IN THE MANCHESTER AND SALFORD MAGISTRATES COURT
CASE:062100712754

BETWEEN

NIGHT & DAY CAFÉ LIMITED	**Appellant**
-v-	
MANCHESTER CITY COUNCIL	**Respondent**

JUDGMENT

This judgement relates to an appeal by Night AND DAY (Appellant) in respect of a Noise Abatement notice (NAN), served upon them on 18th November 2021 by Manchester City Council (MCC) (Respondent).

The notice states that 'under the provisions of the Environmental Protection Act 1990 the Council of the City of Manchester, being satisfied of the existence of and the likelihood of a statutory nuisance by virtue of S79(1)(g) arising from Excessively loud music and bass.' The notice required the appellant to abate the same and prohibit its recurrence with immediate effect. The accompanying letter confirmed that the nuisance was witnessed by officers from MCC on 13th November 2021.

The appellant lodged an appeal against the NAN. The matters are civil proceedings therefore the standard of proof is the 'balance of probabilities. The grounds of appeal are set out in at Regulation 2 (2) of the Statutory Nuisance (Appeals Regulations) 1995.

In essence, the complainant contended that the relevant sections were as follows:

1)REG 2(2)(a): that the abatement notice was not justified under S80 Environmental Protection Act 1990(EPA). This ground of appeal goes to whether a statutory nuisance existed or is likely to reoccur, ie. whether the matter complained of was a statutory nuisance.

2)Reg 2(2)(b): This ground was not listed within the appeal but in skeleton argument of the appellant; that there has been some informality, defect, or error in, or in connection with, the abatement notice.

3)Reg2 (2)©: The Authority has refused unreasonably to accept compliance with the alternative requirements or (2) the requirements in the abatement notice are otherwise unreasonable in character, extent, or are unnecessary.

4) Reg 2(2)(d) that the time or times within which the requirements of the notice are to be complied with is or are not reasonably sufficient for the purpose

5) Reg (2)(2)(e): The best practical means were used to prevent, or to counteract, the effects of the nuisance.

The matter came before me on 29/11/22 and 30/11/2022. The appellant was represented by Ms Clover and MCC by Mr Charalambides. As a result of issues arising within the hearing the matter was adjourned. Both parties entered protracted negotiations, in an attempt to resolve the matter including exhaustive acoustic tests but, ultimately, to no avail. The matter was therefore relisted before me on 29/1/2024- 31/1/2024.

PARTIES POSITIONS

The appellant sought the removal of the NAN by the court, arguing that there was no statutory Nuisance, that it was not justified. However, if the court ruled against it, they sought to have the music levels capped at the rate put forward by Mr Rogers in his latest test profile.

The position of MCC was for the NAN to remain but be amended as suggested by Mr Charalambides in his closing submission to, 'a) abate all music related nuisance;b) prevent any reoccurrence which arises from nightclub use of the premises from midnight onwards and c) nightclub use means pre-recorded music played and presented by a DJ or sound engineer either on a Friday or a Saturday night.' The time for compliance given would be 28 days.

I have had the benefit of perusal of bundles of evidence, copious legal authorities and hearing live evidence from witnesses, including professional witnesses from both parties.

EVIDENCE

JENNIFER SMITHSON

Proprietor of Night & Day. Confirmed her statements. Stated that she has adapted wherever reasonable but unable to do anything more without impacting on the business. Any change would affect viability. The 2014 Noise Management Plan is something created inhouse. Agreed she met the flat occupant regarding a complaint to "understand" their situation and agreed that it was not reasonable to hear music in the bedroom, but she had done all that she could. It was put to her that she needed to respond to today's circumstances, she did not agree. Her evidence was that live music operates in the open venue until midnight. Then on Friday/Saturday from midnight until around 3.00am, closing no later than 4.00am, it operates as a DJ venue.

REX CHESNEY, FLAT 4 3 DALE STREET RESIDENT

He gave evidence that he lives in the neighbouring flat to the appellant's premises. At weekends he moved to the sofa in the living room to try to sleep and on 13/11/21 his partner telephoned Environmental Protection Officers (EPO)officers at 1.40am as they were unable to sleep due to the noise and vibrations. He had a work shift at 05.45am so he was trying to get to sleep with earplugs on in the 2nd bedroom at the time of the officers attendance. He expected some level of intrusion from noise and he had tried to mediate with the appellant. Indeed, Ben Smithson had mentioned to him that they may be able to assist but nothing materialised. However, the noise levels were such that, on occasion, at 2.00 am water rippled in his bedside cup. He and his partner had spent £16,000 installing insulation in an attempt to block noise but this unsuccessful. They have moved as it is not

sustainable to live there with the noise. The flat is up for sale. I found him an impressive, truthful witness.

