Case No: A1/2011/1250

Neutral Citation Number: [2012] EWCA Civ 312
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT
MR JUSTICE COULSON
HT09165

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2012

Before :

LADY JUSTICE ARDEN
LORD JUSTICE CARNWATH
and
LORD JUSTICE PATTEN

- -

Between:

BARR & ORS	**Appellants**
- and -	
BIFFA WASTE SERVICES LIMITED	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

- -

Stephen Tromans QC, John Bates & Catherine Dobson (instructed by **Hugh James**) for the **Appellants**
Ian Croxford QC & Thomas De La Mare (instructed by **Nabarro LLP**) for the **Respondent**

Hearing dates: Tuesday 24th & Wednesday 25th January, 2012

- -

Judgment

Carnwath LJ:

Introduction

The issues

1. This is an appeal from the judgment of Coulson J given on 19th April 2011. He dismissed claims for nuisance by smell from a waste tip operated by Biffa in Ware, Hertfordshire. The case took the form of a group action brought by 152 households on the nearby Vicarage Estate, of whom 30 were selected as lead claimants, taken from three defined "zones" within the estate.

2. Such cases conventionally turn on issues of fact, to be decided in accordance with well-settled principles of law. This case was seen by Biffa as a test case, having regard to its major interests in waste-tipping, and its wish to achieve a degree of certainty as to its responsibilities in similar cases. It developed into a prolonged and very expensive battle, involving what the judge described as a "clash between two potentially irreconcilable principles":

> "On the one hand, the claimants contend that they have 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; on the other hand, Biffa submit that it would be unfair and unrealistic if the cascade of legislation and the terms of their permit were ignored, so that they could comply with all their numerous obligations and the detailed provisions of their permit, and still find themselves liable to the claimants in nuisance, as if the legislation and the permit did not exist." (para 3)

At the end of a massive (590 paragraphs) and intricately reasoned judgment, the judge came down in favour of Biffa on the legal issues, and dismissed all the individual claims.

3. At first sight it is hard to understand how the process of resolving this narrow issue of law, and applying the result to the facts, became so long, hard-fought and expensive. As will be seen, the judge criticised both parties, Biffa for adopting an unnecessarily aggressive even "bullying" approach, following their conviction in October 2007, and extending into the trial; and the claimants for the complications resulting from the "group litigation policy" adopted by their solicitors, Hugh James, which in his view had resulted in the arguable claims of a few in effect being swamped by a mass of less meritorious claims.

4. For us the question is whether the judge was right in law on the principal issues. If he was, the appeal fails. If he was not, then his factual assessment of at least some of the individual claims was made on the wrong basis. It will be necessary to consider which of the claims, if any, can nonetheless be ruled out even disregarding the legal

errors. For the remainder the case will have to be remitted to an appropriate forum for further review on the correct basis.

5. I have considerable sympathy for the judge faced with a case which, for the reasons he outlined, had grown out of all proportions to its subject-matter (more appropriate, as he observed, to the County Court). However, in their essential features, the law and its application to the facts could, and in my view should, have been seen as relatively straightforward. It is unfortunate that the judge was persuaded to undertake what became an elaborate reinterpretation of the law of nuisance, involving citation of some 45 authorities (rising to an agreed list of 60 authorities in this court). The common law is at its best when it is simple.

6. In the interests of clarity, the remainder of this judgment is divided into two parts. Part I is the main judgment, in which I give an outline of the facts and relevant legal principles, and my views on what I see as the essential issues in the case, including the individual claims. Part II is a fuller analysis of the judge's reasoning and my detailed response to it. For the most part Biffa's submissions follow and support the judge's reasons (except in respect of the cross-appeal). I hope I will be forgiven therefore, if, except where indicated, I do not deal with them separately.

PART I MAIN JUDGMENT

Factual background

7. The Westmill site lies immediately to the north-west of the A10 road. The Vicarage Estate ("the Estate") lies immediately to the south-east of the road. It includes some 1,500 homes. There is a history of quarrying and backfilling in this area. The Estate was built in the late 1970s and early 1980s, some of it on previously tipped land.

