Neutral Citation Number: [2009] EWHC 2885 (Admin)

Case No: C0/2542/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2009

Before :

LORD JUSTICE SCOTT BAKER
MR JUSTICE CRANSTON

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Between :

	ETHOS RECYCLING LIMITED	**Claimant**
	- and -	
	BARKING & DAGENHAM MAGISTRATES COURT **LONDON BOROUGH OF BARKING AND DAGENHAM**	**Defendant** **Interested Party**

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Ms Samantha Riggs (instructed by **Messrs DMH Stallard**) for the **Claimant**
Mr Shaun Murphy (instructed by **Messrs Edward Duthie**) for the **Respondent**

Hearing dates: 7/8 October 2009

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Judgment

Lord Justice Scott Baker:

1. This is the judgment of the court to which each member has contributed.

2. The application before the court is for judicial review of a decision of District Judge Woolard in the Barking and Dagenham Magistrates' Court given at Havering Magistrates Court on 5 February 2009. The point of law is the meaning of "summary proceedings" in section 79 (10) of the Environmental Protection Act 1990 ("the EPA 1990"). That sub-section

provides:

> "A local authority shall not without the consent of the Secretary of State institute summary proceedings under this Part in respect of a nuisance falling within paragraph (b), (d) or (e) and in relation to Scotland, paragraph (g) or (ga) of subsection (1) above if proceedings in respect thereof might be instituted under Part I or under regulations under section 2 of the Pollution Prevention and Control Act 1999."

3. The issue is whether "summary proceedings" means proceedings instituted in the magistrates' court i.e. a court of summary jurisdiction or whether it includes the service of a notice of abatement, prior to any proceedings, under section 80 of the EPA 1990.

4. The facts of the case are as follows. The claimant, Ethos Recycling Limited, has a site at 2 Creek Road, Barking, Essex. The site lies within the area of the London Borough of Barking and Dagenham ("the Council"). A waste disposal licence was granted in respect of the site on 31 October 1990 under the Control of Pollution Act 1974. It was issued by the London Waste Regulation Authority, a predecessor body of the Environment Agency. The licence contained a number of conditions. Condition 5.2, relating to design and construction, required that the ground surface of the facility should be properly constructed concrete hard standing and should be properly maintained and drained. Condition 7.1 required that the activities on the site would be carried out so as not to be seriously detrimental to the amenities of the locality. Under Condition 7.5 an effective dust suppression system had to be installed to operate during all waste handling activities, including loading and unloading.

5. With the coming into force of Part II of the EPA 1990 the licence became a waste management licence. Originally granted to Earthpause Limited, it was transferred in 1995 to Neptune Skip Co Limited ("Neptune"). In November 2007 a member of the Ethos group of companies, Sustainable Recycling Solutions Limited, purchased Neptune. The claimant is the company within the Ethos group which operates waste recycling centres including that at 2 Creek Road; it operates the site on behalf of Neptune. As a result of the Environmental Permitting (England and Wales) Regulations 2007 SI No 3538 ("the 2007 Regulations"), the waste management licence became an environmental permit on 6 April 2008.

6. At the time of its acquisition by the Ethos Group the site was in a bad state. It had no concrete pavement or other properly formed hard standing. Work commenced to improve the site in December 2007 and by the summer of 2008 improvement measures included the provision of concrete walls and a concrete base and the installation of a dust sprinkler system.

7. As the licencing authority the Environment Agency has carried out a number of compliance assessments of the site. An assessment on 5 February 2008 found that condition 5.2 in relation to infrastructure had been breached, as had a condition in relation to incident management. The officers of the Environment Agency carrying out the assessment noted that the site was being vastly improved, concreting was being carried out and new waste bays and storage areas were being put in place. Leniency was granted regarding contraventions for a short period of time while the site was being redeveloped. A further compliance assessment on 3 May 2008 found a breach in relation to amenity conditions in that there was no dust suppression system. The officers noted that a complaint had been made about dust being blown onto the River Road Business Park. Indeed the officers could see that dust was blowing from within the site and it could seen covering the cars in the car park and in the air. The yard did not appear to have the ability to control dust from this type of operation. The officers noted that there was only a garden hose and water from a concrete batching plant. The report noted: "(A)n effective dust suppression system to be installed."

