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Nuisance, compliance with environmental permits and the requirement for negligence

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Summary

The role of negligence and strict liability in environmental nuisance actions has been the subject of debate for some time now[1], with cases such as *Cambridge Water* [1994] 2 AC 264, *Transco* [2003] UKHL 61; [2004] 2 AC 1 and *Dobson* [2007] EWHC 2021 (TCC); [2008] 2 All ER 362 suggesting that strict liability is not appropriate for certain environmental nuisance claims, notably where the defendant is under a statutory duty to operate.

The decision in *Derrick Barr & Ors* v *Biffa Waste Services Ltd (No 3)* [2011] EWHC 1003 (TCC) is important as it establishes that a claim in nuisance made against a site which operates in compliance with an environmental permit requires evidence of negligence to succeed. The rationale for the court's conclusion was that the law of nuisance should "march in step"[2] with the relevant environmental legislation and that the law of private nuisance should not make defendants liable for an activity unless liability would also arise under the extensive volume of EU and UK environmental and planning legislation.

This case note discusses the potential impact of the court's findings and considers whether nuisance remains a viable remedy for claimants in relation to permitted sites.

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[1] For a more detailed discussion on the role of strict liability and negligence in nuisance cases see Nolan 2005, and Lee 2003.
[2] See paragraphs 304 and 354 of the judgment.

Contents

Facts

Background to the claim

This case involved a group private nuisance action brought by 152 households on the Vicarage Estate in Ware, Hertfordshire against the Defendant ("Biffa"). The claim related to complaints of odour from Biffa's Westmill 2 landfill site, which the claimants experienced in varying degrees over a 5 year period. In order that the court could effectively manage the case, the trial concentrated on a pre-selected group of 30 claimants, jointly selected by the parties.

The site location and operation

The landfill site was located immediately to the north-west of the estate. Part of the estate had previously been used as a gravel quarry, which subsequently became a waste tip, although operations had ceased before the construction of the estate itself. The areas surrounding the estate were used for commercial purposes including light industrial uses, quarrying, agriculture and landfill. The court therefore found that the character and nature of the area could be categorised as being of "mixed use" and was not "purely residential".

The landfill site was first granted authority[3] to operate as a landfill in 1980, with the existing permit being granted on 7 April 2003. The site was authorised to accept pre-treated waste comprising household and non-hazardous industrial and commercial waste.

The permit contained specific conditions which regulated odour emissions and in its final form set out that "odours at levels likely to cause pollution outside of the site, as perceived by an Agency officer" were prohibited, "unless Biffa had used all appropriate measures to prevent, or where that is not practicable to minimise the odour".

The terms of the permit were important as the court acknowledged that, in accordance with Article 3(a) of the IPPC Directive (2008/1/EC), the conditions in the permit had to ensure that the operator was using 'best available techniques' to prevent pollution. The court was therefore satisfied that the legislation expressly accepted that a landfill site would create odour, at least from time to time and that the permit, if complied with, would suggest that 'best available techniques' to avoid pollution had been utilised.

Biffa acquired the land in June 2003 and started filling the landfill site in July 2004. Importantly, the waste which was tipped in the landfill site was pre-treated which means that the waste would have been first gathered at waste transfer stations so that certain types of waste, such as waste that could be recycled, could be removed. This treatment process meant that the waste which was delivered to the landfill site would have been more odorous than non-treated waste, mainly because all of the recyclates had been removed and so it was more organic in nature.

Complaints made and action taken

Within a week or so of tipping commencing in 2004, the residents of the estate started making complaints to the Environment Agency about odour from the landfill site. The Environment Agency issued an enforcement notice and prosecuted Biffa for nine breaches of the permit relating to the emission of odours from the site. Biffa were convicted of four charges, the remaining five were dismissed.

Complaints were also made directly to Biffa and the court acknowledged that following receipt of such complaints, Biffa made efforts to minimise the odour emissions from the site, which included implementing a series of measures such as the installation of deoderising units, and working areas of the site furthest away from the estate in summer time. These measures were communicated to residents at Community Liaison Meetings attended by the local residents, Biffa and the Environment Agency. However, despite the regulatory action taken, and the mitigation measures employed by Biffa, the claimants continued to be affected by the odour emissions.

