



The legal regimes for the control of odour emissions

Abstract

The control and management of odour is a key issue for waste handling facilities, water treatment plants and other industrial sites and it is important for operators to understand the legal regimes for the control of odour emissions. In 2011 we have already witnessed record criminal fines for odour pollution, new Agency guidance on odour emissions and a landmark judgment on the interaction between private nuisance and environmental permitting for waste sites (*Barr v Biffa*). This paper explores the legal regimes for the control of odour and the interaction between these regimes.

Introduction

The control and management of odour is an important issue for many industries such as water, waste, chemicals, food and many forms of manufacturing. Companies are facing increasingly robust regulation, increasingly vocal neighbours and a proliferation of claimant litigators offering class actions on a “no-win no-fee” basis. Criminal sanctions are also getting heavier, with a recent Court penalty for odour emissions reaching £150,000 in fines and costs. Against this background there have been two important developments. In April 2011, the Environment Agency released horizontal guidance H4 on odour management¹ which explains how the Agency intends to regulate odour under the environmental permitting regime. In the same month, the High Court handed down its judgment in the landmark Westmill Landfill group litigation, *Barr v Biffa Waste Services*². It is therefore an opportune moment to revisit the legal mechanisms for the management of odour and consider the implications of these most recent developments.

Legal liabilities for odour

Odour complaints are not new. The law has sought to impose an element of control over the emission of odours for hundreds of years and records of odour disputes in England can be found dating back to the 14th century³. As the law has evolved over the centuries two distinct mechanisms have emerged. First, the courts have developed the common law of nuisance to protect individuals from offensive odours from neighbouring properties. Secondly, Parliament has

created a regulatory framework which is now contained within the environmental permitting regime (for certain classes of industrial premises) and the statutory nuisance regime (for all premises).

The common law of nuisance

Nuisance is “a condition or activity which unduly interferes with the use or enjoyment of land”⁴. The law acknowledges that, in developed societies, 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”⁵. 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 reasonable user standard takes into account a number of factors. One factor is the intensity of the odour. A faint scent in the wind is very different to a pungent odour. The type of odour is also important. Although it is no defence to a nuisance claim to say that an odour is pleasant or inoffensive, repulsive smells are less tolerable, and therefore less like to be tolerated by the Court. Of course, it is also true that inoffensive odours may not give rise to so many complaints in the first place.

Other factors include the frequency, duration and timing of the odour. An odour that could be detected once or twice a year, for 10 minutes, during the working day, may be reasonable. A perceptible odour every Sunday afternoon, lasting for several hours, just when the residents are enjoying their garden, may not.

Another factor is the character of the area. A character of the area was highlighted as a consideration in the 19th century case of *Sturges v. Bridgman*⁶ that case concerned noise from a sweetshop. The sweetshop had been manufacturing sweets on the premises for over 60 years and the process involved a large scale pestle and mortar set up in the kitchen. A doctor moved in next door and set up a consultation room in the garden, next to the kitchen in the sweetshop. The doctor was disturbed by the sound, and brought an action for an injunction to restrain the grinding noise from the pestle and

¹ H4 Odour Management : How to comply with your environmental permit, The Environment Agency, Bristol, March 2011

² *Barr and ors v Biffa Waste Services Limited* [2011] EWHC 1003 (TCC) aka “the Westmill Landfill Group Litigation

³ Early examples can be found in the “Assize of Nuisance”, a document from medieval London which records odour nuisances such as those caused by Alice Wade in 1314 (case 214). Ms Wade’s DIY sewerage system resulted in her neighbours being “greatly

inconvenienced by the stench” and she was ordered by the mayor to remove the offending pipe within 40 days. [Ref: Chew, Helena M., and William Kellaway, eds. London Assize of Nuisance 1301-1431: A Calendar. London: London Record Society, 1973]

⁴ *Barr and ors v Biffa Waste Services Limited* [2011] EWHC 1003 (TCC) per Coulson J.

⁵ See for example the speech of Lord Goff of Chiveley in *Cambridge Water v Eastern Counties Leather* [1994]2AC 264

⁶ *Sturges v. Bridgman* (1879) L.R. 11 Ch. D. 852.

mortar. The doctor was successful before the Court of Appeal which took into account the fact that the street was not part of an industrial area. The Court of Appeal held that : *“what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey”*.

