

## Statutory notices: an increasing nuisance for businesses



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THE USE OF STATUTORY NOTICES IS ON THE increase. Although there is usually a mechanism for issuing an appeal, there are strict time limits for doing so. If the right to appeal is lost, and the company fails to comply with notice, it may face criminal sanctions including a fine. This can have a significant effect on a business, for example, in terms of its ability to obtain permits in the future, its relationship with its shareholders and its ability to tender for projects.

This article looks at the current procedure for the service of statutory notices and appeals against them, and the difficulties that they can cause. It also looks at examples of statutory notices that are appealed in the Magistrates Courts. However, it should be noted that other notices are appealed in different venues. In each case it is important to examine the statute under which the notice is served to establish how to appeal and what grounds are available. If there is no express ground of appeal, a judicial review of the decision to serve the notice may be the only option.

### THE REGULATORY BACKGROUND

The regulation of environmental matters in the UK is undergoing a period of change. The Macrory Report, a recent review of the effectiveness of regulatory sanctions<sup>1</sup>, found that regulators are too reliant on criminal prosecutions as their main sanction. It recommended that they make greater use of a range of administrative sanctions, including fixed-penalty notices and statutory notices, which are less of a burden on their limited resources than criminal prosecutions.

Statutory notices are already part of the environmental regulation toolkit for both the Environment Agency and local authority environmental health departments. However, although they can be a quick and easy sanction for the regulator to apply, they can be costly and time-consuming for businesses, which bear the burden of contesting the imposition of a notice.

The Macrory Report made a number of recommendations for improving statutory notices, such as allowing an appeal against the notice to proceed through a specialist regulatory tribunal rather than the Magistrates Courts, and allowing regulators to impose administrative sanctions for breaches of notices rather than being forced to begin a criminal prosecution.

Although the government has accepted the recommendations of the Report in full, these changes have not yet been put into place. However, environmental regulators are already armed with

powers to issue notices, and the Report's endorsement of the statutory notice regime is leading to an increase in the number being served on businesses, if the authors' workload is anything to go by.

### STATUTORY NUISANCE

Perhaps the most common form of statutory notice currently used in environmental regulation is an abatement notice served by a local authority under the statutory nuisance regime. The statutory nuisance legislation is intended to provide a summary procedure for the prevention of statutory nuisances. However, as can be seen below, the law in relation to statutory nuisance has become complex and the potential effects on businesses can be severe.

Section 79(1) of the Environmental Protection Act 1990 (the EPA) establishes the categories of nuisance, which include smoke emissions, 'effluvia' and noise from premises. To constitute a statutory nuisance, the issue complained of must be 'prejudicial to health' or a 'nuisance'. The Clean Neighbourhoods and Environment Act 2005 (the CNEA) recently extended the list of statutory nuisances to include light pollution and nuisance from insects.

The enforcement of statutory nuisances generally lies with the environmental health officer (EHO) for the local authority. If the EHO considers that a statutory nuisance is occurring, they are usually obliged to serve an abatement notice. Section 80(1) of the EPA states that the abatement notice can require the abatement of the nuisance, prohibit or restrict its occurrence or recurrence, or require the execution of works or other steps as may be necessary for those purposes. The abatement notice must specify a time for compliance. However, the Court of Appeal in *R v Falmouth and Truro Port Health Authority, ex p South West Water Services* held that the local authority could leave the choice of means of abatement to the recipient of the notice. As such, the abatement notice can merely state that the recipient should 'abate the nuisance'. In practice, to reduce the grounds of challenge of the abatement notice, local authorities tend to adopt this approach.

The sanction for failing to comply with an abatement notice is a criminal prosecution resulting in a fine of up to £20,000 or, in theory, imprisonment. For businesses, it is a defence to a prosecution to show the business is using 'best practicable means' (BPM). BPM is also a ground of appeal (see below). However, to establish whether BPM is being used generally requires costly expert evidence. >

A company that receives an abatement notice needs to decide whether to:

- i) take steps to abate the nuisance (usually without any clear guidance as to what those steps may be or any guarantee that those steps will be successful);
- ii) carry on as before with the risk of a criminal prosecution; or
- iii) appeal the notice.

The first of the above options is difficult for a company. It is unlikely to be cost-effective to implement any substantive work or change of procedures in the absence of clear guidance on how the nuisance can be abated.

Option two is a brave tactic. A business may be prepared to rely on a defence of BPM, but there are cost, time and public relations implications in defending a criminal prosecution, and not all of the costs may be recoverable even if that prosecution is successfully defended.

The third option is often the best. An appeal must be made within 21 days of the date of service of the abatement notice. It is important to note that this time limit cannot be extended. Therefore, if no appeal is made within that period, the business is stuck with a notice it must comply with, or risk criminal prosecution.

The grounds of appeal are contained in the Statutory Nuisance (Appeals) Regulations 1995. There are nine specified grounds of appeal, including that the business was using BPM on the date the notice was served. On each occasion, the company must carefully analyse the grounds of appeal that it should rely on. To do so, it will need to consider the notice itself, its requirements, and the procedure used for service of the notice by the local authority.

The appeal is by way of a 'complaint' to a Magistrates Court. The form of the complaint is prescribed.

Once the appeal has been issued by the Magistrates Court it proceeds as a civil claim in that court. This has two important consequences. First, there are limited rules about procedure and no express provisions for the court to order, for example, disclosure of evidence. In practice, most courts will list an early hearing and make directions. However, there is little consistency across Magistrates Courts. Secondly, the tribunal may well consist of three lay magistrates who are required to consider complicated issues of law and expert evidence in order to make a decision. In a complicated case involving a large commercial organisation, this is arguably inappropriate.

So how does the statutory nuisance regime apply in practice?