The claimants' case

Crucially, the claimants' case was in nuisance only – the claimants made no allegations that Biffa had been operating in breach of its permit, or was otherwise negligent[4]. Coulson J is

[3] The original licence was granted by East Hertfordshire District Council. A permit was subsequently granted under the Pollution Prevention and Control (England and Wales) Regulations 2000 which became an Environmental Permit under the Environmental Permitting (England and Wales) Regulations 2007, subsequently replaced by the Environmental Permitting (England and Wales) Regulations 2010.

somewhat critical of the way in which the claimants' lawyers handled the case generally[5], but particularly in relation to the fact that all allegations of negligence were abandoned at a pre-trial review, despite the fact that the Environment Agency had indicated that Biffa had regularly breached the permit.

As explained below, for the claimants, the absence of a case in negligence was fatal.

Biffa's defence

Biffa denied causing a nuisance and argued that it would make a nonsense of the relevant environmental legislation governing the operation of the site as a landfill, and the detailed permit conditions, if they could be liable for doing what they were permitted to do under such legislation and permit. Accordingly, Biffa raised two defences in the alternative:

1. Statutory Authority

Statutory authority provides a complete defence to an action in nuisance[6], but to successfully avail itself of the defence, Biffa had to demonstrate that: (1) the statutory authority to commit a nuisance is expressly or necessarily implied from statute; and (2) the defendant must be able to demonstrate that all reasonable care and due diligence has been taken to prevent the nuisance occurring. Biffa argued that the relevant environmental legislation (including: the Waste Framework Directive (75/442/EEC); the IPPC Directive (2008/1/EC); the Landfill Directive (99/31/EC); the Environmental Protection Act 1990; and the Pollution Prevention and Control (England and Wales) Regulations 2000) and the terms of the permit granted by the Environment Agency to operate the site, meant that they had statutory authority to operate the site and thus could not in law be liable to the claimants in nuisance.

2. Reasonable use of land

Alternatively, Biffa argued that the relevant legislation, the detailed terms of their permit and the recent nuisance cases established a defence of reasonable use of land. Under this defence Biffa would accept that they could be liable to the claimants in nuisance, but only if the claimants could demonstrate that the nuisance arose as a consequence of Biffa's negligence, or failure to use best available techniques.

The decision

The claim was dismissed. The court found that Biffa did not have a defence of statutory authority. However, the court held that the carrying out of landfill activities at the site in compliance with the terms of the permit, without negligence, amounted to a reasonable use of the land.

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[4] For a full analysis of the nature of a private nuisance claim see Dugdale & Jones 2010, Chapter 20. For further discussion on the use of private nuisance in environmental claims see Wolf & Stanley 2010, pp 511-523, or Bell & McGillivray 2008, pp 332 – 340.

[5] For example, see paragraph 568 of the judgment for comments made regarding the use of Group Litigation.

[6] The leading case on statutory authority is *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 which established that the authority to carry out the activity must be expressly or impliedly authorised by the statute. See also *Budden* v *BP Oil Ltd and Shell Oil Ltd* [1980] JPL 586.

The decision of the court is examined in more detail below:

The availability of the defence of Statutory Authority

In deciding whether Biffa was entitled to the defence of statutory authority, the court found that it was necessary to: (a) identify the nature and scope of the particular obligations imposed on Biffa by the relevant legislation; and (b) consider the balance between Biffa's commercial imperatives with their obligations to the public. Each limb is examined separately below.

(a) The court considered the factors which gave rise to a successful defence of statutory authority in *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66; [2004] Env LR 25 and *Dobson v Thames Water Utilities Ltd* [2007] EWHC 2021 (TCC) (namely that the defendants in those cases were subject to a scheme of statutory duties and had enforcement powers granted by legislation) and determined that they were absent in this case. The court then considered whether the relevant legislation imposed obligations and duties on Biffa to operate the site in a particular manner, or indeed at all. The court found that all of the various obligations that arose under the relevant legislation fell on EU Member States, not on Biffa.

(b) In the absence of such statutory obligations or duties, the court was satisfied that Biffa could operate as a commercial organisation and provided they complied with the terms of their permit, they were free to follow the dictates of their commercial interests and had no wider obligations to the public.

In such circumstances, the court held that Biffa was unable to avail itself of the defence of statutory authority.

Was the operation of the site as a landfill in accordance with the terms of the environmental permit a "reasonable use" of the land?