8. The 30 lead claimants, including Mr Barr, were selected jointly by the parties to provide a range of residents:

> "They are principally based in Zone 1, which is the part of the Vicarage Estate which is closest to Westmill 2, and includes Dovedale, The Larches, Wheatsheaf Drive, The Hawthorns and Greyfriars. The remaining lead claimants come from Zone 2 (which is to the east of Zone 1 and therefore further away from the landfill site), and Zone 3 which lies to the south of Zones 1 and 2. Parts of Zone 3 are the furthest of all from Westmill 2 and, because of the prevailing winds, even those parts which were closer to the site were less affected by odour than Zones 1 and 2." (para 4)

9. Planning permission for tipping of industrial and household waste at Westmill was granted by the district council in April 1980. Tipping on the first part, Westmill 1, began in 1984, and seems to have continued without controversy until spring 2004, when it stopped receiving waste. A Waste Management permit for tipping of "pre-

treated waste" at Westmill 2 was granted by the Environment Agency on 7th April 2003. The permit was transferred to Biffa in April 2004.

10. The permit was subject to detailed conditions, which included requirements for compliance with a defined Working Plan, and measures to "control, minimise and monitor" odours. Clause 2.6.12 provided:

> "There shall be no odours emitted from the Permitted Installation at levels as are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality outside the Permitted Installation boundary, as perceived by an authorised officer of the Agency."

11. It is convenient to note in parenthesis that the condition was amended in February 2009 to read:

> "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 all appropriate measures, including but not limited to those specified in any approved odour site management plan, to prevent or where that is not practicable to minimise the odour."

The judge commented that "the change to an express 'reasonable care and skill' test (was) much more in keeping with the relevant legislation" (para 171).

12. Going back to the original permit, the Working Plan was at this stage directed to "Landfill Gas Odour Monitoring" (para 25). "Curiously" (as the judge observed) it was not until December 2004, some months after the first complaints, that an Odour Management Plan was prepared, addressing the particular odour problems then experienced. He thought it "unfortunate" that Biffa had not been required to "anticipate and address them" in the original working plan (para 37).

13. The tipping was to be carried out in "cells". The judge noted (para 14) that Cell 1 was closest to the A10 and therefore closest to the Vicarage Estate. Next, to the north-east, came Cells 2, 3 and 4. The remaining Cells, from Cell 5 onwards, were further away. At the hearing in this court, Biffa provided some more detailed information, which showed that the closest to the Estate, after Cell 1, were cells 2 and 4a. The order of tipping of the closest cells was:

i) Cell 1: July 2004 – September 2005

ii) Cell 2: September – October 2006

iii) Cell 3: October 2006 – October 2007

iv) Cell 4a: September 2007-February 2009

When considering the pattern of complaints, it is significant that tipping started in the area closest to the Estate, moved away during 2006 and 2007, but moved closer again in late 2007 and 2008.

14. Waste disposal began at Westmill 2 in July 2004. Within one week, complaints began. In late August 2004, particularly over the bank holiday weekend, the odours were very strong. One resident described the smell over that weekend as –

> "… like a cross between a dustbin lorry and rotten fruit and veg. It was a very bad smell, almost like you hadn't emptied your bin in months" (para 27)

15. The principal cause of the problem was not in doubt. An important change as compared to the tipping at Westmill 1 was that this waste was "pre-treated". The judge explained:

> "In practice, this meant that the waste received at Westmill 2 would have been first gathered at transfer stations in order that certain types of waste, such as waste that could be recycled, had been removed. Thus the waste coming to Westmill 2 was not recyclable. That meant that it was likely to be more organic and, because of the delays in getting it to site, more odorous. The evidence was that Westmill 2 was the first, or one of the first, landfill sites in the country to accept pre-treated waste." (para 20)

16. It was soon clear that this was the main cause of the smells suffered by the residents, and that it was not unique to this site. On 29th September 2004, at the first "liaison meeting" between the lead group of residents and Biffa representatives, Biffa's manager noted that the pre-treated waste had longer to decompose before it reached the site, and that Biffa has seen "a national trend in odour complaints as a result". The judge commented:

> "This succinctly recorded, at a very early stage, the principal cause of the problems that were to be experienced, on and off, over the next 5 years." (para 30)

17. Not surprisingly Biffa were anxious to find a practical solution, and they expected to be able to do so. For example, their notes for a public meeting in July 2005 referred to the various mitigation measures that had been taken and concluded:

> "We believe the measures we are taking are working. We remain very committed to resolving this problem. We have undertaken all the actions promised and fully appreciate that the only result the residents seek is to be rid of any odours from this site. It is worth noting that the general standards of operation have improved considerably since Biffa took over

> and we continue to strive to achieve our policy of being good neighbours with an open door approach to local communities."

