Neutral Citation Number: [2011] EWHC 1664 (QB)

Case No: HQ 10 XO 4712

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2011

Before:

MR JUSTICE EDWARDS-STUART

- -

Between:

ALLAN KENNETH WILLIAM WHITE	**Claimant**
- and -	
MARK ANTHONY LYNCH	**Defendant**

- -
- -

Mr Ranjit Bhose (instructed by **Cowells Solicitors**) for the **Claimant**
Mr Robert Lamb (instructed by **Wade Stevens & Co**) for the **Defendant**

Hearing dates: 13th – 16th June 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE EDWARDS-STUART

Mr Justice Edwards-Stuart:

Introduction

1. In this action the claimant, Mr Allan White, seeks a permanent injunction to require the defendant, Mr Mark Lynch to comply with certain conditions of his Premises Licence and of the planning permission that relate to his restaurant, Madisons, at 148 Main Road, Biggin Hill, Kent.

2. Mr White is the freehold owner of a building known as Kestrel House, 146-154 Main Road, Biggin Hill, which consists of a number of retail units on the ground floor with residential flats and an office on the first and second floors. Madisons is one of the ground floor units.

3. By a planning permission dated 5 May 1999 the permitted use of No 148 Main Road was changed from retail to restaurant use. Condition 4 of that permission required that "*All customers shall have left the premises by 2400 hours*". Thereafter No 148 was run as a restaurant and Mr Lynch took it over in about July 2002. He subsequently acquired the lease of the premises on 5 June 2003 for a term of 21 years. The covenants in the lease required Mr Lynch to comply with both the planning permission and the requirements of the licensing authorities.

4. On 17 December 2010 Mr White obtained an interim injunction which, amongst other things, prevented Mr Lynch from playing amplified or live music in the premises at a level higher than 82 dBA and this was to be imposed by a sound limiter. Mr Lynch also gave certain undertakings, one of which was that "*no amplified or live music is played within the Premises after 23.00 Monday to Saturday, and after 22.30 on a Sunday*".

5. Mitting J, who granted the injunction, recognising that it might make it impossible for Mr Lynch to run the restaurant, also gave Mr Lynch liberty to apply for an order that Mr White should undertake to make conditional periodical payments to him as a condition of the continuation of the injunction. The purpose of this was to protect Mr Lynch's livelihood.

6. Mr Lynch decided to make an application for periodical payments and the outcome of that application was a consent order made on 25 January 2011 by which Mr Lynch continued to give the undertakings that were given to Mitting J and the rest of the order was discharged.

7. However, Mr White contends that Mr Lynch failed to observe the undertaking summarised above and has, on a number of occasions in April and May of this year, allowed amplified music to be played in breach of the undertaking given to Mitting J. As a result, Mr White has applied for an order that Mr Lynch be committed for contempt of court. That application is also before me.

The background

8. Mr Lynch has been in the restaurant business since 1996, when he bought a restaurant in Bromley. It was called Madisons. Three years later he bought another restaurant in West Wickham, which he also called Madisons.

9. When Mr Lynch acquired the restaurant at No 148 it used to be called Pacino's and it was run as a restaurant with live entertainment by a Mr O'Kasha. The owner before that, a Mr Porritt, also ran it as an entertainment restaurant having obtained the permission for the change of use. It is Mr Lynch's evidence, which I accept, that the internal layout of the restaurant had not changed significantly since 1999.

10. When Mr Lynch acquired No 148 in 2002, and when he subsequently took the lease in June 2003, it was one of a row of retail units, although there was a first floor above it that had been used by a fishmonger. Mr White acquired the freehold of the row of shops in December 2003 and decided to seek planning permission to build two storeys of residential flats above the retail units.

11. He approached Mr Lynch about this proposal, partly because he wanted to know whether he would oppose the application and also because he needed to acquire part of the land demised to Mr Lynch in order to provide the additional car parking that the development would require. It is more or less common ground that Mr Lynch asked Mr White if the development would affect his business and was assured that it would not. As a result of this conversation, says Mr Lynch, he agreed to sell a portion of land to Mr White for £45,000 and agreed not to oppose the development. Mr White says that when he gave this assurance he did not appreciate the extent to which live and amplified music was played in the restaurant.

12. Planning permission for the development was duly granted and it was built. It seems, but this is an issue that I do not have to decide and so I make no findings about it, that no particular consideration was given to the soundproofing of the new building to take into account the nature and extent of the music played in the restaurant.

13. After the development was completed and the flats became occupied Mr Lynch continued to operate Madisons much as before. In 2008 some residents made complaints and on 12 May 2008 the local authority served an abatement notice on Mr Lynch, requiring him to ensure that no noise was emitted from the premises so as to cause a statutory noise nuisance. Mr Lynch says that he complied with this requirement and so no more came of it.

14. On 26 June 2008 Mr White, together with Mr Daniel Berrisford who managed the property on behalf of Mr White, met Mr and Mrs Lynch at Madisons to discuss the situation.

15. Towards the end of the year, following a further meeting with the Head of Public Health Nuisance at Bromley Council, Mr White carried out certain soundproofing works at the restaurant. These included filling the holes in the ceiling, removing the speakers from the steel columns and covering the columns with acoustic plasterboard and infilling areas with rockwool. This was all done at Mr White's expense.

16. Unfortunately, this did not resolve the problem and in May 2009, following further complaints, Mr Lynch agreed to the installation of a noise limiter on the sound equipment at Madisons. In September 2009 the noise limiter was set at 90/91 dBA, which was a compromise agreed between the parties. The basis of this was that the limiter would be in operation throughout the whole of every evening.

