpool Crown Court, ex p Cooke [1997] 1 WLR 700)

Part III: Action by individuals

- Complaint must give 21 days advance written notice of intention to issue proceedings (and at least 3 days for noise nuisance from premises)
- Proceedings are criminal in nature. Criminal standard of proof applies (e.g. *Bottross v LB Hammersmith and Fulham* (1994) 27 HLR 179) and Crim PR will apply
- Begin proceedings by laying an information with MC (who will in turn issue a summons)
- Provision for costs (“expenses properly incurred by him in [bringing] the proceedings”) if nuisance found to exist when proceedings issued (s.82(12)) (if C loses, limited risk of adverse costs order as D may be awarded costs via central funds)
- Also consider possibility of claiming costs under s.18 Prosecution of Offences Act 1985

The End



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James Burton

Other tools for addressing noises and smells (common law nuisance actions aside):

- (1) Town and Country Planning – focus on “agent of change”.**
- (2) Anti-social Behaviour, Crime and Policing Act 2014, s.43 - community protection notices.**
- (3) Compensation where public works the cause – Land Compensation Act 1973, Part I.**

Planning – agent of change

- Where new development will give rise to noises, smells, or other amenity impacts, the planning system defers to the pollution control regimes (i.e. environmental permitting) [eg NPPF 183] and otherwise fills gaps through conditions.
- More interesting is other end of telescope – impact of new ‘receptor’ on existing businesses, the operation of which might cause a nuisance to the new ‘receptor’ (the “agent of change”).



Evolution of agent of change

- Until relatively recently, this impacted a mandatory material consideration *only* in certain circumstances: *Forster v SSCLG* [2016] EWCA Civ 609, at [16] per Laws LJ:
the impact of a prospective planning permission on the viability of a neighbouring business may in principle amount to a material planning consideration. But...if such an argument is to be advanced it should be clearly raised before the Inquiry Inspector...with a sufficient degree of particularity and supporting evidence to enable the Inspector to reach an objective and reasoned conclusion on the point.
- Now “agent of change” a well-established part of national policy [NPPF 182] (and often found in stat. dev plan).

NPPF para.182

182. Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable constraints placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed.



Issues

* Phrase “unreasonable restrictions” undefined.

Fact dependent. At one end of the spectrum: enforced closure of an existing business. But the other? What if an existing business would likely face a stat. nuisance abatement notice, but make out the stat. appeal?

* Limits of NPPF para.182?

Para.182 speaks of “mitigation”. What if “agent of change” *cannot* be “mitigated” such that it will not impose “unreasonable restrictions”?

* Fettering discretion re. stat. nuisance?

Policy may require LPA to consider likelihood of stat. nuisance abatement notice (and note “prejudicial to health” limb). An uncomfortable exercise, and one that risks claims LPA has fettered its discretion under the EPA 1990/created a legitimate expectation it will not pursue stat. nuisance.

* How will the policy fit with “growth” areas in Planning White Paper?

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If areas are marked for C3, will LPAs insist on, eg, mechanical



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Anti-social Behaviour, Crime and Policing Act 2014, s. 43

- Section 43(1) and (4) of 2014 Act:

(1) An authorised person may issue a community protection notice to an individual aged 16 or over, or a body, if satisfied on reasonable grounds that—

(a) the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality, and

(b) the conduct is unreasonable.

...

(4) The only requirements that may be imposed are ones that are reasonable to impose in order—

(a) to prevent the detrimental effect referred to in subsection (1) from continuing or recurring, or

(b) to reduce that detrimental effect or to reduce the risk of its continuance or recurrence.

Sidesteps EPA Part III?

- As noted, s.79(10) of EPA limits circs in which LAs may bring proceedings where premises under other controls:
(10) A local authority shall not without the consent of the Secretary of State institute summary proceedings under this Part in respect of a nuisance falling within paragraph (b), (d), (e), (fb) or (g) and in relation to Scotland, paragraph (ga), of subsection (1) above if proceedings in respect thereof might be instituted under Part I or under regulations under section 2 of the Pollution Prevention and Control Act 1999.
- Section 2 of the 1999 Act = environmental permitting.
- Can a s.43 notice address conduct that might be a stat.nuisance?

Parliamentary intention

- Explanatory notes to 2014 Act expressly envisage a s.43 notice possible even if conduct would be a stat. nuisance, as does stat. guidance (Aug.2019).
- However, guidance reminds that specific trumps general – but is that correct approach? Better to focus on LA's obligation to act stat.nuis?
- Appeal to Magistrates is available (s.46). Statutory grounds include that the conduct is not unreasonable, and that the requirements are unreasonable. Appeal suspends notice, but must be made within 21 days.
- If a permit allows the conduct, would a court find it unreasonable?
- If no appeal, breach of notice an offence (s.48)

Land Compensation Act 1973, Part I

- Part I of the LCA 1973 an attempt to address the injustice created by statutory immunity from suit in nuisance.
- Where a qualifying property interest (typically, someone's home) is diminished in value by reason of “physical factors” from the use of “public works”, compensation payable (only – no injunctive relief).

An imperfect (money) remedy

- List of “physical factors” not all-encompassing (but not far off: noise, vibration, smell, fumes, smoke and artificial lighting and *‘the discharge on to the land in respect of which the claim is made of any solid or liquid substance’*).
- “Public works” will only catch highways, aerodromes (that benefit from immunity pursuant to s.77(2) of the CAA 1982) and other public works or land any works provided or used in the exercise of statutory powers that benefit from immunity. Otherwise, claimant has common law nuisance suit available (though note that aerodromes occupied by a government department exempt (s.84(1))).
- Claim a one-off, and dependent on prices current as at “first claim day” (a year after the public works first came into use after completion), with assessment conducted on the basis of the “physical factors” then, plus those “reasonable expected” from intensification.
- So potentially rough justice – but better than nothing.

Quiz



Q & A Session



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