8. Four days later, on 7 May 2008, the Environment Agency conducted a further compliance assessment visit. Two environmental services officers from the Council's Environmental and Enforcement Services Department were in attendance. The report subsequently drawn up noticed that there had been complaints from several neighbouring businesses about the amount of dust and that the amount of dust which had accumulated off-site could be seen first hand. Employees had had to stop work the day before due to the amount of dust irritating their eyes. The trommel was activated and the officers noted the amount of dust generated by it and by vehicles moving around the site. The Local Authority advised and the Environment Agency noted that the following actions were to be implemented:

- The yard was to be cleared of existing dry waste by the end of that evening and taken to another depot.

- A sprinkler system had to be installed by the end of the following day.

- The yard had to be completely concreted by 11 May.

- The yard had to be covered by the end of the month i.e. 30 May.

A warning was to be issued in relation to the unacceptable amount of dust causing a nuisance to nearby businesses. The report arising from that visit of 7 May was e-mailed to the claimant on 28 May. No further enforcement action was taken.

9. A week after the visit on 14 May an Environment Agency officer undertook a further compliance assessment. At the site she met an environmental services officer from the Council. There was no issue with dust at the time of this visit. The yard had been cleared,

sprinklers had been installed around the yard and on the conveyor belt in the trommel. A small area of concreting still needed to be carried out in the oil storage area. The officer noted that a mobile browser was in constant use at the site, keeping the site surface dampened down, and all materials were being kept damp. It was agreed with the claimant that the shed would be completed by 14 June and sprinklers installed on it.

10. A further compliance assessment visit on 23 May found no breaches of conditions. The work carried out to alleviate the dust problem was thus far coping with the amount of dust generated. On 8 August a compliance assessment visit noted a small quantity of dust from a wood pile when wood was being moved into the trommel, but also that the site surface was being damped down during the visit. Two months later, on 10 October 2008 an Environment Agency compliance assessment visit found dust that was escaping through the cover at the end of the trommel where the blower was situated and a code B notice was issued. One of the claimant's managers said that the trommel would remain out of operation until the problem was fixed. The Environment Agency officer noted that the site surface was dry and no damping down was taking place. Three days later the claimant's manager advised that the trommel had been fixed and dust was no longer escaping.

11. An Environment Agency compliance assessment report based on a visit on 18 November 2008 found that a number of conditions of the permit had been breached but none of them concerned dust. The report noted that various steps taken for dust suppression "appeared to be effective in controlling dust". There was to be a new building erected to house the waste and this would have proper dust suppression installed, making dust suppression on the site more effective.

12. Meanwhile, on 3 June 2008, the Council had served an abatement notice on the claimant. The notice alleged that it was satisfied of the likely occurrence of a statutory nuisance under Section 79(1) of the EPA 1990 at the site arising from dust from vehicle movement and/or wind whipping and/or loading of the trommel and/or stockpiles affecting properties within the vicinity of a nearby property known as 33 River Road, Barking, Essex. It required the claimant to prohibit the occurrence of the alleged nuisance within 21 days from the service of the notice. Specifically the claimant had to:

(1) install a sprinkler system to prevent dust from the loading of the trommel and stockpiles travelling outside the premises boundary;

(2) complete the concreting of the yard so that the browser could travel across it and damp the yard;

(3) erect a yard cover for the stockpile unloading area, stockpiles and trommel loading area to prevent dust travelling outside the premises' boundary.

13. It is to be observed that the steps to be taken under the abatement notice were very similar to those agreed at the site visited on 7 May 2008. The Environment Agency could have served an enforcement notice under regulation 36 of the 2007 Regulations. The abatement notice covered both the permitted and unpermitted parts of the site.

14. The abatement notice was signed by one of the Council's environmental services officers who was present at the site with the Environment Agency officials at the two compliance assessment visits on 7 and 14 May 2008. The Council did not seek the consent of the Secretary of State to the service of the abatement notice. It is not disputed that the nuisance sought to be abated fell within section 79(1) (d) of the EPA 1990 which covers, inter alia, dust and therefore fell within a category requiring the consent of the Secretary of State to institute summary proceedings.