The judge commented:

> "There was no suggestion in these notes that the residents' complaints were somehow exaggerated or unjustified." (para 68)

18. Unfortunately these hopes proved unfounded. The course of events over the next five years is described by the judge in meticulous detail (over 150 paragraphs). For present purposes the main events can be stated shortly. Problems of smell continued intermittently for that whole period. They were prevalent when the tipping was closer to the Estate, or nearer to the surface, and in warmer weather (see e.g. judgment paras 79, 86, 93, 100, 105). In spite of the continuing efforts of Biffa, encouraged by the Environment Agency, no complete solution was achieved so long as the tipping remained close to the Estate.

19. In June 2005 the Environment Agency launched a prosecution relating to alleged breaches of condition 2.6.12 on nine separate days between August 2004 and February 2005. The prosecution was delayed by a dispute over the validity of the condition, which was determined against Biffa by the Divisional Court at the end of 2006. It eventually resulted in convictions in October 2007 on four of the charges, the others failing for lack of sufficient evidence.

20. Although the prosecutions related to incidents more than two years before, the problems were continuing. For example, an internal Biffa report dated 21 June 2007 stated that Biffa were "aware that the problem of odour emissions could not be easily resolved". It referred to the "extremely large number of complaints" during 2005, due mainly to the proximity of the site to residential housing "and lack of controls in place at the time", but it also noted continuing complaints in spite of controls put in place by Biffa.

21. The author of the report made a number of criticisms based on a recent inspection of the site: for example, that the odour control system was not covering all the area and very few nozzles were working, so the system "had little effect on the odour leaving the site", that the site staff were unaware "of the intensity or extent of the off-site odour prior to the audit, despite the odour-monitoring plan stating the need for more regular odour inspections at sensitive receptors"; and the inadequacy of the waste cover which was "inappropriate for a site with numerous odour complaints" (para 107).

22. In autumn 2007 there was a notable escalation of the dispute on both sides. The firm of Hugh James, solicitors, became involved for the residents. On 2nd August 2007, residents of the Vicarage Estate received a letter from the firm saying that they had been instructed to investigate the possibility of pursuing compensation claims against

Biffa. They proposed an evening meeting for all interested residents in early September. The judge commented:

> "This was the start of the process which has led to this Group Litigation. It appears that Hugh James had been alerted by the forthcoming rehearing of the EA prosecution."

He declined to comment on Biffa's description of Hugh James' strategy as "ambulance-chasing" (para 101).

23. On the other side, following the convictions, Biffa's attitude to the Environment Agency became more aggressive, as they decided to "ratchet up" the pressure on the Agency (para 122). The judge referred to their "belligerent post-conviction stance", which led them "to find fault with everything that the EA did" (para 135). Towards the end of his judgment, he described this change of stance in even stronger terms:

> "I am particularly troubled by Biffa's conduct after the conviction. They changed their approach almost overnight. No point was too trivial for them to argue about; no issue was too peripheral for it not to be the subject of a lengthy letter from Mr Savory. They appear to want to bulldoze the EA into doing precisely what they wanted, and the level and scale of the intimidation was obvious from the correspondence. Although I accept that there was a certain amount of liaison between Hugh James and the EA, and that at one stage an injunction had been threatened, I do not believe that these considerations justified Biffa's hostility...." (para 571-2)

24. In the meantime the problem remained unsolved. In March 2008, "after a lull", complaints began to increase again (para 131). In a report in May, the Environment Agency's officer Mr Pynn noted that –

> "following a peak in 2005, the number of odour complaints to date in 2008 were greater than the same time in 2006 or 2007" (para 136).

