BURGES
SALMON

Environment and energy briefing from Burges Salmon published in the July/August 2011 issue of The In-House Lawyer:

Barr v Biffa [2011]: is permit compliance a defence to private nuisance?

Barr v Biffa [2011]: is permit compliance a defence to private nuisance?

BY MICHAEL BARLOW
partner, Burges Salmon LLP

BY SIMON TILLING
associate, Burges Salmon LLP

IN APRIL THE HIGH COURT HANDED DOWN a landmark judgment on the interaction between the environmental permitting regime and private nuisance. In *Barr & ors v Biffa Waste Services Ltd* (No 3) [2011] (also known as the Westmill Landfill Group Litigation), the court held that compliance with an environmental permit may be a defence to an action in nuisance. This judgment has far-reaching consequences for all businesses that are subject to environmental regulation and is of particular significance to those in sectors such as waste, food and chemicals, where odour emissions are often problematic. To understand *Barr* in context it is necessary to set out a quick summary of the legal regimes for controlling odour. The principles of the law of nuisance were addressed in *IHL*174 (pp19-22) and in recent cases in *IHL*180 (pp23-26). This article therefore provides only a quick refresher on its key principles as background to the *Barr* judgment. This article does not address statutory nuisance, but see *IHL*150 (pp67-70) for further information.

COMMON LAW OF NUISANCE

In *Barr*, Coulson J defined nuisance as 'a condition or activity which unduly interferes with the use or enjoyment of land'. The law acknowledges that, in developed societies, there must be an element of 'give and take' between neighbouring occupiers of land and that a degree of interference must be tolerated for the benefit of society. This principle has become known as the notion of 'reasonable user' as discussed in the speech of Lord Goff of Chiveley in *Cambridge Water Co Ltd v Eastern Counties Leather Ltd* [1994]. It is for the courts to decide when an otherwise lawful activity oversteps the line and impacts on a neighbour to such an extent that the activity is no longer reasonable, and the courts may take into account factors such as the character of the neighbourhood and the intensity, frequency and duration of the interference.

> *'It is for the courts to decide when an otherwise lawful activity oversteps the line and impacts on a neighbour to such an extent that the activity is no longer reasonable.'*

Although some general principles can be drawn from previous cases, ultimately much depends on the facts of the particular situation and it is often difficult to determine whether disagreeable odour emissions constitute a nuisance at law. This grey area creates difficulties for businesses faced with a threat of litigation for odours that are an unfortunate, but inevitable, consequence of their operations.

HIROSE ELECTRICAL UK LTD v PEAK INGREDIENTS LTD [2011]

The High Court decision in *Hirose* is a good example of an activity that was no doubt regarded as a 'nuisance' in common parlance but that 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 that were subjected to the odours felt nauseous and that this effected its business operations. The 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. As such, the manufacture of food additives was a reasonable user for the area. Hirose has appealed the decision and the hearing is due to take place in the summer.

ENVIRONMENTAL PERMITTING REGIME

Many facilities, including those in the food, waste and chemical sectors, will be regulated by the environmental permitting regime now contained within the Environmental Permitting (England and Wales) Regulations 2010. Any facility that 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 prevention of odours outside of the site (the 'odour boundary condition'). 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.'

In *Environment Agency v Biffa Waste Services Ltd* [2007] the validity of odour boundary conditions was challenged. Biffa argued 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 court. 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 the condition had been breached

PROSECUTIONS FOR BREACHES OF THE ODOUR BOUNDARY CONDITION

Under pressure from local communities affected by odour emissions, the Agency and local authorities have been taking an increasingly hard line on enforcement.

In February this year the operator of a rendering plant was 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 as 'vile', 'repugnant' and 'rancid'.[1] 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.[2]

Food and agricultural sectors have also seen several prosecutions. A fine of £140,000 was ordered against a food manufacturer for two breaches, following emissions of 'rotting eggs and cabbage' smells.[3] In March this year, a poultry unit in Lincolnshire was ordered to pay £42,123 in fines and costs for unpleasant odours after failing to comply with its own odour management plan.[4]

> ***'The far bigger threat to most businesses from nuisance actions is the threat of an injunction in private nuisance claims or an abatement notice served under the statutory nuisance regime, either of which can limit operations.'***

H4 GUIDANCE

In April, to assist operators with odour management and compliance, the Agency published a revised version of its H4 guidance.[5] H4 provides an insight into the Agency's approach to the odour boundary condition and odour management plans. Although H4 is a helpful document for operators, one area that may cause concern is the attitude of the Agency when interpreting the words of the permit. Although the environmental permitting regime was created in 2007 and revised in 2010, permits issued under the previous rules have continued in force and therefore there are a great number of permits issued under earlier regimes with wording that differs from the standard odour boundary condition set out above. In H4, the Agency addresses 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.