As the defence of statutory authority failed, the court then considered whether a claim in nuisance could lie against the operator of a landfill site, in circumstances where the activities said to give rise to that nuisance have been carried out in accordance with an environmental permit granted by a competent authority. In essence, the court was asking whether the relevant legislation, and the detailed terms of the permit, meant that the operation of the site in accordance with such legislation and the permit was a "reasonable use" of land.

This question is important as an essential ingredient of a claim brought in nuisance is that the claimant must establish "unreasonable use". Previous authorities such as *Bamford v Turnley* (1862) 122 ER 27 and *Cambridge Water v Eastern Counties Leather plc* [1994] 2 AC 264 have long established that in cases of nuisance there must be an element of "give and take" as between neighbouring occupiers of land. If the use is reasonable, then the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land (unless the claimant can prove negligence).

In the *Derrick* case, the court felt strongly that the common law should "march in step" with the relevant environmental legislation and that "an activity should not be permitted by one set of specific rules (derived from detailed environmental legislation), yet at the same time give rise to a liability to a third party by reference to a much more general set of principles to be

derived from the common law"[7]. In other words, the private law of nuisance should not make defendants liable for an activity unless liability would also arise under the relevant legislation. This approach accorded with the judgments in *Cambridge Water* and *Transco Plc v Stockport MBC* [2003] UKHL 61; [2004] 2 AC 1.

Following a detailed analysis of the relevant legislation and the common law, the court concluded that the use of a site in accordance with the terms of the permit, without negligence, was a "reasonable use" of the land.

This finding meant that a claim in nuisance only must fail. The claimants' case could only succeed if they could establish that Biffa had operated the site negligently (whether in breach of the permit or otherwise). As the claimants had not pleaded a case in negligence, their case in nuisance failed as a matter of law. This conclusion was not affected by the four proven breaches of the permit as the court found that four breaches in five years was not sufficiently frequent to amount to a nuisance.

Other findings

The court also made two findings in the event that it was wrong in determining the principle that the claimants cannot bring a nuisance claim without proving negligence.

The threshold at which the odour would become a nuisance in law

The court stated that it would be necessary to establish a minimum standard of comfort that a neighbour must accept as part of any reasonable use, but beyond which the activities amounted to a nuisance ("the threshold"). Only once this threshold had been exceeded could a nuisance be actionable. The court considered the method used by the court to calculate the appropriate threshold in the case of *Watson v Croft Promo-Sport Ltd* [2008] 3 All ER 1171 and applied this to the claimants' evidence on the alleged odour events including complaints records and the claimants' contemporaneous notes. It concluded that "an analysis of that threshold which identifies a number of days on which inconvenience must be accepted, averaged over a year, is a sensible and fair approach"[8]. In this case, that amounted to an appropriate threshold of 52 days a year, that is one odour complaint day each week, regardless of intensity, duration and locality. Out of the 30 lead claimants, only two would have exceeded the threshold, and only over a period of one year.

The level of damages payable

The court also considered what damages would have been payable if the claimants had been successful. The court heard expert evidence on the appropriate levels of quantum, but rejected it as being of little assistance and instead made its own assessment as to the level of damages which would be awarded. The court considered the approach taken other relevant cases including *Watson, Halsey v Esso Petroleum* [1961] 2 All ER 145 and *Milka v Chetwynd Animal By-Products (1995) Limited* (Carmarthen County Court, 19100) and determined that the appropriate level would be £1,000 a year, for each year that the threshold was exceeded.

[7] See paragraph 347 of the judgment.
[8] See paragraph 444 of the judgment.

Comments

At the time of writing it is understood that permission has been granted to appeal the *Derrick* case to the Court of Appeal, although the grounds of appeal are unknown. Whatever the outcome of the appeal, the judgment prompts many questions about the relationship between nuisance and negligence, particularly in relation to permitted sites. This case comment focuses on the problems that claimants could encounter when attempting to prove that a permitted site has been operated negligently.

A new defence?