25. It is clear that the problem remained of considerable commercial concern to Biffa. The judge quoted an internal email dated 16 May 2008, relating to a site audit the previous day, which referred to the potential difficulties relating to inputs from the transfer stations at Barking and Edmonton:

> "Inputs from Barking and Edmonton represent approximately 30% of Westmill's input and are a long-term strategic outlet for the waste. It is of vital importance to Westmill's performance and the transfer stations' long-term viability that they continue to dispose of their waste at Westmill. We do not want to get into a situation where the EA or Biffa decide that the transfer stations cannot continue to tip at Westmill because that will

> severely jeopardise the long term security of all the operations."

26. There was a "spate of complaints" on 12th and 13th June 2008, and "not for the first time the odour control system malfunctioned" (para 149). Complaints continued into July. On 16th July, after a "batch of complaints" Mr Pynn attended the site, and found "a strong waste odour to be present and persistent throughout several residential streets", which was "highly likely" to be emanating from the Westmill site (para 151).

27. The judge noted that, at a meeting on the 21st July 2008, "for the first time" Biffa disputed the Environment Agency's findings of smells. He attributed the disagreement to the fact that odour "was usually transient and thus came and went without warning", and that the assessments were carried out "at different times in different places by different people". He regretted that the Environment Agency and Biffa did not carry out joint inspections:

> "Unhappily there is almost an air of childishness about the exchanges as to what happened on 16 July, particularly as the underlying position could not be contested: the weighbridge clerk himself had noted, that there were 'very, very smelly' loads from Biffa transfer stations at Westmill 2 on 16 July." (paras 153-4)

The Environment Agency issued a formal warning to Biffa in respect of incidents in July, August and October 2008, with a view to possible prosecution (para 170).

28. Eventually, sometime in 2009 the odours "reduced to such an extent that (residents) felt they could put up with them" (para 182). It was common ground that events after October 2009 were of no significance to the action. There is no express finding as to why the problem ceased. I infer that it was simply because tipping in the cells close to the Estate was completed, and the works moved further away.

29. Proceedings were commenced on 5th May 2009. The trial took place in November and December 2010. Coulson J handed down judgment on 19 April 2011.

Comment on the findings of fact

30. Before leaving the factual account, I should mention two matters, on which the findings of the judge are not entirely clear: first, the public importance of the activity carried on by Biffa at the site; secondly, the technical feasibility of avoiding escape of smells.

31. On the first, the judge made some passing comments referring to the significance of Biffa's activities from a public point of view. For example, late in the judgment (para 388), he referred to Westmill 2 as providing "a necessary, even vital, environmental service", but he did not discuss the evidential basis for this comment. Mr Croxford took us to the pleadings in which it had been alleged by Biffa, and apparently not challenged, that this site was of strategic importance to the disposal of London's

waste. However, had the judge regarded this as important to his reasoning, one would have expected him to make a more specific finding, with an indication of the supporting evidence. I infer that he did not do so, because, after discussion of the authorities (including *Miller v Jackson* [1977] QB 966, *Dennis v Ministry of Defence* [2003] EWHC 793; see "Beneficial activities", para 233-5), he accepted that consideration of public benefit was of no (or very little) significance in law.

32. As to the practicability of containing the smells within the site, there seems to have been surprisingly little technical evidence at the trial. The contemporary Biffa reports give a mixed message. On the one hand, the tipping of pre-treated waste appears to have created a new and unfamiliar challenge, affecting a number of their sites around the country, and for which special mitigatory systems were deemed necessary. On the other hand, the judge thought it strange that this problem had not been anticipated and covered in the initial working plan. His chronological account identifies, even in Biffa's own reports, apparent shortcomings from time to time in the management and supervision of these systems. It is not clear, therefore, how far failure to limit smells in the first or subsequent years was due to inadequate planning, inadequate remedial measures, inadequacy of implementation, or the intractable nature of the problem.