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 odour which is perceptible, and discomforting, is of sufficient frequency, duration and intensity to constitute a nuisance at law. This grey area creates difficulties for businesses facing a threat of litigation for odours which are an unfortunate but inevitable consequence of that business.

Hirose Electrical UK Limited v. Peak Ingredients Limited

The Court of Appeal case of *Hirose Electrical UK Limited v. Peak Ingredients Limited*⁷ is a good example of an activity which was no doubt regarded as a “nuisance” in common parlance but which was not sufficient to constitute an actionable nuisance at law. In *Hirose* the Defendant was a food additive manufacturer emitting strong and pervasive smells such as curry and garlic from its commercial unit. The electronics component manufacturer in the adjacent commercial unit argued that its employees felt nauseous when subjected to the odours and that it impacted their business operations. The High Court found that odours did escape and that the employees probably did find the odours disagreeable. However, the Court held that the interference was not a nuisance in law, because the character of the neighbourhood – a light industrial estate – permitted a greater interference from noise and odours than would be permissible in a business park or residential area, and as such food additives manufacture was a reasonable user for the area. The Court held that the food additive manufacturer had been reasonable in the way it operated its commercial unit and had taken reasonable steps to limit the impact of the odours. As such, the claim was dismissed, The Court of Appeal upheld the decision, emphasising that the difficult task of identifying the boundary of “reasonable user” was best undertaken by the Court hearing all the evidence.

The statutory nuisance regime

There are a number of barriers to a claim in private nuisance for odour emissions, such as the difficulties of obtaining evidence and the costs of bringing a claim in the courts. For these reasons Parliament created a summary procedure for dealing with unacceptable states of affairs: now the statutory nuisance regime contained in Part III of the Environmental Protection Act 1990 (“EPA1990”) (as supplemented by the Clean Neighbourhoods and Environment Act 2005 (“CNEA2005”).

The statutory nuisance regime is more limited in scope than private nuisance but it does include *“any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance...”*⁸. Local

authorities must inspect their areas for nuisances and take reasonable steps to investigate complaints, and if a local authority is satisfied that a statutory nuisance exists, it has a duty to serve an abatement notice to prohibit the occurrence or reoccurrence of that nuisance.

The abatement notice can be appealed but there is a strict time limit of 21 days to do so. Failure to comply with an abatement notice is a criminal offence. For industrial, trade or business premises the maximum penalty is £20,000. Where an offence is committed by a company, it is also possible to prosecute any officer of the company who consented to or connived in the commission of the offence, or whose neglect contributed to it.

It is a defence to a prosecution for private nuisance (and a ground of appeal against an abatement notice) to demonstrate that *“best practicable means”* have been adopted to minimise the nuisance. This is very important for commercial operations because often odours will be an inevitable consequence of the process and emissions cannot be eliminated entirely. The determination of what constitutes *“best practicable means”* is often highly technical and is likely to require input from experts on odour abatement technology.

The environmental permitting regime

Many facilities, including those in the water, waste, food and chemical sectors, will be regulated by the environmental permitting regime contained within the Environmental Permitting (England and Wales) Regulations 2010⁹ (“EPR2010”). Any facility which operates a process covered by the regime must apply for an environmental permit and must operate the facility in accordance with the terms of that permit. Failing to comply with a condition of a permit is a criminal offence.

Many permits will contain a condition relating to the control of odour. The condition is usually phrased along the following lines:

“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 appropriate measures, including, but not limited to, those specified in an approved odour management plan, to prevent or, where that is not practicable, to minimise the odour.”

Because of the reference to the detection of odours outside the site, the condition is sometimes known as the “odour boundary condition”. The validity of odour boundary conditions has been challenged in the courts on the grounds that framing the condition by reference to the perceptions and judgment of an individual Agency officer offended the legal principle of certainty in criminal law and usurped the fact-finding and adjudicative role of the Court¹⁰. However, the divisional court did not agree. It held that the odour condition was to be construed as requiring evidence from an authorised Agency officer as a necessary ingredient of the case against the operator, but it was still for the Court to decide, looking at all the evidence in the round, whether odours emitted were at levels offending against the standards required by the odour condition.