15. The abatement notice informed the claimant that if, without reasonable excuse, it failed to comply it would be guilty of an offence under section 80(4) of the EPA 1990 and on summary conviction liable to be fined. The notice also explained that were an appeal to be brought against the notice it would be suspended pending the outcome of the appeal except, where the expenditure which would be incurred in the carrying out of the works in compliance with it would not be disproportionate to the public benefit to be expected.

16. On 23 June 2008, the day before the works required by the abatement notice were to be completed, the claimant appealed against the notice to the Barking and Dagenham Magistrates' Court. At the hearing of the appeal the claimant took as a preliminary point that the abatement notice was a nullity because its service by the Council was prohibited by section 79(10) without the prior consent of the Secretary of State. On 5 February 2009 District Judge Woolard rejected that contention. This application for judicial review relates to that preliminary ruling. The appeal before the Magistrates' Court has been adjourned until the outcome of this judicial review is known.

17. The critical question in the present case is therefore whether the Secretary of State's consent is required before the service of the abatement notice or whether that consent is only required before the Council takes proceedings in the Magistrates' Court for failure to comply with the notice.

18. The strongest point in favour of the claimant's argument that the Secretary of State's consent in required before service of the abatement notice is to be found in the heading to section 80 of the EPA 1990:

> "Summary proceedings for statutory nuisances"

Section 80, as amended, provides:

> "(1) Subject to subsection (2A) where a local authority is satisfied

that the statutory nuisance exists, or is likely to occur or recur, in the area of the authority, the local authority shall serve a notice ("an abatement notice") imposing all or any of the following requirements –

(a) requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence;

(b) requiring the execution of such works, and the taking of such other steps, as may be necessary for any of those purposes,

and the notice shall specify the time or times within which the requirements of the notice are to be complied with.

(2) Subject to subsection 80A(1), below, the abatement notice shall be served -

(a) except in a case falling within paragraph (B) or (C) below, on the person responsible for the nuisance;

(b) where the nuisance arises from any defect of a structural character, on the owner of the premises;

(c) where the person responsible for the nuisance cannot be found or the nuisance has not yet occurred, on the owner or occupier of the premises.

Subsections (2A), (B), (C), (D) and E are irrelevant for present purposes.

"(3) A person served with an abatement notice may appeal against the notice to a magistrates' court or in Scotland, the sheriff. Within the period of 21 days beginning with the date on which he was served with the notice.

(4) If a person on whom an abatement notice is served, without reasonable excuse, contravenes or fails to comply with any requirement or prohibition imposed by the notice, he shall be guilty of an offence.

(5) Except in a case falling within subsection (6) below, a person who commits an offence under subsection (4) above shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale together with a further fine of an amount equal to one tenth of that level for each day on which the offence continues after conviction.

> (6) A person who commits an offence under subsection (4) above on industrial, trade or business premises shall be liable on summary conviction to a fine not exceeding £20,000."

It is unnecessary to recite the remainder of the subsections.

19. It is common ground that the heading to the section is admissible as an aid to construction, albeit headings are unamendable on the passage of the Bill through Parliament: see *R v Montila & ors* [2004] 1 WLR 3141, paras 32-36.

20. Simply put the point made by Ms Riggs, for the claimant, is that section 80 prescribes what is to happen when the local authority is satisfied that the statutory nuisance exists. Service of the abatement notice falls four square under the heading *"Summary proceedings for statutory nuisances*" and therefore service of the notice must be within the definition of "summary proceedings". Ms Riggs also relies on the long title to the Act which refers to re-stating the law defining statutory nuisances and improving the summary procedures for dealing with them. We doubt, however, whether this takes her argument very much further because there is an obvious distinction between "procedures" and "proceedings".