PETER ROGERS -ACOUSTIC EXPERT

Confirms his statements**.** Gave evidence on two occasions**.** His initial evidence was to confirm that the appellant had done all that can reasonably be done. Conditional planning permission had been given by MCC in 2000 as a result of concerns regarding the party wall shared by the appellant and Flat 4, 3 Dale Street. The noise limit stipulated in the Blue Tree report recommendations was 95db and N & D employ this. The reality was that the planning condition was not discharged. His investigations at the venue established that the noise transmission is air and structure borne through the party wall, floor, and ceiling. This occurs at certain high and low frequencies. The venue has devised a robust system that has evolved with technology, a core compression limiter, integrated means of controlling levels etc. These actions are operated by expert sound engineers. Other Blue Tree recommendations have been implemented; ones that have not been done are because of the cost/benefit analysis. The cost would be significant for minimal effect. The club operates to a ”sweetspot”, that is reasonable in all the circumstances. This ensures that the sound is not too high/low for an audience to engage in the experience (fundamental), but also viable for the venue. The existing system achieves all that can reasonably be done. If it were any lower it would impact on the listener experience. It is impossible to obtain inaudibility in the bedroom and have a functional live venue next door. He accepts that the statutory nuisance scheme is a safety net for when Planning and Licensing measures are insufficient.

After the case went part heard he returned to the venue and conducted more tests which illustrated that the 95db was regularly being exceeded. He suggested that the original measurement was a “snapshot”. The reality is that the position has moved on, and the reality demonstrated by further joint tests is that that assessment effectively was only a snapshot. Mr Rogers accepted that some level of restriction was reasonable and suggests the levels in Profile 1.

His opinion was that this was a sensible compromise as it would be impossible to achieve a workable level for both parties. The adjusted level would be noticeable but not produce an unreasonable reaction. It would impose a restriction of 56% events in the bass output region of club events whereas the other tests would have such an adverse impact as to be commercially unviable.

Regarding Test 2 and 3 (variation on Test 2) put forward by Mr Bonnert and MCC, his view was that the sound and quality dipped resulting in dissatisfied customers and sound operators. They would also not be commercially viable for the venue.

EPO LORRAINE BAMBRICK

She confirmed her written statements. Her evidence was that when she attended at the flat on 13/11/21 at 1.50am she identified the vocals of “Sweet Dreams” by the Eurythmics and the voice of the DJ. She was in the flat more than 30 minutes; sleep was not possible and it was reasonable to expect to sleep at 3.00am. She had taken into account the range of necessary factors to assess a nuisance. In her professional opinion, the noise emitting from Night & Day constituted a statutory nuisance. I accept her evidence.

The evidence of the EPOs was that a degree of tolerance “give and take” was acknowledged but that different factors and policies governed night-time hours from 11.00pm when generally individuals would be asleep.

EPO JONATHAN MATHERS

Confirmed his statement and corroborated the evidence of Lorraine Bambrick, that the noise level in the flat when he attended on 13/11/21 constituted a statutory nuisance. He had regard to the range of factors when assessing a nuisance. He drafted the NAN and confirmed that he has used such terms previously. Excessive- beyond the normal. I accept his evidence.

BEN MORAN – TEAM LEADER

Confirms his statement. Believed terms of the NAN were clear and fair when issued. MCC were not prescriptive in the NAN, leaving it to the venue as to how they abate as they know their own business.

ANGELA WHITEHEAD-SRATEGIC LEAD EPO

Confirmed her statement. Present with the acoustic experts when the 3 different profiles were tested in the apartment between 1-2 September 2023. Confirmed that EPO Sharon McAndrew would assess Test 1 and EPO Lisa Jones would assess Test 2 and 3. Neither were aware of which test they were assessing. Both EPOs considered that the noise from the tests they assessed constituted a Nuisance. The EPOs confirmed this to be the case in their statements.

TOM BONNERT- ACOUSTIC EXPERT

Confirms his statements. Large areas of agreement with Mr Rogers. Both experts agreed that noise from the appellant’s premises could be heard within the adjoining flat. Confirms the structural/airborne transmission of noise to the apartment. Some disagreement as Mr Rogers preferred to use a 8 hour period to secure the dB average but Mr Bonnert was of the opinion to employ a 5 minute period as this gave a more accurate picture. This was in light of the venue being shut for some of the 8hours.