17. Mr Lynch considered that this level was too low and he began to receive complaints from customers that the music was not loud enough and that they could not enjoy themselves. After about three months, according to Mr Lynch, the limiter was raised to 100 dBA.

18. At about the same time, during the latter part of 2009, the bass speakers under the stage were disconnected and new bass speakers were suspended on cables at either end of the stage. In terms of reducing the noise transmitted through the building, these further measures do not seem to have been successful.

19. However, in early 2010 further complaints were made about the noise from the restaurant by one of the occupiers of the flats in the new development. In March and April 2010 the Council installed noise monitoring equipment in flats 8 and 2, then owned by Mr and Mrs Beale and Pauline Williams, respectively. As a result of this noise monitoring the Council served an abatement notice on Mr White in May 2010 because it took the view that the cause of the nuisance was the inadequate soundproofing of the building. This view appeared to be supported by Hann Tucker Associates, acoustic consultants engaged by Mr White, in a report dated September 2010. Their opinion was that the construction of the building was not suitable for controlling noise between a bar on the ground floor and residential properties above.

20. Mr Beresford says that in September 2010 he instructed the acoustic expert who was acting on behalf on Mr White to contact Mr Lynch in order to have the noise limiter reset to 90/91 dBA. He says that Mr Lynch refused to agree to this.

21. This impasse resulted in an exchange of correspondence between the parties' solicitors. On 12 October 2010 solicitors acting for Mr White wrote to Mr Lynch asserting that the noise from the restaurant constituted a nuisance, as a result of which Mr White had been served with an Abatement Notice. They called on Mr Lynch to comply with the notice. Mr Lynch's solicitors replied on 4 November 2010 referring to the representations made by Mr White to Mr Lynch that the development of the residential units would not affect his business and saying that the liability for any nuisance rested firmly with Mr White.

22. On 16 Noveember 2010 Mr White's solicitors wrote a letter before action, in which they required Mr Lynch to ensure that:

    (a) No amplified music is played within the Demised Premises after 23.00 Monday to Saturday, and 22.30 on a Sunday.

    (b) No customers will be admitted to the Demised Promises after 23.00.

    (c) All customers will leave the Demised Premises by 2400 hours on every day.

    (d) No nuisance noise disturbance or inconvenience is caused to any residential or commercial neighbours to the Demised Premises, in particular by the playing of amplified (or other) music.

23. Mr Lynch's solicitors replied on 19 November 2010 asserting that live music did stop at 11 pm in accordance with the terms of the licence and that thereafter Mr

Lynch played background music that was sufficiently quiet to allow normal conversation. On his behalf they confirmed that he would continue to do this. As to the requirement that all customers should leave by midnight, Mr Lynch's solicitors contended that he was permitted to allow customers 30 minutes drinking up time under the Premises Licence.

24. Mr White's solicitors responded on 10 December 2010 disputing Mr Lynch's right to play any music at all after 11 pm. Further, they disputed that the music that was played after 11 pm was anything like background music. In addition, they disputed the assertion about the 30 minutes drinking up time.

25. On 13 December 2010, having failed to secure the undertakings from Mr Lynch that had been demanded, Mr White issued an application for an interim injunction to restrain the alleged breaches of covenant by Mr Lynch. Amongst other things, Mr White sought orders to secure that:

    (a) No customers are admitted to the Premises (being Madisons Restaurant, 148 Main Road, begin here will) after 23.00 on any day (and irrespective of any Temporary Event Notice issued under the Licensing Act 2003).

    (b) No customers remain on the premises after 00.00 on any day (and irrespective of any Temporary Event Notice).

    (c) No amplified or live music was played within the Premises after 23.00 on Monday to Saturday; and that

    (d) No nuisance annoyance disturbance or inconvenience is caused at any time to any neighbour (including Mr and Mrs Beale and Ms Williams) and, in particular, by the playing of amplified or live music at the restaurant.

26. In addition, the draft order included a requirement that Mr Lynch should not cause or allow bands and/or other musicians to use the restaurant as a rehearsal room. A further order was sought in the Particulars of Claim, which was served at the same time, requiring Mr Lynch to operate the premises as a "sit down restaurant" within the meaning of the Lease and not as a nightclub and/or entertainment venue. An order in these terms did not form part of the application for an interim injunction.

27. In a letter dated 13 December 2010, in response to the application, Mr Lynch's solicitors said that their client had agreed that there would be "*no live or recorded music after 11pm Monday to Saturday*" except where their client had a Temporary Event Notice. The letter went on to make it clear that the real objections were to the order sought in (d) above, together with the requirements that Mr Lynch was not to allow bands or other musicians to use the restaurant for rehearsing and that the restaurant was only to be used as a "sit down restaurant", and not as a nightclub or entertainment venue.

28. Mr White's solicitors replied the following day saying that from the comments in the letter they were assuming that Mr Lynch now agreed to the provisions in paragraphs (a), (b) and (c) of the Particulars of Claim – which included the restriction on amplified or live music after 23:00. They made it clear that the order in relation to the "sit down restaurant" was no longer being pursued and that the use

of the restaurant for rehearsing could be accommodated by a modest adjustment to the wording of (d).

29. Mr Lynch's solicitors replied on 15 December 2010 saying that with respect to undertakings (a), (b) and (c) they were prepared to advise their client to give the undertakings provided that the wording could be agreed. It is not clear from the latter precisely what it was in the wording with which they were taking issue. However, they made it clear that they were not prepared to advise Mr Lynch to make any further concessions.

30. Mr White's solicitors replied on the following day stating that the only wording of the undertakings that would be acceptable were those set out in the draft order (which were effectively the same as those in the Particulars of Claim). The same day Mr Lynch's solicitors replied to say that they were prepared to advise their client to give undertakings in respect of (a), (b) and (c) and suggested that the wording was discussed and agreed between counsel. No agreement was offered in relation to the orders preventing a nuisance and rehearsals taking place in the restaurant.