33. The judge did not find it necessary to make any express findings on these aspects. This, it seems, was because allegations of negligence or mismanagement, made in the original pleadings, were not pursued. The judge highlighted this as a point of significance early in his judgment:

> "..., the claimants have said in clear terms that they 'do not allege any breaches of permit and do not seek to persuade the court that any particular instance was in breach of the permit'. Accordingly, it is no part of the claimants' case to seek to rely on any breaches of the terms of the permit – whether alleged or proved in the Magistrates' Court or otherwise – in support of their claim for nuisance. Thus the claimants' claims in these proceedings are based on simple nuisance only, and *I must assume that Biffa were neither in breach of the conditions of the permit* (save in one limited respect, dealt with at paragraph 118 below), *nor negligent*. As will become apparent from the following Sections of this Judgment, these express and self-imposed limitations on the claimants' claims are of considerable significance." (paras 10-11, emphasis added)
>
> (The "limited" exception in paragraph 118 related to the four incidents subject of the convictions in October 2007.)

34. This comment seems to me, with respect, to go a step too far. The "assumption" appears to beg the very question which the judge had identified as lying at the heart of the dispute. Of course, if Biffa were right in law, the absence of such an allegation of negligence or breach of condition would no doubt leave a serious gap in the claimants' case. However, their case was that they did not need to prove breaches of

the permit or negligence to establish their case in nuisance. If that was right, it was immaterial, other than by way of background, whether Biffa could or should have done more to mitigate the problem. The residents' failure to make any specific allegation of breach by Biffa could be no more than neutral. It could not support a positive case in favour of Biffa.

35. Either way, there was no reason for the judge, in evaluating the facts, to assume in Biffa's favour a degree of compliance which was not established by the evidence.

The law

36. In my view this case is governed by conventional principles of the law of nuisance, which are well-settled, and can be found in any of the leading textbooks. Thus, in *Clerk & Lindsell on Torts* 20th ed. chap 20, the third category of nuisance is that caused by a person "unduly interfering with his neighbour in the comfortable and convenient enjoyment of land". Typical examples include "creating smells by the carrying on of an offensive manufacture or otherwise" (paras 20-06,-09). Relevant to this case are the following rules:

i) There is no absolute standard; it is a question of degree whether the interference is sufficiently serious to constitute a nuisance. That is to be decided by reference to all the circumstances of the case (20-10).

ii) There must be a real interference with the comfort or convenience of living, according to the standards of the average man (20-11), or in the familiar words of Knight Bruce VC:

> "… not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people" *(Walter v Selfe* (1851) 4 De G&Sm 315, at p 322).

iii) The character of the neighbourhood area must be taken into account. Again in familiar 19th century language, "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey…" (20-13, citing Thesiger LJ, *Sturges v Bridgman* (1879) 11 ChD 852, 856).

iv) The duration of an interference is an element in assessing its actionability, but it is not a decisive factor; a temporary interference which is substantial will be an actionable nuisance (20-16).

v) Statutory authority may be a defence to an action in nuisance, but only if statutory authority to commit a nuisance is express or necessarily implied. The latter will apply where a statute authorises the user of land in a way which will "inevitably" involve a nuisance, even if every reasonable precaution is taken (20-87).

vi) The public utility of the activity in question is not a defence (20-107).

Illustrative cases

37. The application of these principles to facts such as the present can be sufficiently illustrated by reference to three cases, two old, and one more modern:

(i) Polsue and Alfieri v Rushmer [1907] AC 121 (CA [1906] 1 Ch 234)

38. The claimant lived in Gough Square, which was in an area devoted to printing and allied trades. The defendant had a printing business in the adjoining house. They set up new machinery which caused a serious disturbance at night. The judge held that, notwithstanding the established character of the area, a nuisance was proved, because there was "a serious and not merely a slight interference with the plaintiff's comfort" according to the standard defined in *Walter v Selfe*. His decision was upheld in the Court of Appeal and House of Lords, the latter regarding it as "a hopeless appeal" raising no issue of law (p 123). In the Court of Appeal it was argued that a person living in an area devoted to a particular trade could not complain of activities within that trade carried on "without carelessness and in a reasonable manner". The judge had considered:

> "A resident in such an area must put up with a certain amount of noise… But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendants works may be so substantial as to create a legal nuisance." (p 250, per Cozens Hardy LJ; to like effect p 249, per Stirling LJ)