He agreed with Mr Rogers that the issue is not the overall noise level but there is a particular problem with high/low frequencies, particularly 250HZ. He had suggested Test 2 to abate the nuisance but accepted that this did not achieve the desired effect. Test 3 was the closest to abatement. However, he acknowledged that none of the test profiles succeeded in the objective to abate the nuisance. He also maintained under cross examination that the positioning of the wedges could be improved.

THE LAW

The EPA govern the area of statutory nuisance

S79(1) of the EPA 1990 provides:

"Subject to subsections (1A) to (6a) below, the following matters constitute "statutory nuisances" for the purposes of this Part, that is to say-

S79(1)G noise emitted from premises so as to be prejudicial to health or a nuisance.

S80(1) EPA provides that:

"Where a Local Authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, in the area of the Local Authority, the Local Authority shall serve…an abatement notice.

MCC witnesses, in evidence, Counsel also, confirmed that its case was not presented on the basis of prejudice to health.

NUISANCE DEFINITION

There is no statutory definition of nuisance within the EPA therefore all agree that the court must turn to the common law definition of nuisance.

Various authorities have been supplied but the landmark Supreme Court case of **Coventry v Lawrence NO 1 [2014] UKSC 13** set out the general principles of nuisance by interference with a neighbour's quiet enjoyment of land.

A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land.

As Lord Wright said in **Sedleigh-Denfield v O'Callaghan [1940] AC880, 903** "a useful test is perhaps what is reasonable to the ordinary usages of mankind living in society, or more correctly in a particular society."

In **Sturgess V Bridgeman (1879) 11 Ch D 852, 865**, Thesiger LJ, giving the judgement of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to the circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey" Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out.

The recent case of **Fearn and others v Board of Trustees of the Tate Gallery [2023] UKSC 4** also reiterates that the interference must be substantial. Other terms used are real, material, and significant. This is to be judged by the standards of an ordinary or average person in the claimant's position.

The principles also encompass long held concepts of good neighbourliness and reciprocity, give and take.

REASONABLENESS

It is well established that the issue of 'reasonableness' needs to be assessed objectively. Lord Carnwath in **Lawrence** at [179] stated "Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot by being unduly sensitive, contain one's neighbours' freedoms), but what objectively a normal person would find it unreasonable to put up with',

'The recent case of **Fearn v Tate** discussed in detail the concept of nuisance and 'reasonableness' . Lord Leggatt helpfully outlines several questions/issues that I must consider.

A) IS THE USAGE BY REX CHESNEY AN ORDINARY AND COMMON USE?

If it was not then, then the occupier cannot complain if the use interfered with was not an ordinary use.

The property of Rex Chesney was a residential flat where he lived with his partner, and he was using it as such. He was using his bedroom to try to sleep. Therefore, I am satisfied that his usage was a common and ordinary use.

B) IS THE USAGE OF THE PREMISES BY NIGHT & DAY A COMMON AND ORDINARY USE?

The next aspect I must consider is whether the usage by the appellant of their property is a common and ordinary use of their property and that the activities associated with that use were being conveniently done. If it was then there would be no nuisance.
To be precise is the usage of their premises by the appellant after midnight on a Friday and Saturday as a DJ event a common and ordinary use?
Or is their usage of the property an exceptional manner-not unnatural or unusual but not the common and ordinary use of the land?

Are the activities associated with that use being conveniently done? As Lord Leggatt confirmed, this relates to the principle of 'give and take' On the evidence I find that this activity was not being conveniently done. Mr Chesney had been to liaise with Mr, Mrs Smithson on occasions to try to reach a solution and had attended meetings but was told that there was nothing more that the club was prepared to do. Clearly, noise limiters were not used to ensure music levels remained within their own plan. The appellant stated that it was not in a position to alter its business model. By contrast he had spent £16,000 trying to reduce the noise by insulation, negatively impacting upon his apartment. Sadly, this was ineffective.

C) DO THOSE ACTIVITIES INTERFERE WITH THE COMPLAINANT'S ENJOYMENT OF THEIR LAND IN LIGHT OF WHAT, OBJECTIVELY, AN ORDINARY PERSON WOULD FIND REASONABLE TO PUT UP WITH?