The court held that compliance with the terms of the permit is evidence of "reasonable user" of the land such that negligence must be proved in order to establish nuisance. In other words, compliance with the permit would provide a defence. Coulson J distinguished the planning permission cases[9], which established that a planning permission cannot authorise a nuisance[10], on the basis that unlike an environmental permit, a planning permission may contain only a handful of conditions, whereas an environmental permit will contain many detailed conditions and obligations "which [are] the subject of almost daily scrutiny by a third party"[11]. Coulson J further argued that the environmental permit in question expressly accepted the subject matter of the nuisance as being inevitable[12]. This analysis arguably over simplifies the content of planning permissions and does not take into account complex planning permissions which contain specific detailed conditions regarding environmental matters. It is arguable that, contrary to the existing case law, the principle established in the *Derrick* case in relation to environmental permits should also apply to such detailed planning permissions. In other words, that a complex planning permission containing detailed environmental conditions could authorise a nuisance in the absence of negligence. Whether this argument has any merit will of course depend upon the outcome of the appeal to the Court Appeal.

What is negligence on permitted sites?

If compliance with the environmental permit is to provide a defence against nuisance actions on permitted sites, the scope of negligence in such cases will be critical in determining whether nuisance remains a viable remedy on permitted sites.

The scope of negligence was not considered in the *Derrick* case (as the claimants made no allegations of negligence). However, Coulson J does provide an indication as to how the courts may define negligence in such cases, stating that the law of nuisance should "march in step"[13] with the relevant legislation and should not make defendants liable for an activity unless liability would also arise under the relevant law. If this is to be the case, it follows that the scope of an actionable nuisance on a permitted site would be restricted to breaches of permit conditions or relevant legislation. In other words, the standard of care which needs to

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[9] See *Gillingham BC v Medway (Chatham Docks) Co Ltd* [1992] 3 All ER 923 and *Wheeler v JJ Saunders Ltd* [1996] Ch.19.

[10] For a more detailed discussion on the impact of planning permission in nuisance actions see Lee 2011.

[11] See paragraph 363 of the judgment.

[12] The emission of odour from a landfill site is referred to in the Introductory Note to the permit, condition 2.6.12 of the permit and the relevant legislation.

[13] See paragraphs 304 and 354 of the judgment.

be breached has to equate to a breach of permit or relevant legislation[14]. Of course every case is specific to its facts, and it remains to be seen whether this approach will be applied in future cases, but if the courts were to allow any other evidence as proof of negligence, they would be imposing liability on a defendant that would not otherwise have arisen under environmental legislation, something which the court in *Derrick* was very clear it wanted to avoid[15].

This position accords with the comments made by Lord Goff in *Cambridge Water* that: "given that so much well-informed and carefully structured legislation is now put in place for [the protection and preservation of the environment] there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so"[16]. Coulson J also considered the observations made by Buckley J in *Dennis v Ministry of Defence* [2003] EWHC 793 (QB) that: "statute can, of course, deal expressly with the right to bring actions either preserving or prohibiting them. The common law has contributed by restricting the alleged tortfeasor to disturbances that are reasonably necessary in carrying out the undertaking that has been authorised"[17].

It is therefore clear that the courts are taking the position that compliance with the controls provided by regulatory supervision and the relevant legislation create a level of 'reasonable disturbance' which cannot of itself constitute nuisance[18].

How can a claimant establish negligence?

If the scope of negligence is restricted to breaches of the permit or relevant legislation, we must consider how claimants would prove that a breach has occurred. Whilst some breaches may be straightforward for a claimant to prove (for example operating the site outside of the hours authorised by the permit), other breaches may be difficult to establish. This can be demonstrated by looking at the odour conditions in the permit considered in the *Derrick* case and considering what evidence the claimants in that case would have needed to prove a breach of those conditions. The two conditions which were relevant are:

Condition 2.6.8

> "the Operator shall, subject to the conditions of this Permit, provide, implement and maintain measures to prevent or otherwise control, minimise and monitor...odour... at the Permitted Installation as described in the document specified in Table 2.6.8b... or as otherwise agreed in writing with the Agency".