(ii) Metropolitan Asylum District v Hill (1880) LR 6 App Cas 193

39. Under the Metropolitan Poor Act 1867, the district was required, under directions of the Local Government Board, to provide hospitals for the reception of the sick poor of the metropolis. The district had erected a hospital for reception of persons suffering from smallpox and other infectious diseases. This was held to be a nuisance, not authorised by statutory authority. There was no indication in the statute that the statutory powers should be exercised "at the expense of, or so as to interfere with, any man's private rights" (p 201, per Lord Selborne LC; also p 208, per Lord Blackburn, p 212-3 per Lord Watson). Lord Blackburn acknowledged the difficulty of finding suitable sites to discharge their functions under the Act, but that was a matter for the legislature (p 209).

(iii) Halsey v Esso Petroleum Co Ltd [1961] 1 WLR 683, 695-6

40. The claimant complained about noxious fumes from Esso's oil storage depot. Occasional smells of oil had been around for many years, but in recent years and "growing in intensity and frequency" there had been emitted "a particularly pungent smell, which goes far beyond any triviality, far beyond any background smell of oil". Veale J held that this was a serious nuisance to local residents. Although it was not necessary for the residents to prove the source, he noted that Esso had turned their total through-put to fuel oil (with Government encouragement – see p 686), which in

the heavier grades was heated, and produced smell. Even though the plaintiffs had not made any specific complaints before bringing the action, the judge accepted the truth of their evidence. He had earlier observed that, in spite of the numerous authorities to which he had been referred, the law was not in dispute; that "no absolute standard" could be applied, it being a question of degree whether the interference was sufficiently serious to amount to a nuisance (p 689-91).

Application of the law to this case

41. Judged by these principles and in the light of these authorities, the case against Biffa seems reasonably clear-cut. The introduction of "pre-treated" tipping had resulted in a series of episodes of unpleasant smells, affecting the ordinary enjoyment of residents' houses and gardens. They were not just isolated or trivial occurrences, but continued to attract substantial and credible complaints, intermittently and particularly in warm weather, over five years. Until Biffa's attitude changed in October 2007, there was no real dispute about the significance of the problem, or Biffa's responsibility for it. The likely area of controversy would be about the extent of the problem within the Estate, as between those most directly affected, and the rest of the 150 households who had joined in the group action. It was also clear, judged by conventional principles (notably *Allen v Gulf Oil Refining Ltd* [1981] AC 1001) that Biffa did not have statutory immunity, express or implied.

42. However, Biffa argued, and succeeded in persuading the judge, that this conventional view of the case was too simplistic a view. Their case was that the correct understanding of more recent case-law, taken in the context of the elaborate modern statutory framework, European and domestic, justified and required the reshaping of conventional principles to fit the modern world. In the judge's words:

> "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." (para 359)

43. To develop a modified set of principles appropriate for the modern age, the judge embarked on an arduous journey through 200 paragraphs of legal analysis. Similar industry has been shown in the arguments in this court, the combined skeletons running to more than 120 pages. Biffa's arguments are directed principally to upholding the reasoning of the judgment. In addition, by the cross-appeal, they seek to establish, contrary to the judge's view, that similar flexibility should apply to the principles of statutory immunity.

44. Without disrespect to those efforts, I continue to believe that the applicable law of nuisance is relatively straightforward, and that the 19th century principles for the most part remain valid. Although I will examine the judge's reasoning in more detail in Part II, the essential points can in my view be shortly stated and shortly answered.

45. The following are the main building blocks of the judge's reasoning :

i) The "controlling principle" of the modern law of nuisance is that of "reasonable user". If the user is reasonable, then absent proof of negligence, the claim must fail (para 203).

ii) In the context of the modern system of regulatory controls under EU and domestic environmental legislation, and the specific waste permit granted in 2003, the common law must be adapted to "march in step with" the legislation (para 304). Biffa's user must be deemed to be have been reasonable, if it complied with the terms of the permit (para 350).

iii) Furthermore, the permit was relevant in two other ways:

a) The grant of a permit for what was the first site for tipping of pre-treated waste was "strategic" in nature, and therefore altered the character of the neighbourhood in which reasonableness was to be judged (para 371).