31. It was against this background that the application came before Mitting J on 17 December 2010. In an extempore judgment delivered that day he began by describing the problems posed by the application as "intractable". He said that if he granted the injunction as asked it was likely that Mr Lynch's business would be so hobbled that he might well be compelled to cease to trade altogether. Alternatively, if he did not grant an injunction the neighbours who were complaining of the noise would have their Christmas and New Year holidays ruined. Both sides, he thought, had a respectable argument that the problem had been caused by the other.

32. He therefore found himself in this dilemma: he could see no possibility of reducing the noise level inside the restaurant to one which would leave Mr Lynch's business viable whilst at the same time eliminating the nuisance to the neighbouring residents. On the basis of undertakings that he required to be given by both parties, Mitting J ordered that the noise level in the restaurant was not to exceed 82 dBA. In addition to the usual undertaking as to damages to be given by Mr White, the judge took the unusual course of giving Mr Lynch liberty to apply, as a condition of the continuation of the injunction, for a monthly payment of a modest kind so that he would not go bankrupt before the trial.

33. Mitting J's order was also unusual in that one further respect. One of the undertakings that he required from Mr White was an undertaking that he would waive rent during the currency of the injunction. That part of the order has given rise to a short point of construction, which I explain below.

34. Following the making of the order Mr Lynch found himself, as Mitting J had feared, in the position that he could no longer afford to keep the restaurant open and so he and his wife decided that they would have to close it. Mr Lynch decided to make an application for periodical payments as Mitting J had given him permission to do. The prospect of that application led to the consent order made on 25 January 2011.

35. By that order Mr Lynch agreed to continue the undertakings that he had offered to Mitting J on 17 December 2010 in return for which Mr White agreed to the

discharge of the order. It was recorded that the point of construction in relation to the waiver of rent would be reserved to the trial judge on the hearing of Mr White's claim for permanent injunctive relief.

36. On 15 February 2011 Mr White issued a notice of partial discontinuance. By that notice he abandoned the claims to injunctive relief set out at paragraphs 1(d), 1(e) and 1(f) of the prayer to the Particulars of Claim - these being the orders in relation to the prevention of a nuisance to any neighbour, in particular by the playing of amplified or live music in the restaurant, the use of the premises as a "sit down restaurant" and the ban on rehearsals. Of course the most important of these was the abandonment of the claim for an order that Mr Lynch should ensure that no nuisance was caused at any time.

37. The result of this was that the substantive relief claimed before me is now effectively confined to an injunction requiring Mr Lynch to ensure that no customers remain on the premises after midnight and that no amplified or live music is played in the restaurant after 23.00, Monday to Saturday. The order in relation to customers not being admitted to the restaurant after 23.00 is no longer pursued.

38. The other issues in relation to the claim that remain to be addressed at this hearing are:

    (a) The construction point in relation to the provision of Mitting J's order concerning the waiver of rent.

    (b) The costs consequent upon the partial discontinuance in relation to the relief claimed.

    (c) Costs generally.

39. In addition, I had to determine the application to commit Mr Lynch for contempt of court. That is an application that had to be decided on the basis of the criminal burden of proof, but the parties were agreed that there was no objection to my doing that at the same time as determining the other issues that I have summarised above.

The Licensing Act 2003

40. Section 1 of the Act provides that certain activities are to be licensable activities. These include the retail sale of alcohol, the provision of regulated entertainment and the provision of late night refreshment. Schedule 1 of the Act sets out what constitutes the provision of regulated entertainment. Paragraph 1 of that Schedule provides that the "provision of regulated entertainment" means the provision of entertainment falling within the descriptions given in the schedule or the provision of entertainment facilities.

41. The descriptions of entertainment given in the schedule include the performance of live music, any playing of recorded music, a performance of dance and any other entertainment of a similar description. The expression "entertainment facilities" means facilities for enabling persons to take part in entertainment of the described types for the purpose (or including the purpose) of being entertained. The descriptions of entertainment in the relevant paragraph include dancing.

42. One of the principal exemptions to these licensable activities is the situation where the performance of live music or the playing of recorded music is incidental to some other activity which is not itself entertainment as defined in the schedule; in that case it is not to be regarded as regulated entertainment.

43. I was referred also to the licensing guidance that the Secretary of State is required to issue under section 182 of the Act, and to the Advice for Licensing Authorities about Incidental Music that has been jointly developed by LACORS and other organisations connected with the entertainment industry. LACORS is the acronym for the Local Authority Coordinators of Regulatory Services group.

44. Paragraph 3.22 of the licensing guidance, which concerns incidental music, includes the following:

> "In considering whether or not music is incidental, one factor will be whether or not, against a background of the other activities already taking place, the addition of music will create the potential to undermine the four licensing objectives of the Act. Other factors might include some or all of the following:
>
> - Is the music the main, or one of the main, reasons for people attending the premises?
> - Is the music advertised as the main attraction?
> - Does the volume of the music disrupt or predominate over other activities or could it be described as 'background' music?"

45. The LACORS advice, after emphasising that each case must be looked at on its own merits, states that:

> ". . . some general comments can be made in relation to incidental music:
>
> - The public must be allowed to talk during the performance of incidental music ie. there should be no expectation to listen or to watch (even if the public spontaneously sing along with the music).
>
> . . .
>
> - Incidental music does not have to be just "background" music. There should not be an expectation for the public to be able to hold a normal conversation without having to raise their voices . . ."