⁷ *Hirose Electrical UK Limited v. Peak Ingredients Limited*[2011]JPL 329

⁸ Section 78(1)(d) of the Environmental Protection Act 1990

⁹ 2010/675

¹⁰ *Environment Agency v Biffa Waste Services Limited*[2007]Env LR 16

Prosecutions for breaches of the odour boundary condition

Failure to comply with an odour boundary condition in a permit is a criminal offence and, under pressure from local communities affected by odour emissions, the Agency has been taking an increasingly hard line on enforcement.

In February this year the operators of a rendering plant were handed a record penalty for odour emissions of £150,000 in combined fines and costs after it pleaded guilty to six breaches of its permit condition. The odours were described by local residents in Newham as “vile”, “repugnant” and “rancid”. There have been a large number of prosecutions against waste operators, and in particular composting operations, the most recent being the conviction of a composting company in Bury St Edmunds for a breach of the odour boundary condition following the emission of odours described by the Agency officer as a “strong diarrhoea foul rotting smell”. The company were fined £20,000 and ordered to pay costs of £13,873.

Food and agricultural sectors have also seen a number of prosecutions. A fine of £140,000 was ordered against a food manufacturer for two breaches following emissions of “rotting eggs and cabbage” smells, and in March this year a poultry unit in Lincolnshire was ordered to pay £42,123 for unpleasant odours after failing to comply with its own odour management plan.

H4 Guidance

In recognition of the potential complications for site operators attributable to the difficulties of controlling odour, the general nature of the odour boundary condition, and the severity of the consequences for breach, the Agency has produced guidance on odour management under the environmental permitting regime, known as “H4”¹¹. The revised version was released in April and provides an insight into the Agency’s approach to the odour boundary condition and odour management plans.

In general, H4 is a helpful document, but there are areas that may cause concern to in house lawyers dealing with odour complaints and regulatory investigations on permitted sites.

The principal concern is the attitude of the Agency when interpreting the words of the permit. The principle of legal certainty in criminal law – if an act is to be criminal, its scope must be certain – has already been mentioned in the context of the odour boundary condition, and it arises again here in the context of the Agency’s interpretation of the permit. Although the environmental permitting regime was created in 2007 and revised in 2010, permits issued under the previous regimes have continued in force and therefore there are a great number of permits issued under predecessor regimes with wording that differs from the standard odour boundary condition set out above. H4 addressed the problem by stating that “whichever form of words is used in the permit we will treat it as having the same meaning...”. In many cases this may be acceptable, as words used may be interchangeable, but there may also

be occasions where the words used are not interchangeable. This may give rise to a situation where the local Agency officer is interpreting an odour condition based on H4 but the site personnel and the in house lawyer are (quite rightly) following the strict wording of the permit. H4 is only guidance and is not binding on the courts, and in the event of a dispute or prosecution the court must consider the natural meaning of the wording of the condition in the permit. One can envisage a scenario where the H4 guidance is more onerous than the permit condition and where an Agency officer threatens regulatory action even though the company is of the opinion that it is in full compliance with its permit. In such a situation, although legally the company is correct, for commercial and PR reasons the company may not wish to engage in a public dispute with the Agency on the point, leading to a difficult dilemma.

There is also some ambiguity over the meaning of the phrase “unless the operator has used appropriate measures”. H4 sets out the Agency’s view on the meaning of “appropriate measures” but again this is only the Agency’s view and it is not binding on the courts. Interesting, H4 goes on to state that “even if the operator is using all appropriate measures, if we consider the residual odour is at such a level that it is unreasonable it will be necessary for the operator to take further measures to reduce odour pollution or risk having to reduce or cease operations”. This goes beyond the natural meaning of the words in the odour boundary condition. The words are straightforward: if the operator is using reasonable measures to minimise the odour then it is in compliance with the permit – there is no additional wording to suggest it must use additional (unreasonable?) measures to reduce the odours still further. The confusion may arise because under regulation 37 of the EPR 2010 the Agency can suspend a permit if it considers that there is a risk of “serious pollution” whether or not there is compliance with the permit conditions, but “serious pollution” is not necessarily the same as “unreasonable odour” and ultimately the definition of “serious” is a matter for the courts.