b) The permit (in particular condition 2.6.12) by implication gave statutory licence for "inevitable teething troubles"; and for escape of "a certain amount of odour emission", which was "inevitable", and "inherent" in the granting of the permit and the underlying statutory scheme (para 371, 388, 567).

iv) It followed that in the absence of any specific allegation of negligence or breach of the permit, Biffa's user must be deemed reasonable, and the claims must fail (para 376).

v) In any event, in the light of recent authorities, and since some level of odour was inherent in the permitted activity and accepted by residents, it was necessary to set a precise "threshold", to distinguish between the acceptable and the unacceptable (para 385).

vi) In the absence of any alternative suggestion by the claimants, the judge set the threshold at "one odour complaint day each week (i.e. 52 each year) regardless of intensity, duration, and locality" (para 446). Judged by that test all but two of the claims would have failed (para 538).

46. In my view there are short answers to all these points:

i) "Reasonable user" is at most a different way of describing old principles, not an excuse for reinventing them.

ii) The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. There is no principle that the common law should "march with" a statutory scheme covering similar subject-matter. Short of express or implied statutory authority to commit a nuisance (rule (v) above), there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights.

iii) Further:

a) The 2003 permit was not "strategic" in nature, nor did it change the essential "character" of the neighbourhood, which had long included tipping. The only change was the introduction of a more offensive form of waste, producing a new type of smell emission.

b) The permit did not, and did not purport to, authorise the emission of such smells. Far from being anticipated and impliedly authorised, the problem was not covered by the original Waste Management Plan, and the effects of the change seem to have come as a surprise to both Biffa and the Environment Agency. Nor can they be dismissed as mere "teething troubles", since they continued intermittently without a permanent solution for five years.

iv) There was no requirement for the claimants to allege or prove negligence or breach of condition. Even if compliance with a statutory permit is capable of being a relevant factor, it would be for the defendant to prove compliance, not the other way round.

v) There is no general rule requiring or justifying the setting of a threshold in nuisance cases. The two cases mentioned do not support such a general rule, and in any event concerned noisy activities which could readily be limited to specific days (unlike smelly tipping at Westmill).

vi) By adopting such a threshold, the judge deprived at least some of the claimants of their right to have their individual cases assessed on their merits.

Conclusion

47. In view of the errors of law identified in the previous section, it is not possible to draw any final conclusions from the judge's analysis of the individual claims. In particular, his erroneous adoption of a 52-day threshold pervaded and affected his assessment of the other evidence. The appeal must succeed. By the same token, the cross-appeal, against the judge's rejection of a more conventional application of the statutory immunity defence must be dismissed. The unfortunate consequence is that, for those claimants who have been so deprived, and whose claims are otherwise arguable, there is no alternative but to remit the case to an appropriate forum to complete that assessment.

48. In these circumstances it is unnecessary at this stage to consider the arguments about the judge's assessment of quantum. It is better for them to be looked at after the substantive claims have been assessed on the correct basis. In any event, as I understand it, they fall within a narrow compass. It is common ground that the damages were not to be based on diminution in capital or rental value. Mr Tromans submits that the judge's figure of £1,000 a year for any claims which had succeeded was too low, by reference for example to the judge's comparison with the £2,000 awarded to individual claimants in *Watson* (para 559). Although he did not develop

that argument in oral submissions, he realistically accepted, as I understood him, that, even assuming success for a significant number of the thirty selected claimants, the total is unlikely to add up to more than a few tens of thousands. On any view they will be dwarfed by the costs (probably of the order, so we were told, of £3m on each side).

49. The most important issue now is how to bring these unfortunate proceedings to an end, as speedily and economically as possible, whether by remitter to Coulson J or to another judge, or by mediation, or by some other means. Although there was discussion of the possible options at the hearing, it was apparent and understandable that the parties would need to see our judgments before committing themselves. Now that the judgments will be available, it will be for the parties and their advisers to consider and if possible agree their submissions as to the way forward. The order will in any event need the approval of the court. Dependent on the scope of the issues outstanding, it may be possible for this court to recommend the use of the Court's own mediation scheme.