To assist me in determining the above I then must take into consideration several factors. These include location, time, frequency, duration, value to the community. Ultimately, as Lord Leggat stated, this is a matter of judgement for the court, having consideration of all the evidence. There is no absolute standard, and each case is fact specific.

i) CHARACTER OF AREA

Both parties agree that it is a lively, vibrant area. I find that it is a mixed-use locality; late night bars, restaurants, shops. residencies. There is not a monopoly for any specific type of activity. Mr Charalamides used the term' protean' and I accept this. Manchester and its areas are evolving, usage changing. Another local example is Ancoats. Such change is inevitable, and the case of **Lawrence** confirms that individuals must recognise and adapt to such changes.

ii) TIME, DURATION, FREQUENCY.

I refer to the evidence I outlined earlier of Rex Chesney, the EPOs and Jennifer Smithson. In essence, a DJ playing pre-recorded music event every weekend until approx. 3.00am.

iii) IMPORTANCE AND COMMUNITY VALUE

This relates to the importance and community value of the DJ set from midnight onwards. (the NAN is not proposed to apply to Live Music Events) I acknowledge that such activity has a value to some parts of the community however it is not an activity unique to the appellant. I have to balance the value of going to that event until the early hours against the fundamental right of an individual to enjoy peacefully their home and to be able to sleep at night in their bedroom. I am satisfied that an early hours music event cannot trump that right.

D) IS THE INTERFERENCE IN THE PRESENT CASE SUBSTANTIAL?

I am satisfied on the facts of this case, namely, 2 acoustic experts, EHOs and Mr Chesney, that music from the appellant's premises is clearly audible in Flat 4, 3 Dale Street.

Jennifer Smithson confirmed that Night and Day operate every Friday/Saturday after the live music ends as a DJ set until approximately 3.00 am. I am satisfied that, objectively, audible music within a residence in the early hours played so that it is very difficult to sleep is a substantial interference with one's peaceful enjoyment of their property. I do not find that Mr Chesney was oversensitive. I am satisfied that, on the evidence, that the use of the premises by the appellant, judged by the standards of an ordinary individual in the position of Rex Chesney, caused a substantial interference with the ordinary usage of his residential flat.
This flat is for sale, and I am satisfied that the nuisance is likely to reoccur when a new purchaser is found for the property.

DEFENCES/ CONTENTIONS

1) NAN NOT JUSTIFIED

This is relevant as to whether a statutory nuisance occurred or was likely to reoccur. For the reasons above I am satisfied that a statutory nuisance occurred and is likely to reoccur.

2)DEFECTIVE NOTICE

It is submitted that the terminology in the NAN is vague and imprecise. The underlying aim of the NAN is simplicity. When drafting a NAN, the purpose is to ensure that the recipient knows what is wrong and tell them in simple, straightforward terms, what, if any measures should be taken to put it right. This was confirmed in the evidence of EPO Ben Moran

Lord Bingham, in **Brighton & Hove Council v Ocean Coachworks (Brighton) Ltd DC [2001]** confirmed that there was no complexity and set out a useful test for a NAN; -

a) Did it outline the statutory nuisance which was the subject of the notice?
b) What did the NAN require the recipient to do?
c) Were any works to be carried out?

Applying the test to the NAN served, I am satisfied that the phrasing used was simple, straightforward, and easy to understand, in accordance with the above test. I do not find that there was a material defect but, having taken into account all the evidence now available, all agree that if the imposition of a NAN is upheld that it is appropriate that the terms be amended for certainty.

3)THE RESPONDENT HAS REFUSED UNREASONABLY TO ACCEPT COMPLIANCE WITH ALTERNATIVE REQUIREMENTS.

I do not find that the respondent unreasonably refused to accept compliance with alternative requirements.

No satisfactory argument/evidence was put before me that the appellant had suggested an alternative scheme to abate any nuisance before service of the NAN.

4) THE REQUIREMENTS OF THE NAN ARE UNREASONABLE IN CHARACTER OR EXTENT OR ARE UNNECESSARY.

For reasons given above, I am satisfied that the requirement within the NAN was reasonable and necessary.

5) BEST PRACTICAL MEANS UNDER S80(9) EPA. (BPM)

The burden of proof to satisfy me regarding this defence rests with appellant. The appellant must satisfy me why all other obvious means are not practicable. I remind myself of the various factors within the S79(9) EPA provision that I can take into consideration. Much has been mentioned of the 'sweet spot'. The inhouse Noise Management Programme was created by the professional sound engineers. This was as a result of a review of the appellant's Licence in 2014 and the Blue Tree Acoustics work undertaken on behalf of the appellant. Mr Rogers, in his original report, confirms

that such levels provide guidance to the sound engineers, whom, he informs the court are best placed to manage the noise levels to secure the sweet spot. The 95db(a) was the target maximum in this document. This was the original level advocated to the court by Mr Rogers. However, it became evident that, as Mr Rogers said, this was only a snapshot as that figure was regularly exceeded. I agree that the document did not have the advantage of robust expert calibration equipment/testing. I also accept that other measures were put in place by the venue as outlined by the acoustic experts and that financial considerations are relevant. However, the court was informed that the venue already possessed the equipment to limit sound levels yet had not done so. I find that the levels stated may have been a written aspiration, but no oversight was undertaken to ensure compliance to such levels. The appellant has not satisfied me that the defence of 'best practical means' is applicable.