#### Practical example

A local authority receives complaints from residents about odour from a food operation in the vicinity. It is inevitable that odours will be created by the food operation. The company believes that it is taking all the appropriate steps to prevent any odour, but, in practice, odour will be emitted for reasons beyond its control on two or three occasions each year.

The EHO receives pressure from the residents, one of whom happens to be a member of the council. Faced with that pressure the EHO serves an abatement notice upon the food operator requiring the operator to abate the nuisance from odours within 21 days. The EHO does not state how that should be done.

The food operator has 21 days in which to make a decision. The only safe way of complying with the abatement notice is to cease operations altogether. That is clearly not a sensible route. The food operator may wish to get an expert report confirming that it is operating BPM. However, such a report will not be available within 21 days. As such, the safe option for the food operator is to appeal the abatement notice to the Magistrates Court. This clearly has significant costs consequences, but gives the food operator time to gather any evidence that it needs and to negotiate further with the local authority.

#### NOTICE TO REQUIRE REMOVAL OF UNLAWFULLY DEPOSITED WASTE

Under s59 EPA, the Environment Agency has the power to serve a notice on an occupier of land requiring it to remove waste from the land it occupies. Such a notice must specify a period for the removal of the waste of not less than 21 days.

The EPA provides a right of appeal against the service of such a notice by 'summary

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application' within 21 days. Again the appeal is to a Magistrates Court.

The grounds of the appeal are set out in s59(3) EPA and require the court to quash the requirement in the notice if it is satisfied that:

- '(a) The appellant neither deposited or knowingly caused or knowingly permitted the deposit of the waste; or
- (b) there is a material defect in the notice.'

In any other case the court 'shall either modify the requirement or dismiss the appeal'.

A company served with a section 59 notice will face issues similar to those caused by an abatement notice (see i) to iii) above).

**Practical example**

A company has a site on which it operates a waste transfer station, for which a pollution prevention and control (PPC) permit is required. At the waste transfer station it separates concrete and other inert materials from the waste. On part of its site (but outside the area covered by the permit) it crushes these materials for onward sale. The materials, once crushed, have a commercial value.

The local Environment Agency officer considers that the processed material is waste and serves a section 59 notice requiring its removal within 21 days.

It is not possible for the company to remove the material within 21 days unless it is disposed of to landfill with significant cost and environmental implications. Further, the product has commercial value and, arguably, does not fall within the definition of 'waste'.

As a result, the company is forced to issue an appeal against the section 59 notice in the Magistrates Court. This incurs legal fees, but pursuing an appeal may give the company time to sell the material.

As the company had deposited the waste it can only appeal the notice on the basis that there is a 'material defect' in the notice. Therefore, careful consideration is required of what constitutes a 'material defect'. This could be something as simple as an inaccurate plan attached to the notice, or, at the other end of the spectrum, an argument that the material described in the notice is not 'waste'.

**LITTER CLEARING NOTICES**

Another example of the increasing number of statutory notices available to the regulators is the

litter clearing notice, which the CNEA introduced into the EPA at s92A.

Section 92A EPA gives the 'principal litter authority' (in most cases the local authority) the power to serve a notice on a party to clear litter or refuse and:

'... if the principal litter authority is satisfied that the land is likely to become defaced by litter or refuse again, to take reasonable steps to prevent it becoming so defaced.'

Section 92B EPA provides that an appeal can be made against the litter clearance notice to a Magistrates Court within the period of 21 days beginning on the date the notice is served. It sets out the grounds of appeal, namely that:

- '(a) There is a material defect or error in, or in connection with, the notice;
- (b) The notice should have been served on another person;
- (c) The land is not defaced by litter or refuse so as to be detrimental to the amenity of the locality;
- (d) The action required is unfair or unduly onerous.'

Again, see i) to iii) above for the type of issues that a company served with such a notice will face.

**Practical example**

A borough council finds that an area of land contains unacceptable amounts of rubbish and litter. It carries out a search at the Land Registry and establishes that the land is owned by a company (Company A). The borough council serves a litter clearance notice on Company A requiring it to remove the litter and refuse from the land within 28 days and, because it is satisfied that the land is likely to become defaced by litter or refuse again, to carry out monthly inspections on the site and remove any rubbish and litter.

In fact, the land is let to another company (Company B). Company A does not object to clearing the litter and refuse currently on the site because of the minimal cost of carrying out that work. However, it does object to the requirement to carry out monthly inspections on the site and the criminal penalty if it fails to do so. In those circumstances Company A is obliged to appeal the litter clearance notice (unless it can persuade the borough council to withdraw it). Again, that requires a careful consideration of the grounds of appeal and is likely to incur legal fees.

### CONCLUSION

The Macrory Report established that the current regime of appealing statutory notices is unsatisfactory. Ironically, as a result of the Report, far more statutory notices are likely to be served. Until the regulatory tribunal can be established, appeals will be through the Magistrates Courts in most cases.

Statutory notices may be quick, easy and cheap for the regulators to serve. However, there will often be significant financial consequences for a company that receives such a notice. At one end of the scale, it will be cheaper for the company to comply with the notice (for example a litter clearance notice with minimal financial outlay) even if it is not responsible for the matter in question. The alternative – appealing the notice – is likely to be more expensive. However, at the other end of the scale, in the case of abatement notices for example, a company may

be forced to appeal the notice to protect its business interests.

If a company receives a statutory notice, it must be acted upon as soon as possible. The time limits for appeal are very short and cannot be extended.

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*R v Falmouth and Truro Port Health  
Authority, ex p South West Water Services  
[2000] 3 All ER 306*

### NOTES

- 1] Professor Richard Macrory, 'Regulatory Justice: Making Sanctions Effective', November 2006.