21. "Summary proceedings" is nowhere defined in the EPA 1990. To most lawyers it imports the concept of proceedings in a court of summary jurisdiction – a magistrates' court and Mr Shaun Murphy for the Council, who are an interested party to this judicial review, draws attention to numerous statutory provisions where the phrase "summary proceedings" is used in this context. On the other hand, we are concerned in the present case with the meaning in EPA 1990. The authors of various textbooks including those of the sixth edition of Bell & McGillivray on Environmental Law (see page 789) suggest a local authority can only serve an abatement notice with the consent of the Secretary of State, thus supporting the interpretation contended for by Ms Riggs. The authors of the second edition of McCracken & Others on Statutory Nuisance at paragraph 10.06 do not go quite so far: they say there is an argument that summary proceedings will only commence following non-compliance with an abatement notice but that it is more likely that all local authority statutory nuisance procedures were intended to be included. The matter has not, however, as far as we are aware, until now been considered by the court.

22. The District Judge said that if Parliament had intended to prevent the local authority from taking any action in the form of an enforcement notice section 79(10) would have required them not to serve any notice under section 80 without the consent of the Secretary of State or the Environment Agency. By that wording Parliament would have made it clear that the local authority had no locus when dealing with the types of premises coming within section 79(10). He added:

> "By using the words "institute summary proceedings" they have in

> my view prevented double jeopardy in the criminal sense by leaving the final decision of enforcement to the Environment Agency without preventing the local authority from taking the preparatory steps necessary to allow them to institute summary proceedings if necessary."

23. In our judgment it is helpful to look at how the legislation has developed in relation to statutory nuisances. The EPA 1990 was an Act that consolidated the Public Health Act 1936 ("the 1936 Act") and the Control of Pollution Act 1974 ("the 1974 Act"). Prior to the 1936 Act the relevant law was to be found in the Public Health Act 1875 ("the 1875 Act"). Section 91 of the 1875 Act defined nuisances. Section 92 made it the duty of the local authority to inspect for the detection of nuisances. Section 94 provided for the service by the local authority of an abatement notice and section 95 for a complaint to be made to justices in the event of non-compliance. Section 96 set out the powers of the court. The side-note reads:

> "Power of court of summary jurisdiction to make order dealing with nuisance."

Section 251 has a side-note, referring to summary proceedings for offences, penalties etc.

24. The relevant scheme of the 1936 Act is to be found in Part III. Section 91 provided a general duty to inspect for statutory nuisances. Sections 92-100 were headed: "Nuisances which may be dealt with summarily". Section 92 was headed "statutory nuisances" and set them out. Section 92(2) provided that a local authority was not, without the consent of the Minister, to institute summary proceedings in respect of certain nuisances that might be instituted under the Alkali, etc and Works Regulation Act 1906. Thus for the first time there appeared the concept of the local authority requiring approval from the Minister or Secretary of State before instituting summary proceedings. The requirement to serve an abatement notice was in section 93 but we do not think that a reader of the 1936 Act would construe service of an abatement notice as falling within the ambit of instituting summary proceedings. Section 94 covered the powers of the local authority and the court where an abatement notice was disregarded. Section 98 specifically referred to summary proceedings *before a court.* Section 100 is another clear indication of summary proceedings involving a court because it gave the local authority a right to take proceedings in the High Court if it thought summary proceedings would have afforded an inadequate remedy.

25. A point which seems to us to tell against the claimant's construction is section 296 of the 1936 Act. The side-note to that section is: "Summary proceedings for offences". The section provided that all offences under the Act could be prosecuted under the Summary Jurisdiction Acts. So, here was the draughtsman using the expression "Summary proceedings" specifically in the context of proceedings in court and not so as to cover

abatement notices.

26. The Control of Pollution Act 1974 was the predecessor to the EPA 1990 with regard to noise nuisance. Section 58 is headed "Summary proceedings by local authorities" and section 58(1) required the local authority to serve an abatement notice where it was satisfied a noise nuisance existed or was likely to recur. Later provisions in the section provided for proceedings where an offence had been committed. In particular section 58 (4) provided that if a person served with a notice without reasonable excuse contravened it he was guilty of an offence. Whilst the point was made that service of an abatement notice fell under the section head of "summary proceedings" and to that extent it was similar to section 80 of EPA 1990, local authorities were not required to obtain the Secretary of State's approval before commencing proceedings under the 1974 Act, i.e. there was no equivalent provision to section 79(10) of the EPA 1990.