The interaction between the various regimes for controlling odour emissions

The common law of nuisance and the statutory regulatory regimes have developed in parallel and the interaction between the regimes is not as certain and precise as one would hope. This is demonstrated by a series of cases, the most recent being the landmark judgment in *Barr* handed down by the High Court in April.

The relationship between environmental permitting and the planning regime

The case of *Harrison v. Secretary of State for Communities and Local Government*¹² is a good example of the interaction between the permitting regime and the planning regime. A business applied for and was granted a PPC permit (the predecessor to environmental permits) for commercial rendering

¹¹ H4 is the fourth horizontal guidance note published by the Environment Agency on the permitting regime – the guidance is “horizontal” because it applies across all sectors.

¹²*Harrison v Secretary of State for Communities and Local Government and Cheshire West and Chester Council*[2010]Env LR 17

activities and the permit contained controls for the emissions of odour on similar terms to those discussed above. The business did not, however, have planning consent for the rendering activities and at the subsequent inquiry the inspector decided that, notwithstanding the existence of the conditions in the permit, the odour from the site was likely to cause very significant harm to the amenity of people living in the area and permission was refused.

The business appealed to the High Court on the grounds that the inspector was wrong to take into account the odour emissions because odour was regulated by the permit, but the Court dismissed the appeal, holding that although the permitting regime regulated odour emissions, it was for the planning regime, not the permitting regime, to establish whether the location itself was suitable.

The relationship between the statutory nuisance regime and environmental permitting

The case of *R (Ethos Recycling Limited) v Barking and Dagenham Magistrates' Court*¹³ demonstrates of the interaction between statutory nuisance and permitting. The case concerned the emission of dust which the Environment Agency was seeking to control through the environmental permit. At the same time as the Agency was negotiating with the operator for improvements to the site under the permit, the local authority, under pressure from local residents, deemed the dust to be a statutory nuisance and issued an abatement notice under Part III of the EPA 1990. The operator appealed, claiming that the service of the notice by the local authority was a nullity under section 79(10) of the Act which provides that "a local authority should not without the consent of the Secretary of State institute summary proceedings under this Part in respect of a nuisance...if proceedings in respect thereof might be instituted under [the environmental permitting regime]". The Administrative Court held that the prohibition in section 79(10) only prevented the local authority from commencing Court proceedings for breach of the abatement notice, not for the service of the notice itself, which the Court held often had to be served quickly to protect residents in that authority's area.

The relationship between environmental permitting and private nuisance : Barr v Biffa

The cases above deal with the interaction between the various statutory regimes, but it has long been thought that compliance with those statutory regimes does not defeat a private claim under the common law of nuisance. However, the groundbreaking judgment of the High Court in *Barr* has stated for the first time that compliance with a complex regulatory regime set down by Parliament may well be a bar to private nuisance actions.

The case concerns Biffa's Westmill landfill (which happens to be the same landfill that gave rise to the challenge over the validity of the odour boundary condition discussed above). A

group action was brought by 152 neighbouring households seeking damages for odour nuisance arising from the site, although to simplify the process the trial concentrated on the claims of 30 pre-selected individuals. Although the claim was originally pleaded in negligence, this element was dropped prior to the trial and it was accepted that Biffa was not negligent in its operation of the landfill and that Biffa was in compliance with its environmental permit. The claimants submitted that evidence of negligence or breach of permit was not necessary to found a claim in nuisance and that they had "*inalienable common law rights in nuisance which have not been affected, let alone excluded, by the relevant environmental and landfill legislation and the detailed terms of Biffa's permit*"¹⁴. Biffa's response was that it would be unfair and unrealistic if they could still find themselves liable to the claimants in nuisance despite compliance with the numerous obligations and detailed provisions of the permit.

Coulson J acknowledged that this was "*a clash between two potentially irreconcilable principles*" and proceeded to set out a detailed and comprehensive analysis of the legal position. Biffa's primary argument in defence – that the permit provided statutory authority – was rejected. However, the Court was more sympathetic to Biffa's secondary argument, that compliance with the comprehensive legislative framework and the detailed terms of its permit was evidence that Biffa was meeting the standard of reasonable user required for this site.