46. Mr Ranjit Bhose, who appeared for Mr White, was eventually constrained to accept that, when considering the playing of recorded music in the context of the present proceedings, the principal indicators of whether or not it could be regarded as incidental to some activity other than entertainment were its volume and its nature. In other words, if music was played of a type to which people could dance and was played at a level that encouraged them to do so, it would not be incidental to activities such as having a meal or drinking. In practice, since customers would not

be eating after 23:00, the only other activities apart from listening to the music or dancing would be talking and drinking.

47. It is clear from the observations of Mr Griffiths, an acoustic expert retained by Mr White, that background, or incidental, music was played in the restaurant during the first part of the evening. This was at a time when most customers would be either ordering food or actually eating it and would no doubt wish to be able to carry on a conversation without any great difficulty. It is equally clear that, from some time between 20:30 and 21:00 there was live music and recorded music the purpose of which was to entertain. This was the activity that gave rise to the need for a licence and which was indeed licensed, up to 23:00, by the various licenses issued to Mr Lynch.

48. On 24 November 2005 the former Public Entertainment Licence was replaced by a Premises Licence under the 2003 Act. The description of the licensable activities included the sale or supply of alcohol, late night refreshment, live music, recorded music and facilities for dancing. The last three of these were authorised until 23:00 Monday-Saturday, and until 22:30 on Sundays. However, the sale or supply of alcohol or late night refreshment was permitted until midnight Monday-Saturday, and to 23:30 on Sundays. The licence also provided that the opening hours were from the start of permitted hours "until 30 minutes after the end of permitted hours", in other words 00:30 on Monday to Saturday. Condition 4 of the licence made the position even clearer in that it stated that "Alcohol and food may be consumed during the first 30 minutes after the end of the above periods, provided the alcohol was sold for consumption as an ancillary to their meals."

49. However, Condition 7 was as follows

> “Customers shall not be admitted to the premises before 0900 or after 2300 Mondays to Sundays inclusive and at no time on Christmas Day. All Customers shall have left the premises by 0000."

50. This condition, although in conflict with the earlier conditions that I have quoted above, was clearly intended to reflect the terms of the planning permission that was granted on 5 May 1999. This was subject to the following condition:

> “04 Customers shall not be admitted to the premises before 0900 or after 2300 Mondays to Sundays inclusive and at no time on Christmas Day. All customers shall have left the premises by 2400 hours."

51. This condition was also included in the Public Entertainment Licences that were issued to Mr Lynch on 9 September 2003 and 13 April 2005 for the years ending 31 July 2004 and 31 July 2005, respectively.

52. On 14 February 2011, following an application made by Mr Lynch, Bromley Council determined that the use of the premises until 12:30 am on Friday and Saturday evenings was lawful, and a Certificate of Lawfulness for an Existing Use or Development was issued to this effect on 11 April 2011.

53. It seems that at some stage thereafter Bromley Council issued a revised Premises Licence, although still dated 24 November 2005, which retained the condition permitting the consumption of alcohol and food during the first 30 minutes after the end of the licensed hours but removed the words of the former Condition 7 that required customers to have left the premises by midnight.

54. Mr Bhose submitted that these changes could not override Condition 4 of the planning permission which, until the grant of the Certificate of Lawfulness, required all customers to have left the premises by midnight. Mr Lynch was required by his lease to comply with the terms of the planning permission. I accept that Mr Bhose's submission is correct, but I cannot help feeling considerable sympathy for Mr Lynch when faced with these various conflicting conditions. I find it understandable that Mr Lynch would have decided to conduct his business in compliance with the conditions in the Premises Licence that were most favourable to him.

55. However, it is clear that Mr Lynch must have appreciated that permitting customers to remain on the premises until 30 minutes after the permitted hours was unlawful because otherwise he would not have applied for the Certificate of Lawfulness for an Existing Use or Development.

The application to commit

56. On 4 March 2011 Mr Lynch's solicitors wrote to the solicitors for Mr White raising the question of whether or not (either by the terms of the Premises Licence or by the terms of the undertaking given on 17 December 2010) Mr Lynch was entitled to play incidental music after 23:00, as opposed to being prevented from playing any music at all. The letter stated that the matter had been discussed with counsel who had advised that playing incidental music which is not loud and does not cause a nuisance to neighbours would not be a breach of the undertaking. Accordingly the solicitors said that they had advised Mr Lynch that he would not be in breach of the undertaking by playing incidental music between 23:00 and midnight (or later, if there was a Temporary Events Notice).

57. It is alleged that on the following dates, in breach of the undertaking, Mr Lynch permitted loud music to be played after 23.00: 1, 2, 3, 8, 9, 15, 16 and 23 April, and 7, 14 and 21 May 2011. This allegation is based in large measure on the evidence of Ms Williams, the occupier of Flat 2 above the restaurant. She accepted in her evidence that there should not have been an entry in her diary for 3 April, and that she had simply duplicated the entry for 2 April by mistake.

58. It is not disputed by Mr Lynch that music was played after 23:00 on those dates. His case is that the music was "incidental” music within the meaning of Schedule 1 to the Licensing Act 2003 so that it did not constitute a breach of either the premises licence or the undertaking.

59. During the course of the hearing I told the parties that I would give my decision on the committal application at the conclusion of the closing submissions, together with brief reasons. For the reasons that are set out in the following paragraphs of this judgment I concluded that Mr Lynch had been guilty of breaches of the undertaking on all the dates mentioned except for 3 April and 14 May 2011. I was

able to reach that conclusion on the assumption that the advice given to Mr Lynch as to the true construction of the undertaking was correct.