27. We do not think the legislative history supports the construction urged upon us by Ms Riggs. Insofar as it is of assistance it supports the Council.

28. Ms Riggs submits that for the purpose of the EPA 1990 to be achieved it is necessary to construe "summary proceedings" as not just covering proceedings in a court of summary jurisdiction but also things done outside the court. This includes not only the process of serving an abatement notice but also the abatement of a nuisance which is something a local authority has power to do under section 81(3).

29. The claimant put before the court a great deal of material on the subject of dual regulations and the need to ensure that there is no duplication of enforcement by the local authority on the one hand and the Environment Agency on the other. In 2003 the Environment Agency and the Local Government Association agreed a memorandum of understanding "Working Better Together" designed to enhance performance and better cooperation between local authorities and the Environment Agency. The Environment Agency's enforcement and prosecution policy dated August 2008 explains in its introduction that its agency functions are extensive and that its officers work with local government and other regulators on matters relating to the environment. The Agency regards prevention as better than cure, offers information and advice to those it regulates, seeks to secure cooperation avoiding bureaucracy and excessive cost, and where a criminal offence has been committed will consider whether to institute a prosecution, administer a caution or issue a warning.

30. The Environment Agency's environment and prosecution policy should be seen against a background of government policy set out in documents such as the Department of Trade and Industry's Enforcement Concordat: Good Practice Guide for England and Wales, and the Better Regulation Executives Statutory Code of Good Practice for Regulators. In very broad terms that policy is to implement business regulation according to standards such as openness, helpfulness, proportionality and consistency. We do not think there is any serious dispute about the principle of generally avoiding duplication of enforcement. The

issue is whether and if so how the principle effects the construction of sections 79 and 80 of the EPA 1990.

31. The Council in the present case and the Environmental Agency had received a number of complaints from the claimant's neighbours about nuisance arising from dust from its premises. The Council, rather than the Environment Agency, is the more natural recipient for such complaints. The Council is obliged subject to some qualifications that are irrelevant for present purposes, to issue an abatement notice the purpose of which is to prevent the continuation or recurrence of the nuisance where they are satisfied that such a nuisance exists, see *R v Carrick District Council ex parte Shelley* [1996] Env LR 273. It seems to us that it would be wholly artificial in such circumstances to require the Council first to obtain the consent of the Secretary of State. Such a step would inevitably take time and frequently time is of the essence. Neighbours are complaining and expect prompt action from the Council. The company can, as in the present case, appeal against the abatement notice. It seems to us entirely logical, practical and in keeping with the published policy to which we have referred that the consent of the Secretary of State should be required prior to the commencement of proceedings for failure to comply with the abatement notice rather than at an earlier stage.

32. Mr Murphy makes the further point that section 82 of the EPA 1990 contains a similar heading to section 80 only on this occasion it is "Summary proceedings *by persons aggrieved* by statutory nuisance*"*. There is no question here of having to obtain the Secretary of State's consent and the expression summary proceedings in this heading is plainly referring to court proceedings. Here, the aggrieved member of the public must first give written notice of the existence of a statutory nuisance and of the intention to bring proceedings if it is not abated. So, the situation is analogous to the service of an abatement notice by the local authority. Mr Murphy's argument is that if Ms Riggs argument is correct the phrase "summary proceedings" has different meanings in two sections in the same Part of the Act and there is no reason why this should be so. Mr Murphy also makes the point that while inevitably there is an element of dual regulation what is important is that there should be consistency of approach.

33. In our judgment the true construction of the phrase "summary proceedings" in section 79 (10) of the EPA 1990 is as found by District Judge Woolard. This seems to us to be the natural meaning of the phrase. It is also the meaning that is consistent with the earlier statutory history and in our view accords with the practicalities of local authorities meeting their responsibilities for dealing with statutory nuisances in the context of their relationship with the Environment Agency.

34. For these reasons we dismiss this application for Judicial Review.