To assess whether this condition had been breached, the claimants would first of all have to obtain a copy of the documentation detailed in this condition. This should not be overly

[14] For a more detailed discussion regarding the relationship between tort law and statutory compliance see Stallworthy 2003.
[15] Indeed, in paragraph 354, Coulson J accepted that "if the law of nuisance does not march in step with the legislation, as reflected here by the terms of the permit, then Biffa might find themselves liable in nuisance as a result of their positive compliance with the terms of the permit".
[16] At page 305 of the *Cambridge Waters* judgment.
[17] Paragraph 38 of the *Dennis* judgment.
[18] See the arguments presented by Maria Lee that in the context of permitted sites negligence could "also be found independently of regulation, in the sense both that a reasonable defendant might be required to go beyond regulation and that a reasonable defendant might on occasion fail to comply with regulation" (Lee 2011).

problematic as the documentation is likely to be "Environmental Information" and so should be made available under the Environmental Information Regulations 2004. However, under section 5 of the EIR, the Environment Agency is required to respond to a request for information as soon as possible and within 20 days of receipt of the request unless extra time is required, in which case the time limit can be extended to 40 days. Therefore, by the time the claimant has the information it needs to determine what the relevant condition is, the circumstances which caused the nuisance may have passed. Once it has the relevant documentation, the claimant will then need to determine whether the specific measures detailed in the documentation have been implemented. This may require access to the site and/or further information, both of which could be prohibitive to reaching a conclusion. It is also unlikely that a claimant will have the technical knowledge required to make an assessment as to whether the condition has been complied with.

Condition 2.6.12

> "emissions from the activities shall be free from odour at levels likely to cause pollution outside the site, as perceived by an authorised officer of the Agency, unless the operator has used all appropriate measures, including but not limited to those specified in any approved odour site management plan, to prevent or where that is not practicable to minimise the odour".

To establish a breach of this condition, an Agency officer must have "perceived the odour" and determined that it is at a level likely to cause pollution (the operator must also have failed to use all appropriate measures to prevent or minimise the odour). It would be impossible for a claimant to establish a breach of this condition unless the Agency officer has attended the site and recorded evidence as to his perception of the odour.

The wording of both permit conditions makes it clear that for the claimants in the *Derrick* case to prove a breach of permit condition, some degree of involvement from the regulatory authorities would be required, whether it be in setting discharge parameters in the permit conditions or in assessing whether pollution has been caused. It is well known that the regulatory authorities are facing severe budget restrictions and have very limited resources to offer each site under their jurisdiction – they simply cannot investigate every complaint made in order to determine whether that complaint constitutes a breach. It must also be remembered that the regulator is responsible for monitoring the site as a whole and the subject matter of the complaint (in this case odour) is likely to form just a small part of the range of issues that a regulator needs to consider when inspecting a site. It follows that it is very unlikely that every potential breach will be investigated by the regulator and an even smaller number will result in enforcement action being taken (indeed, the Agency's enforcement statement[19] recognises that all breaches will not necessarily result in enforcement action). Also, if an incident has not been properly investigated by the regulator it is unlikely that the circumstances will even be formally noted, for example on a Compliance Assessment Report completed after a site visit.

Without formal evidence from the regulator, claimants would have to argue that notwithstanding the fact that the regulatory authority has not recognised the breach (by taking enforcement action or otherwise), the defendant had in fact been operating in breach of the

[19] Environment Agency Enforcement and Sanctions Statement Policy 1429_10, Version 3 (previously EAS/8001/1/1).

permit and/or relevant legislation. This is not likely to be an easy task for claimants who in most cases are unlikely to have the knowledge or skills to identify when an alleged nuisance constitutes a breach of permit or relevant law. In the absence of a prosecution or other enforcement action, a defence lawyer is inevitably going to argue that there is no proof that the operations breached the permit or legislation and the civil court cannot deem the defendant to be guilty without trial in the criminal courts. It would also be open to a defendant's lawyer to argue that even if there had been a breach, it was not sufficiently serious for the regulator to take action and therefore should not constitute a nuisance in the civil court.

In conclusion, if the Court of Appeal upholds the principle that an environmental permit provides a defence in nuisance actions on permitted sites, claimants will only be able to succeed in private nuisance actions against permitted sites where they can establish negligence. Following indications given by the court in *Derrick*, *Cambridge Waters* and *Dennis*, negligence is likely to be restricted to breaches of permit or relevant legislation. This approach is problematic as it assumes that the regulators are fully investigating all complaints made and taking the appropriate enforcement action. In reality, with regulatory resources stretched, this may not always be the case, leaving claimants in a position where they could find it impossible to demonstrate a nuisance on permitted sites. Unfortunately, as the *Derrick* case did not contain allegations in negligence, the Court of Appeal is unlikely to clarify the scope of negligence on permitted sites and the uncertainty surrounding this question could deter claimants from bringing nuisance actions against permitted sites in the future.

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