RELATIONSHIP BETWEEN ENVIRONMENTAL PERMITTING AND PRIVATE NUISANCE

Prior to *Barr*, the question of the extent of any interaction between the common law of nuisance and the environmental permitting regime had not been directly addressed by the courts, although many commentators had taken the view that the position of environmental permits was similar to that of planning consents – it is established law that planning permission does not authorise what would otherwise constitute a nuisance.

However, in *Barr*, the court stated for the first time that compliance with the environmental permitting regime – a complex regulatory regime set down by Parliament – can be a defence to common law nuisance actions.

In *Barr,* a group action was brought by 152 households seeking damages for odour nuisance arising from Biffa's Westmill landfill (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 expressly accepted that Biffa had not been 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.'

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 in the Technology and Construction Court 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

> *'Coulson J concluded that the appropriate threshold was one odour complaint a week, or 52 a year. Only two of the 30 lead claimants had experienced interference above this threshold.'*

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*:

> '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 s73(6) of the Environmental Protection Act 1990 supported his conclusions. The statutory tort, which we examined in *IHL*134 (pp56-59), 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 its losses. A claim under s73(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 have no practical benefit if it was more difficult to obtain a remedy under s73(6) than under the common law, and that cannot have been the intention of Parliament. Coulson J did not, however, go on to consider the differences between s73(6) and the common law (such as the wider categories of potential claimants and potential damages available under s73(6)), and it will be interesting to see how this line of argument fares on appeal.

The claimants argued that Biffa's defence ran contrary to the Court of Appeal decision in *Wheeler v AJ Saunders Ltd* [1996], 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. Coulson J also held that, as with planning permission, the grant of an environmental permit could (and in this case did) change the character of a neighbourhood with a corresponding change in the standard of reasonable user for the area.

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, Coulson J went on to consider whether the facts would support a claim in nuisance in the event that he was wrong on the law.

Coulson J considered that the first step in any nuisance action was to determine 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 30 lead claimants had experienced interference above this threshold and

NOTES

1) Environmental Data Services, Report 434, March 2011, pp72-73.

2) See http://www.environment-agency.gov.uk/news/111721.aspx?month=10&year=2009§or=Waste.

3) See http://www.environment-agency.gov.uk/news/101798.aspx?month=1&year=2009§or=Waste&persona=Prosecution.

4) See http://www.environment-agency.gov.uk/news/128847.aspx?page=1&month=3&year=2011.

5) 'H4 Odour Management: How to comply with your environmental permit', The Environment Agency, Bristol, March 2011 (H4 is the fourth horizontal guidance note published by the Agency on the permitting regime – the guidance is 'horizontal' because it applies across all sectors).

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 therefore 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 tackled the question of the appropriate threshold and it will no doubt be of valuable assistance for lawyers engaged in the difficult task of predicting 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. The figure reached was £1,000 for each year in which the threshold was exceeded. Again, this conclusion is fact-specific, but it does provide a reminder of the relatively low value of damages awards for odour nuisance cases. Of course, the far bigger threat to most businesses from nuisance actions is the threat of an injunction in private nuisance claims or an abatement notice served under the statutory nuisance regime, either of which can limit operations on site and sometimes prevent a site from operating altogether. The claimants in *Barr* do not appear to have sought an injunction against Biffa and no abatement notice had been served 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 those that emit odours, and the implications are far-reaching. For facilities where a particular concern (eg noise, fumes, odour) is regulated by an environmental permit, the operator can now run the argument that it is not liable in nuisance unless the claimant can also prove a corresponding breach of the permit or negligence in the operation of the facility. For many facilities with vocal neighbours, this judgment provides some comfort that, providing the business meets its compliance obligations under the environmental permitting regime, it should be shielded from nuisance actions in the civil courts.

This summer, Burges Salmon, in conjunction with a leading odour consultancy, is running 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.

By Michael Barlow, partner, and Simon Tilling, associate, Burges Salmon LLP.
E-mail: michael.barlow@burges-salmon.com; simon.tilling@burges-salmon.com.

Barr & ors v Biffa Waste Services Ltd (No 3) [2011] EWHC 1003 (TCC)

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

Environment Agency v Biffa Waste Services Ltd [2006] EWHC 3495; reported at [2007] Env LR 16

Hirose Electrical UK Ltd v Peak Ingredients Ltd [2011] JPL 429

Wheeler v JJ Saunders Ltd [1996] Ch 19