

Challenges to renewables projects in the operational phase: nuisance actions

Challenges in the operational phase

Energy companies and developers are used to protracted arguments and disputes at the consenting phase of renewables projects and many schemes must survive legal challenges from vociferous neighbours before the construction can begin. It is no wonder that the commissioning of the facility and the move to the operational phase is often the time at which operators and funders breathe a collective sigh of relief. However, as recent cases demonstrate, that may not be the end of the story.

Persistent opponents to a renewables project can still seek to limit or disrupt the operation using the law of nuisance.

The case of *Davis v Tinsley* is the most high profile example. Mr and Mrs Davis of Deeping St Nicholas are taking the owners and operators of a neighbouring wind farm to the High Court to claim damages and an injunction for noise nuisance caused by the turbines. The trial is due to begin on 4 July this year and the claimants are seeking an injunction to limit the hours of operation of the wind farm and to remove the turbines closest to their home.

However, it is not just wind farms that are at risk from such nuisance actions. There are numerous other scenarios that could give rise to complaints at the operational phase, such as odour nuisance from composting, claims for particulate pollution from energy from waste plants, claims against hydroelectric schemes for interference with water flow or fishing rights and noise from the construction and operation of most forms of energy generation, to name just a handful of examples.

The law of nuisance

Nuisance at law is a condition or activity which unduly interferes with the use or enjoyment of land. The law acknowledges that, in modern life, there must be an element of "give and take" between neighbouring occupiers of land and a degree of interference must be tolerated for the benefit of society. This principle has become known as the principle of "reasonable user". It is for the Courts to decide when an otherwise lawful activity oversteps the line and impacts a neighbour to such an extent that the activity is no longer reasonable user.

The courts will take into account factors such as the character of the area and the intensity, frequency and duration of the

interference in deciding whether an activity meets the standard of reasonable user.

It is a common misconception that people moving into a new area must accept the neighbourhood as it is when they arrive but it is no defence to a claim to say "but I was here first". This is a big risk for renewables projects. A site could be chosen because it is remote but if houses are subsequently erected on nearby land then there is nothing to stop the new residents complaining about the impact of the existing operation.

Although some general principles can be drawn from the cases over the years, ultimately much depends on the facts of the particular situation and it is often difficult to determine whether an activity which some people may find annoying actually constitutes a nuisance at law. This grey area creates difficulties for renewables operators faced with a threat of litigation for interference which is an unfortunate but inevitable consequence of their project.

Nuisance actions can take one of three forms:

Private Nuisance

A claim in the civil courts brought by one or more individuals alleging that an activity is unreasonably affecting their enjoyment of their own property, seeking an injunction to limit that activity and/or damages.

Public Nuisance

A criminal prosecution brought by the Attorney General or a local authority alleging that an activity unlawfully interferes with a class of people (for example, a village community), seeking a fine. In certain cases, individuals that are particularly affected can also bring a civil claim for damages.

Statutory Nuisance

A regulatory mechanism contained in the Environmental Protection Act 1990. A local authority can serve an abatement notice requiring a nuisance to be abated or restricted. Failure to comply with the notice is a criminal offence. However, it is a defence for a business to demonstrate that it is using "best practicable means" to minimise the impact. The notice can be appealed but there is a strict time limit of 21 days which cannot be extended.

Compliance with other statutory regimes

Planning

It is no defence to a nuisance action to say that a renewables project has planning consent. However, the Courts have held that a planning consent can change the character of the neighbourhood and this may lower the standard of "reasonable user". In such cases, activities that would previously have been a nuisance at law must now be tolerated. It must be noted, however, that this argument is rarely successful.

The position is different where a nuisance action relates to a Nationally Significant Infrastructure Project (NSIP) under the Planning Act 2008. In such cases operators have a defence of statutory authority to nuisance actions. The defence covers both the construction and the operation phase of a NSIP. However, in order to benefit from this defence, the operator must demonstrate that he has not acted negligently and has complied with the requirements set out in the Development Consent Order.

Environmental permitting

In contrast to the position for planning consent, the recent case of *Barr v Biffa* suggests that it could be a defence to a private nuisance action to demonstrate compliance with specific conditions of an environmental permit. For example, if the permit regulates odour emissions and the operator is in compliance with those conditions, then neighbours affected by the odour cannot succeed in a private claim. *Barr v Biffa* is likely to be appealed and we will watch this with interest. We have a separate briefing note available on the implications of *Barr v Biffa*.

Other defences

There may be other defences available in particular statutory regimes. For example, hydroelectric projects will require an impoundment licence from the Environment Agency under the Water Resources Act 1991. Once granted, the impoundment licence offers a defence to any private claim for obstructing or impeding the flow of water, provided that the obstruction or impediment is carried out in accordance with the terms of the licence.

On each occasion when a private challenge threatens the operation of a renewables project it will important to consider whether there are any specific defences available.

Practical tips: If you are threatened with a nuisance action or if you are concerned that complaints may give rise to a claim then you may want to consider the following:

- Don't dismiss complaints out of hand: frivolous complainants do exist but there is often a reason why someone is driven to complain, so try to establish if there is any justification for the complaints and work with your neighbours to identify whether there is a workable solution.
- Take expert advice: demonstrating best practicable means will require technical expertise.
- Keep environmental health officers on side: demonstrate that you are using best practicable means, explain why further improvements are not practicable and keep them in the loop.
- Escalate matters quickly to the appropriate person within the business and don't miss deadlines: if served with an abatement notice, the time limit for appeal is a strict 21 days that cannot be extended, and there are also tight timescales for responding to private claims.
- Consider the legal position: is the activity a nuisance at law, and are there any specific defences available to you?

Conclusion

Opposition to renewables projects does not necessarily stop once consent is granted and disgruntled neighbours may seek to use the law of nuisance to obstruct or curtail renewables projects at the construction and operational phase. Burges Salmon's renewables team includes specialist litigators and we frequently advise on contentious environment and energy disputes and nuisance actions.

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