

Barr v Biffa : is permit compliance a defence to nuisance actions?

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In *Barr and ors v Biffa Waste Services Limited* [2011] EWHC 1003 (TCC) the Technology and Construction Court dismissed a claim in private nuisance by 152 households for odour pollution from a landfill site because the operator was complying with the terms of its environmental permit and was not operating in a negligent manner. This is the first time that the Court has held that compliance with a permit is a defence to a private nuisance action. The Court distinguished the situation from that of planning permission (which does not provide a defence to an action in nuisance – see *Wheeler v AJ Saunders Ltd* [1996] Ch 19) because permitted sites are heavily regulated and tightly controlled whereas planning consents only contain a handful of general conditions.

A nuisance in law is a condition or activity which unduly interferes with the use or enjoyment of land. The law acknowledges that, in a modern society, there must be some “give and take” between neighbouring land uses and not all interferences will constitute an actionable nuisance. To reflect this the Courts have developed the standard of “reasonable user” and the intensity of the interference, its frequency and duration, and the character of the area, are all factors to take into consideration. Following *Barr v Biffa*, it is now arguable that there is an additional factor: compliance with an environmental permit.

The Court reviewed the EU and UK statutory regimes for environmental protection and held that the “cascade” of regulation for landfill sites created a complex and comprehensive regime with which operators had to comply. The judge considered that it would be wrong for the common law of nuisance to create a different set of standards: “An activity should not be permitted by one set of specific rules (derived from detailed legislation), yet at the same time give rise to a liability to a third party by reference to the much more general set of principles to be derived from the common law”.

The Court concluded that compliance with this comprehensive statutory regime was evidence that the operator was meeting the standard of “reasonable user” and therefore, despite the odour emissions, it was not causing a nuisance at law.

The judge also suggested that historic cases on nuisance may not be of great assistance for the modern day: “The common law must be flexible in order to survive. What was appropriate in Victorian England may need to be modified in the rather more complex world of the twenty-first century. Then, there was very little statutory control of industry, development, and the environment; now there is, on one view, too much”.

The claimants have sought leave to appeal and we will watch this with interest.

This judgment has implications for all businesses that are subject to environmental regulation and especially those in the waste, food and manufacturing sectors where complaints from neighbours are common. Businesses whose operations inevitably result in environmental emissions such as noise, fumes and odour and who are subject to permit conditions controlling those emissions may be able to rely on compliance with those permit conditions to defeat private claims.

Burges Salmon and OdourNet are hosting a training webinar on odour nuisance, the impact of *Barr v Biffa* and practical solutions for odour abatement. For more details please visit our website : www.burges-salmon.com.

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