60. As I have said, the evidence in relation to the playing of music after 23:00 on the dates mentioned in the committal application came primarily from Ms Pauline Williams, who lived in Flat 2, which was immediately above the restaurant. From the beginning of April 2011 Ms Williams made a note in her diary of the precise time when the loud music stopped or, more precisely, was turned down to a level so that either she could no longer hear it or it was just a "hum" that was not disturbing.

61. For example, on 1 April 2011 she noted that the music stopped (in the sense I have just described) at 11:34 pm, and on 2 April that it stopped at 11:30 pm. She said that she minded the music because it disturbed her evenings but that she was prepared to put up with it until 11 pm. Her complaint was that the music sometimes continued until midnight. She said that it was loud enough to sing along with. She said that she always knew exactly when it was going to finish because it got louder towards the end. This would have been the fire show with which the evening invariably concluded.

62. Ms Williams was not hostile to Mr and Mrs Lynch: indeed on 19 June 2010 she held a party for her mother's birthday at Madisons and said that they "had a fantastic time". I found Ms Williams to be an impressive witness who I thought had gone out of her way to be reasonable. It seems that what had particularly upset her was a conversation that she said she had with Mr Lynch in about mid April 2011 when he told her that he had obtained a Certificate of Lawfulness from the local authority and that they would be back to normal (ie. playing music until midnight). She says that she asked him to turn the music down at 11 pm, but that he said that he needed the music after that in order to be able to trade. She said that Mr Lynch had suggested that she could approach Mr White and get him to buy her out as he had done with Mr and Mrs Beale. She said that she had not had any negotiations about this with Mr White because she liked her flat and it was her home. This evidence was not effectively challenged and I find that a conversation did take place in early or mid April 2011 between Ms Williams and Mr Lynch along the lines described by Ms Williams.

63. Where the notes made by Ms Williams in her diary were on days when there was independent verification of the levels of music, the times in her diary accorded precisely with the noise level readings. For example, on 15 April 2011 an acoustic expert instructed by Mr White, Mr Crofton-Martin, visited the restaurant for the evening and took covert measurements of the sound levels. His measurements show that between about 21:00 and 23:00 the measured sound level, in Leq (1 min), was generally between 85 and 95 dBA. Between 23:00 and 23:45 it was between about 82 and 88 dBA, after which it fell to about 75 dBA until just before midnight. According to Ms Williams's diary the music stopped at 23:45. On 14 May 2011 further covert measurements in the restaurant were taken by another acoustic expert, a Mr Griffiths. According to him, the loud music continued until midnight. Ms Williams also noted that the music stopped at midnight.

64. I therefore have no hesitation in concluding that the times noted by Ms Williams are reliable, with one possible exception, which is 23 April 2011. For that day she has noted in her diary "11:45 ?": she had been to a wedding (as her diary records) and

came back fairly late, and she said that she probably made the entry the following day based on her best recollection. That is why she added the question mark. Whilst I find that on that occasion the loud music may not have stopped at 11:45 pm precisely, I have no doubt that it continued until approximately that time.

65. When Mr Griffiths and his party visited Madisons on 14 May 2011 they took with them three logging sound level meters. One was placed on the side of the table at which they were sitting, but pointing in a direction that was at right angles to the direction of the stage, another was located in the top pocket of a jacket left on a chair and the third was worn by one of his colleagues sitting at the table. I assume that the second and third meters were facing roughly towards the stage (except for the first part of the evening when the levels recorded by the first and second meters were very similar, so that the second meter must also have been pointing away from the stage). Looked at very broadly, the readings from the three meters showed that the levels of the music can be divided into five periods.

66. The first period was until about 20:40, during which the music was described as background music. The second period was from 20:40 to 23:00 when the levels were much higher and were created by a combination of singers and amplified music: on 14 May 2011 this culminated in a 10 minute session, from about 22:50 to 23:00, when the sound was at a sustained high level as three singers were singing together. The third period started when the level then fell to a level lower than that which had prevailed before 22:50, but well above the level of the background music that had been played until about 20:40. This period culminated with the fourth period, which was the conclusion of the entertainment, consisting of a fire show in the area of the bar which was always accompanied by "Fire Starter" by The Prodigy. This was the climax of the evening. On 14 May 2011 it started a few minutes before midnight, and the sound levels increased significantly, although on that occasion it was not the loudest period during the evening. Finally, the fifth period was after the fire show concluded when the sound volume dropped dramatically to a level approximately equivalent to the original background music.

67. A similar pattern was observed and recorded by Mr Crofton-Martin during his visit on 15 April 2011, although he did not arrive at the restaurant until about 21:00 and so his measurements did not include an early period of background music. The fire show took place a little earlier, starting at approximately 23:40. When the fire show finished at about 23:45 the music was turned right down to a level around 75 dBA.

68. It is clear from the evidence as a whole that the background music that is usually played until about 20:30 and after the fire show is not audible, or at least not to a level that is intrusive, in the flats above. But it is equally clear that the amplified music played after 23:00, culminating in the fire show, is at a level that is intrusive to the occupants of the flats above.

69. The background music played in the restaurant during the first part of the evening was at a time when most customers would be either ordering food or actually eating it and would no doubt wish to be able to carry on a conversation without any great difficulty. In the light of the evidence as a whole, I am quite satisfied that this music was incidental to activities that were not regulated, such as having a meal.

70. By contrast, it is clear that from some time between 20:30 and 21:00 there was live music and recorded music the purpose of which was to entertain and during which customers would dance. This was the activity that gave rise to the need for a licence and which was indeed licensed, up to 23:00, by the Premises Licence issued to Mr Lynch.

