



Nuisance and Noise - How safe is your business?

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Payne Hicks Beach partner Andrew Tugwell and Sasha White QC consider how a deed of easement can be used to help the planning process and to prevent a future claim in nuisance (first published in the Estates Gazette on 29 March 2014).

To what extent do residents and businesses control their noise environment in law? Their perception of control is often far greater than the reality in practice. However, the reality might be changing by recent trends in the law.

A recent planning objection made by Ministry of Sound in respect of proposed nearby residential flats was resolved by the local planning authority on the basis that the developers would procure that future flat owners cannot object to any noise nuisance generated by the Ministry of Sound. The future use as a nightclub was to be protected by a Deed of Easement to allow the noise generated. This raises the question of whether this kind of innovative agreement is a practical option in terms of preventing a future claim under the usual laws relating to nuisance and also in terms of facilitating difficult planning applications.

The right to do something on your own land which would otherwise amount to a private nuisance can be an easement, for example, acts that give rise to noise. Various cases since Victorian times have acknowledged in theory the right to have an easement granting the right to make noise. In *Re the State Electricity Commission of Victoria & Joshua's Contract* [1939] VLR 121 Martin J ordered the inclusion, in a conveyance of land to be used as an electricity substation, of an express easement of transmitting such noise as might arise from the proper use and operation of the substation.

When Lohan Presencer, the Chief Executive of Ministry of Sound, described the 'deed of easement' as being "pretty groundbreaking" he may have been correct at least in relation to the signing of an actual deed to create such an easement.

A right to cause an interference which would otherwise constitute a nuisance may be acquired as an easement by prescription if it has existed for 20 years or more. This can be extremely difficult to establish as there must be certainty as well as a use "as of right" - this was the sticking point in *Dennis v Ministry of Defence* [2003] 2 E.G.L.R. 121 where it was argued that a long period of low flying aircraft had established a right for such a use.

It was held that the prescriptive right to commit a nuisance must be capable of forming the subject matter of a deed. In the case of aircraft noise, the nuisance was not defined or established. Fortunately

Ministry of Sound are not relying on prescriptive rights.

An example of an implied easement was found in *Lyttleton Times Co. Ltd v Warners Ltd* [1907] A.C. 476 when a landlord let the upper part of a building to use as hotel bedrooms. The lower part of the building was to be used for a printing works and this was known to the tenant. It was held that the tenant could not complain of the nuisance caused by the noise of the printing works as there was no evidence that the work was carried out improperly or negligently. Neither party would have embarked upon the work if they had not thought their intended enjoyment of the building would be permitted.

If a claimant has consented to the defendant creating nuisance he cannot then complain of an interference with his land to the extent that the interference was permitted. However, in the Ministry of Sound case it will ultimately be the landlord inserting express easements into the future tenants' conveyances for the benefit of a third party

The creation of such easements in leases for residential use will have far reaching consequences for both planning and property law. In planning law it will enable conflicting uses to be in much closer proximity. In property law it adds additional power to the landlord to control the future behavior of the tenant. However it does raise very interesting issues as to enforceability. If a resident subsequently complains it will clearly constitute a breach of the easement and give a private law remedy. But does it preclude the local authority from having to consider the objection received in determining a planning application. In our judgment it will be required to be taken into account in any event. The objection affects the use of land and is patently a material consideration. It will also be material to consider the existence of the easement. However it will be a brave planning authority that ignores the objections of 30-40 residents on grounds of noise solely because an easement imposed by the landlord prevents them from making objections to surrounding land uses on the basis of noise.

In terms of property law it begs the question of what will be the remedy imposed by the court if the easement is breached. If the tenant can show that the amount of noise does actually constitute a nuisance will the court not be extremely sympathetic to the breach of the easement and what remedy can the court sensibly impose.

The Supreme Court's recent decision in *Lawrence and another v Coventry and others* [2012] EWCA Civ 26 (*Lawrence*) provides an interesting take on a similar situation to that which Ministry of Sound were trying to prevent- i.e. an established motor sport venue that might be forced to close due to a recent neighbour claiming private nuisance. Whether or not a land use is a nuisance will take into account the character of the area, but the *Lawrence* decision has clarified that in most cases it will not be possible to argue that the character of the area includes the offending use. This is a sharp reminder that neither a planning consent nor an established use will necessarily authorise a nuisance.

As Lohan Presencer said - 'London does need to expand and develop, it does need more multi-use developments, but these should not be at the expense of entertainment venues'. The decision in *Lawrence* seems to do little to reconcile these two, increasingly competitive, forces, although the decision does encourage Courts to consider more readily awarding damages rather than preventing uses by injunctions. This is unquestionably an area of law that will be of great expansion and development over the coming years.

For further information please contact Matthew Spring of the Property Disputes Team by email or on 020 7465 4300.

Tel: 020 7465 4300 Fax: 020 7465 4400 www.phb.co.uk

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