NON- STATUTORY DEFENCES

The appellant in the skeleton argument relies upon a number of non-statutory defences including,

Agent of Change

Coming to the Nuisance

Prescription

I cannot accept the contention that these defences are applicable. The regime of statutory nuisance is governed by its own statutory procedure, regulations, and specified defences. It is a safety net for when other regimes fail. It fills an important gap in the common law as it protects individuals in the community, rather than property, from harm. It was open to Parliament to include the principles listed but it failed to do so. However, Parliament provided a specific statutory defence in the provision of BPM. As is acknowledged there are distinct differences between Public, Private and Statutory Nuisance which possess different regimes and objectives. In **Fearn v Tate** it was confirmed that Planning Law and the common law of nuisance have different functions, endorsing the sentiment in Lawrence. The cases relied upon by the appellant to support its case are not within the ambit of statutory nuisance. I have not been referred to any authorities where non statutory defences have been successful and have not seen any commentaries where the said defences have been supported.

In the event that I am wrong in this regard, I make the following findings.

AGENT OF CHANGE

I agree with the representation of the council. This is a planning law principle with no application. I have determined that a statutory nuisance existed, exercising the appropriate tests and as Lawrence confirms 'planning laws are not a substitute or alternative for the protection provided by the common law of Nuisance, or in this case the 'safety net' of Statutory Nuisance.

COMING TO THE NUISANCE

The case of **Lawrence** confirms that the coming to the nuisance is not a defence in itself. **Fearn v Tate** also confirms this principal. However, my findings regarding the character of the

neighbourhood are that it has developed and evolved to a mixed use. I have considered the factors required when determining if a nuisance exists above, including the character of the neighbourhood. I do not consider that it would be a defence on these facts.

PRESCRIPTION

A private law right where an individual enjoys at least 20 years uninterrupted enjoyment as of right. This is not the situation with the appellant's premises which operates as a venue subject to the Licence granted in 2005 and amended consensually in 2014.

CONCLUSION

Having found that a statutory nuisance exists, as the parties agree, I have 3 options. Under the Statutory Nuisance (Appeals) Regulations 1990: Reg 2 (5)

A) Quash the NAN- for the reasons above, I decline to do so.
B) Dismiss the appeal.
C) Vary the NAN in favour of the appellant.
   Mr Charalambides urges the court also to amend the NAN as outlined earlier in my judgement.

I remind myself of all the evidence in the case and the fact that Parliament inserted a defence of BPM. Circumstances were envisaged where it would be found that a statutory nuisance existed but no liability by the imposition of a NAN would arise for an appellant, if they made out the defence. I made a finding that the appellant had not satisfied me that they had adopted best practical means prior to the proceedings. However, things have moved on substantially because of these proceedings with several acoustic tests deployed. In an ideal world a balance would be able to be struck, enabling the residents to enjoy their property and the venue to operate as a going concern. Sadly, because of the faulty party wall this has not proved possible. All profiles tested were unsuccessful in achieving a satisfactory outcome. Mr Rogers gave evidence that it is impossible for noise from the venue to be inaudible within the flat. He proposes Test 1 measurements which would place some restrictions upon 56% of club nights. In effect, he says, this is BPM, together with the existing measures already in place and provides a compromise. Any further restriction upon noise levels, he states would not be viable for the venue, putting its survival at stake. Ms Smithson's evidence was in a similar vein. I have considered the factors in S79(9). and I am satisfied that this is a reasonably practical level which could be ensured by sealed sound limiters to restrict music levels. The existing sound system is capable of being programmed to achieve this aim.

I therefore amend the NAN as requested in favour of the appellant as follows: -

The Friday/Saturday nightclub use of the premises from 11.00pm with pre-recorded music played and presented by a DJ or sound engineer should not exceed the level of Test 1. The measurements are to be taken by professional acousticians and enforced by sealed sound limiters within the system.

The time for compliance is 28 days.

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