71. Mr Crofton-Martin noted that this music was at a level such that it was almost impossible to hold a conversation without shouting. He described the level of music after 23:00, which was amplified music only, as being lower but only to the extent that it was difficult (rather than impossible) to hold a conversation without shouting. I am quite satisfied that the music played after 23:00 on the relevant dates was at a level that was intended to encourage people to dance - which the evidence shows they did - and was not at a level that permitted ordinary conversation. By this time the customers would have invariably finished their meals and so, apart from dancing, there was nothing else to do but drink and talk. I find that on the dates listed in the committal application (except for 3 April 2011) this was not incidental music within the meaning of Schedule 1 to the Licensing Act 2003.

72. This finding makes the outcome of the debate about the meaning of the undertaking academic but, since it has been fully argued, I shall state my conclusions briefly.

The meaning of the undertaking

73. I have to admit that my first reaction to this issue was that the submissions of Mr Robert Lamb, who appeared for Mr Lynch, were more realistic and would have accorded with the likely intentions of the parties. He submitted that the undertaking should not be construed to mean that no music at all could be played after 23:00, but simply that such music should be confined to incidental music within the meaning of the Act.

74. It seemed to me that it was unlikely that a party would have deliberately agreed to accept a restriction that was more onerous than those to which he was already subject. The reference to live music does not pose a problem because there is no evidence that any live music was played after 23:00. It is the reference to "amplified" music that gives rise to the difficulty: it is not a term that appears in the Schedule to the 2003 Act.

75. In the context of a restaurant such as Madisons all music played through the sound system must, by definition, be amplified. Thus the only meaning of the words in the undertaking, if read literally, is that they prevent any music at all being played after 23:00.

76. However, after Mr Bhose had taken me through the correspondence that I have summarised above he persuaded me that this was clearly what the parties had in fact intended. It seems that Mr Lynch, or his solicitors, were prepared to back down in the face of the refusal of Mr White's solicitors to accept that any music at all could be played after 23:00. I find that this is what happened.

77. But, for the reasons that I have already given, I find that it does not matter whether the undertaking meant what it says if read literally or whether it is to be construed so as to permit the playing of incidental music after 23:00. I am quite satisfied that the music that was played after 23:00 on the relevant dates could not be described as

incidental music in the sense described in Schedule 1 to the Licensing Act 2003. Accordingly, by permitting music to be played after 23:00 that was not incidental to other non-regulated activities Mr Lynch was in breach of the undertaking.

The disposal of the application to commit

78. In his final submissions Mr Bhose disclaimed any intention to have Mr Lynch committed to prison and ordered to pay a fine. It seemed to me that this very late concession lent some support to Mr Lamb's submission that the application to commit was entirely tactical and had been made in order to put additional pressure on Mr Lynch.

79. In order to establish a breach of an undertaking it is not necessary to show that the alleged contemnor acted with the intention of committing a breach. It is sufficient that he knowingly and deliberately committed the act or acts constituting the breach: see *Miller v Scorey* [1996] 1WLR 1122, at 1132 per Rimer J. The absence of intention goes to the penalty, if any, that the Court may impose.

80. I find that, apart from 14 May 2011, when he was not present at the restaurant, Mr Lynch was in breach of the undertaking on all of the other dates set out in the application (3 April 2011 being excluded). However, all these breaches occurred after Mr Lynch had received the advice that is recorded in his solicitors' letter of 4 March 2011: that is to say, that he was permitted to play music provided that it was not sufficiently loud to be heard outside the premises and to cause a nuisance to his neighbours.

81. It is not in dispute that no complaints of noise nuisance were made during 2011. That is, of course, not to say that no nuisance was being committed but only that no one complained about it. As I have already recorded, Ms Williams had decided that she would not make any further complaints but would instead record the times when the music stopped so that she would have the information available if it was needed subsequently. However, from Mr Lynch's point of view it would have appeared that no one was in fact being disturbed.

82. In the light of the advice that he received and the absence of any complaints during 2011 it is perhaps understandable that Mr Lynch continued to permit music to be played after 23:00 at a level that I have found not to be consistent with the playing of incidental music.

83. In these circumstances I concluded that to commit Mr Lynch to prison would have been out of the question. Further, I concluded that it would be inappropriate to impose a fine, particularly in the light of Mr Lynch's somewhat parlous financial straits. The appropriate course, in my view, is to take the breaches into account when considering general questions of costs.

The point of construction arising out of Mitting J's order

84. The relevant part of the order was in the following terms:

> "To waive forever all claims for rent in relation to the Premises for the period of this interim injunction (save that if at trial it is held that the

Claimant is liable to the Defendant in damages or costs, any rent so waived shall be set off in diminution or extinction of the liability)."

85. Mr Bhose submits that the part of the order that I have quoted above means that the rent waived is the amount of the rent (on a daily basis) that relates to the actual period for which the injunction is in force. In other words, if the injunction remains in force for 60 days Mr White would waive a sum equivalent to 60/365^{ths} of the annual rent.

86. By contrast, Mr Lamb submits that, since the rent is payable quarterly, Mr White has agreed to waive the rent payable on any quarter day that falls within the period during which the injunction is in force. By the terms of the lease the rent was payable on the usual quarter days, so that the next quarterly payment following the making of the injunction was 25 December 2010. Mr Lynch contends that Mr White has waived this payment, which amounts to £13,000.

87. The argument for Mr White is that the injunction was only in force until 25 January 2011, with the result that the rent for the remaining period of the quarter, namely from 26 January to 24 March 2011, remains payable. That is £8,263.26. There is in my view one small flaw in this argument as presented, and that is that it ignores the 8 days between the making of the order on 17 December and the following quarter day, 25 December 2010. However, that is a matter of detail and, in any event, I understood Mr Bhose to accept that an appropriate adjustment needed to be made.