Coulson J considered that "*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*". In supporting this proposition, he drew support from the words of Lord Goff in *Cambridge Water v Eastern Counties Leather*¹⁵: "*given that so much well-informed and carefully structured legislation is now being put in place [to protect 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*". Echoing Lord Goff's sentiment, Coulson J concluded: "*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*".

Coulson J also considered that the statutory tort in section 73(6) of the EPA1990 supported his conclusions. The statutory tort allows individuals who suffer damage as a result of another's failure to comply with its waste management obligations to bring an action in the civil courts to recover their losses. A claim under section 73(6) will not succeed if a company is operating in accordance with its permit or if the company took all reasonable precautions and exercised all due diligence to avoid committing the offence. Coulson J concluded that the statutory tort would

¹³ *R (Ethos Recycling Limited) v Barking and Dagenham Magistrates' Court*[2010]Env LR 25

¹⁴ *H Barr and ors v Biffa Waste Services Limited*[2011]EWHC 1003 (TCC) per Coulson L

¹⁵ *Cambridge Water Co v Eastern Counties Leather plc*[1994]2 AC 264

have no practical benefit whatsoever if it was more difficult to obtain a remedy under section 73(6) than under the common law, and that cannot have been the intention of Parliament.

The claimants argued that this conclusion ran counter to the Court of Appeal decision in *Wheeler v Saunders*¹⁶ which held that the mere grant of planning permission did not authorise a nuisance. Coulson J held that environmental permitting was a very different situation to planning consent, because the former contained detailed conditions about the operation of an activity and was closely regulated by the Agency, whereas the latter merely permitted a development at a specific location and often only contained a handful of general conditions.

Having concluded that the action in nuisance could not succeed unless there was evidence of negligence or breach of permit, which was not pleaded and for which the claimants had produced no evidence, the group litigation failed. However, despite dismissing the claim as a matter of principle, Coulson J went on to consider the facts.

Coulson J considered that the first step in any nuisance action was to establish a threshold position *“to establish a minimum standard of comfort that a neighbour must accept as part of any reasonable user...but beyond which it can be said with confidence that the consequences of the relevant activities amounted to a nuisance”*. After a detailed explanation of his methodology, Coulson J concluded that the appropriate threshold was one odour complaint a week, or 52 a year. Only two of the thirty claimants had experienced interference above this threshold and therefore Coulson J concluded that, even if he was wrong in his conclusions on the interaction between the common law of nuisance and the environmental permitting regime, only two claimants had demonstrated a level of interference sufficient to succeed in a claim in nuisance. Although the calculation of the threshold is fact specific and it is a step too far to suggest that all regulated facilities are allowed to emit odours on 52 days of the year, it is nevertheless very helpful to see how Coulson J has tackled the question of the appropriate threshold and it will no doubt be of valuable assistance in the future when lawyers engage in the difficult task of establishing the boundaries of the reasonable user standard. Finally, having concluded that only two claimants could have succeeded on the facts in any event, Coulson J determined

the quantum of the general damages that would have been awarded in the event that a nuisance had been established. The figure reached was £1,000 for each year in which the claimants were subject to the nuisance. Again, this conclusion is fact-specific, but it does provide an indication of the relatively low value of damages awards for odour nuisance cases. The far bigger threat to most businesses from nuisance actions is the threat of an injunction, which can limit operations on site and sometimes can prevent a site from operating altogether. The claimants in *Barr* do not appear to have sought an injunction against Biffa and so this issue did not arise.

The residents have sought leave to appeal the decision and this will be watched with interest.

Conclusion

The *Barr* judgment is of considerable importance to all regulated sites, not just in those for which odour is a concern, and the implications are far-reaching. At its simplest, for facilities where a particular problem (noise, fumes, odour etc.) is regulated by an environmental permit, it appears that an individual may only be able to recover damages for nuisance if he can also demonstrate a corresponding breach of the permit or negligence in the operation of the facility. For many facilities with vocal neighbours, this judgment provides a little comfort that, providing the business meets its compliance obligations under the environmental permitting regime, it may be shielded from nuisance actions in the civil courts.

Whether this judgment survives the scrutiny of the Court of Appeal remains to be seen. The appeal is currently expected in early 2012.

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¹⁶*Wheeler v AJ Saunders Ltd* [1996]CH 9