88. Like many short points of construction, the answer is really a matter of impression. I would have expected Mitting J to have contemplated that the waiver of rent would be *pro rata* on a daily basis to the period for which the injunction remained in force. To make the amount of rent waived dependent on the number of quarter days that fell within the period of the injunction would be capricious. For example, if the injunction granted on 17 December 2010 had remained in force until, say, 22 March 2011, on Mr Lamb's argument one month's rent would be waived. By contrast, if the injunction had remained in force until 27 March 2011, 6 months rent would be waived, even though the duration of the injunction was only 5 days longer.

89. Not only is such an approach inconsistent in its operation, I can readily see that it could give rise to serious difficulties in practice. Even though Mr White might have been willing to agree to the undertaking being withdrawn by, say, mid March 2011, Mr Lynch would have every incentive not to agree to an appropriate consent order until after the March quarter day. I cannot believe that Mitting J would have intended such consequences or that either of the parties would have agreed to them if they had thought about it.

90. For these reasons I consider that Mr Bhose's submissions are to be preferred. Accordingly, subject to the small correction that I have already mentioned, I accept the approach contended for by Mr White.

The form of the permanent relief

91. As the hearing progressed the differences between the parties narrowed, as is so often the case. Mr Bhose did not press the injunction to prevent customers being admitted to the restaurant after 23:00 because it is clearly unnecessary.

92. In opening the case Mr Bhose submitted that Mr Lynch ought to be restrained from playing any recorded music at the restaurant after 23:00. He submitted that in the light of Mr Lynch's deliberate failure to comply with the terms of his licence in the past and his failure to comply with the undertaking given to Mitting J, the only course that could be safely relied on to prevent any noise nuisance in the future was an absolute ban on any music after 23:00.

93. Whilst I did not understand Mr Bhose to abandon this claim, it was perhaps pressed a little less forcefully in his closing submissions. Mr Bhose submitted also that the court should grant the permanent injunction restraining Mr Lynch from allowing customers to remain on the premises after midnight, except on occasions when a Temporary Events Notice had been granted.

94. Mr Bhose's alternative position, repeated in his closing submissions, was that the court should make an order preventing the playing of any live music after 23:00, and the playing of any recorded music after 23:00 unless the following conditions were satisfied:

    (a) the installation of a sound limiter and timer to the music system:

    (b) the limiter should be set by an independent expert to restrict the sound to 80 $dBA_{Leq(1\ min)}$;

    (c) that no recorded music should be played after 23:00 otherwise than through the limiter;

    (d) in the event of the limiter being re-set (for example, following the issue of a Temporary Event Notice) an opportunity should be provided for the attendance by an acoustic expert appointed by Mr White.

95. Mr Lamb submitted that the court did not have jurisdiction to impose an arbitrary limit on the volume of the music. He submitted that Mr Lynch had a statutory right to play music that was incidental to other non-regulated activities from after 23:00 until midnight and that right could not be eroded by an order of the court. However, he indicated on instructions that his client would not oppose an order imposing an arbitrary sound level provided that level was not less than 85 dBA.

96. I consider that Mr Lamb's submission is in principle correct. If the statute permits Mr Lynch to play music that is incidental to non-regulated activities, then I cannot see what right the court has to impose some more restrictive regime. Even if there is jurisdiction to do this, which I doubt, I consider that to do so would not be an appropriate exercise of my judicial discretion.

97. However, if the court is satisfied that, in this particular restaurant any incidental music would never exceed a particular sound level, then there is no reason why the court should not make an order imposing a limit at that level. Such an order has the merit of certainty, unlike an order which simply requires Mr Lynch to refrain from playing any music after 23:00 that is not incidental music. An order in the latter terms would be extremely difficult to enforce: in reality, the only objective means by which the court could reliably assess compliance would be by reference to measurements of sound level.

98. In relation to any order requiring customers to leave the premises by midnight, there is one immediate problem of jurisdiction. I have already mentioned that Bromley Council has issued a Certificate of Lawfulness of Use and Development so as to permit customers to remain on the premises until 00:30. However, the Council has conceded, in the face of the threat of an application for permission to apply for judicial review, that the certificate should not have been issued. It is inevitable, therefore, that by one means or another the certificate will shortly be quashed. But the fact remains that as the position stands today Mr Lynch is entitled to allow his customers to remain on the premises until 00:30.

99. But leaving this problem aside, I do not consider that it would be appropriate to make an order requiring customers to leave the premises at midnight. It is almost inevitable that from time to time there will be minor breaches of any condition of this sort: for example, a particular customer who may have been slow in drinking up may object to being made to leave the premises at midnight precisely. Short of physically ejecting such a customer, which may be difficult as well as counter-productive, there is not very much that a restaurant owner can do in such a situation accept to persuade the customer to leave as quickly and quietly as possible. Such a situation would put the owner in breach of his licence, possibly without any fault on his part.

100. As the application to commit Mr Lynch shows, Mr White is a person who is ready and willing to resort to court if he considers that his interests will be served by doing so. I would not wish to encourage a situation in which private investigators are sent to sit outside the restaurant every night in the hope and expectation that a customer might be seen leaving the premises after midnight. I consider that once it has been made clear to Mr Lynch that he is obliged by the terms of the planning permission (once the Certificate of Lawfulness has been quashed) to ensure that his customers leave the premises by midnight, as I hope this judgment will have succeeded in doing, he will not deliberately put himself in breach of it.

101. However, if I am wrong in this and Mr Lynch does commit persistent future breaches of the requirement for customers to leave the premises by midnight, then in appropriate circumstances a fresh action can be brought to compel Mr Lynch to comply with the terms of his lease. In such circumstances, Mr Lynch could not expect a very sympathetic reception from the court.

The measurement of sound

102. At this point I must say a little more about the evidence of sound measurements that has been put before the court. Sound is measured in decibels which represent the logarithm of the ratio of the measured sound pressure to a reference sound pressure. Since this case is concerned with sound as it affects humans, it is necessary to apply a weighting to any mechanically recorded measurement of sound so as to reflect the sensitivity and response of the human ear. The weighting which is generally accepted as providing the best correlation is known as dBA.

103. The human ear can just distinguish the difference in likeness between two noise sources when there is a difference between them of 3 dBA. When two sounds differ by 10 dBA one is said to be twice as loud as the other. The ear's response to noise is dependent not only on the sound pressure level and its frequency, but also its

intermittency. To cater for this a system of measurement (a metric) is used known as the Equivalent Continuous Sound Pressure Level (LA_{eq}). This effectively converts the fluctuating sound level allowed into a pressure level of steady sound. It is in effect the energy average level over the specified measurement period: the period that has been used by the experts in this case is 1 minute. Using this, a typical conversation produces a level of 60-70 dBA, whereas traffic on a street corner would have a level of 70-80 dBA.

104. There are other metrics, such as LA_{max} and LA_{90}. LA_{max} is the maximum sound pressure level recorded over a certain time period; in this case that period has also been 1 minute. LA_{90} is the sound pressure level which is exceeded for 90% of the time. On the basis of the measurements that have been taken in this case the LA_{max} levels are generally some 7-10 dBA greater than the LA_{eq} levels.

The appropriate limit in this case

105. One of the difficulties facing the court in fixing any limit, in dBA, on the sound level permitted after 23:00 is that of anticipating precisely how the limit will operate. For example, if the limiter operates so as to cut out any sound pressure exceeding a particular amount, it may effectively act as a LA_{max} filter and therefore permit a level, when measured in LA_{Leq}, that is somewhat lower than the limit intended. This was not an area in which I gained a great deal of help from the experts, mainly because the result would depend, at least in part, on the qualities of the particular limiter that was used.

106. If this approach is to be adopted, then the appropriate form of order might be that the limiter should be set so that the sound level in the restaurant measured at a position midway between the speakers and 1 m from the dance floor did not exceed X dBA_{Leq} over 1 minute (1 m from the dance floor is a dimension that I have derived indirectly from the experts reports).

107. The difficult question is to determine what X should be. The Hann Tucker report noted that the general level in the restaurant during a busy and noisy period was about $101dBA_{Leq}$. That report also concluded that if the music from the restaurant is to be inaudible in the flats above it would have to be limited to $82dBA_{Leq}$. The measurements (in dBA_{Leq}) of the background music that was played up to about 20:30 varied fairly considerably from meter to meter, according to their position and orientation. The lowest readings ranged from about 70 to 77 dBA. Higher readings from a different meter were from about 75 to 86 dBA. Measurements taken in the office above the restaurant over the same period were in the range 26-30 dBA (by way of comparison a range of 20-30 dBA is said to represent a bedroom at night). The background level in the office when no music was being played was 20-25 dBA.

108. The measurements taken in the office on 14 May 2011 after the loud music was turned off were in the range of 25-30 dBA. I infer that this is a level that is acceptable to Ms Williams.

109. On the basis of the evidence of sound measurement that has been put before the court I consider that a sound level that did not exceed 85 dBA_{Leq} over any 1 minute period, measured from the position that I have indicated, would probably ensure that

there was no undue noise intrusion into the flat belonging to Ms Williams and would be unlikely to be achieved unless the music being played was incidental music within the meaning of Schedule 1 to the 2003 Act.

Conclusions

110. I have found that Mr Lynch was in breach of his undertaking on the dates listed in the committal application (save for 3 April and 14 May 2011). However, I am not persuaded that on those dates he acted in the knowledge that he was committing a breach of the undertaking.

111. The committal application has therefore succeeded in a technical sense, but in reality it has not achieved anything significant. I therefore make no award as to the costs of the application.

112. I consider that Mr White is entitled to a permanent injunction on the terms set out in paragraph 106 above, but where the measured noise level is to be 85 dBA_{Leq} over 1 minute. This is to be subject to the other conditions set out at paragraph 94 above. However, in case that limit proves to be inappropriate I will give either party permission to apply on 21 days notice to the other for that limit to be varied. I would expect any such application to be supported by appropriate evidence.

113. I decline to make any order in relation to the time by which customers must leave the premises. Mr Lynch will, of course, remain bound by the terms of the planning permission, as modified by the Certificate of Lawfulness for so long as it remains in force.

114. I direct that Mr White's solicitors are to draw up an appropriate order for the permanent injunction in accordance with the terms of this judgment and in a form that is to be agreed by those acting for Mr Lynch. When that order has drawn up and sealed they are to serve a copy of it, together with a copy of this judgment on (a) Ms Williams and (b) Bromley Council.

115. I have not heard argument on the costs of the application for the interim injunction and of the amendment of the Particulars of Claim to discontinue and delete sub-paragraphs (d), (e), and (f) of the prayer for relief. On the face of it, in the light of that discontinuance I consider that Mr White should pay Mr Lynch's costs of the application for the interim injunction (including the costs of the consent order of 25 January 2011) and any costs occasioned or thrown away as a result of the withdrawal of those sub-paragraphs of the Particulars of Claim. However, before reaching any final conclusion on this I will give Mr White an opportunity to make any representations in support of some other order for costs.

116. As to all the other costs of the action, including the cost of the trial, I will hear the parties if liability for these costs cannot be agreed between them. At the same time I will also give directions for the conduct of the assessment of any damages to which Mr Lynch may be entitled as a result of the making of the interim injunction.