50. Accordingly, I would allow the appeal and dismiss the cross-appeal. We should make arrangements to hear further submissions on the form of order and consequential matters.

PART II –THE JUDGMENT OF COULSON J

Section 1 - Structure of the Judgment

51. In Part II, I will review the structure of the judgment, as a prelude to a more detailed analysis of the judge's reasoning.

52. Having set out the facts (section ***B – Chronology*** paras 12-187), he discussed a large number of authorities relating to the law of nuisance (***C – Nuisance: General Principles*** paras 188-257), under the following heads::

i) *Reasonable user/"give and take"*

ii) *Identifying a threshold*

iii) *The Character of the Neighbourhood*

iv) *Planning permission*

v) *Statutory Authority*

vi) *Beneficial Activities*

vii) *Modern Odour Cases*

53. He concluded with a summary of the relevant principles (para 256), deciding that there was no binding authority on what he saw as the critical issue of principle:

> "is the operator of a landfill site, who complies with the detailed requirements of his permit, and is not alleged to be negligent, liable in nuisance for the inevitable consequences of those permitted activities?"

54. He then turned to what he called the "statutory framework" (***D - The Statutory Framework for Waste Disposal and Landfill*** paras 258-304). He set out extensive extracts from the EU and domestic legislation. They included, at the EU level, the Waste Framework, the IPPC, and the Landfill Directives; and domestic legislation giving effect to them, including the Environmental Protection Act 1990, the Environment Act 1995, and related regulations. Again he concluded this section with a summary (para 303).

55. After a short section dismissing arguments based on the Human Rights Act (***E – Article 8 of the ECHR***), he considered the application of the principles previously discussed to the three central issues in the case:

i) ***F – Does Biffa have a defence of statutory authority?*** **(para 311-41)** He answered this question in the negative. He rejected Biffa's "primary case" that it could rely on the defence of statutory authority as such to defeat the claims in nuisance (para 321). (This is subject to the cross-appeal). However, the "cascade of legislation" was in his view directly relevant to consideration of "the nature and scope of the claims in nuisance" (para 340-1).

ii) ***G –Reasonable user*** (para 342-382) This issue was determinative of the claim in favour of Biffa. He held, in short, that activities carried out in compliance with the detailed terms of the permit and without negligence "must equate to a reasonable user of land" (para 350); that the character of the area included gravel extraction and tipping, which was "emphasised" by the "strategic 2003 permit", for what was–

> "the first landfill site of its kind, because it was taking pre-treated waste, and so it was always going to give rise to inevitable teething troubles" (para 371),

and that:-

> "As a matter of law, in the absence of a case based on breaches of the permit, and once the negligence claims were abandoned, the simple claims in nuisance were bound to fail, because the use of the site in accordance with the permit was not an unreasonable use of land." (para 376)

iii) ***H – The Threshold*** (para 383-460) He went on to consider the cases on the assumption that he was wrong on the reasonableness issue. Because of the

"nebulous" nature of nuisance by odour, and the lack of any objective or scientific method or measurement, a "reasonable balance" required the setting of a threshold to identify "the appropriate dividing line, the moment when 'give' becomes 'take'" (para 385). He criticised the claimants' lawyers for failing to propose such a threshold (paras 389-393). After conducting his own lengthy and detailed analysis of the various forms of contemporaneous records and witness statements (para 394-444) he concluded:

> "… based on the contemporaneous material, an appropriate threshold amounted to an average, taken over a year, of **one odour complaint day each week (i.e. 52 each year), regardless of intensity, duration, and locality**. In other words, if a particular claimant's odour complaint days for a given year were in excess of 52, the threshold has been exceeded and a prima facie case in nuisance has been made out…." (para 446)

Judged by this test, even if he was wrong on the reasonable user issue, all but two of the claims (those of Mr Hobbs and Mr Clark) failed (para 459).

56. ***I - the Individual Claims*** (para 461-541) Having set the appropriate threshold, he used it to test the evidence relating to each of the thirty individual claims in four groups:

i) Category 1: 12 claimants who had made no contemporaneous complaint and had no other record of particular incidents (para 465-71).

ii) Category 2: 5 claimants who had made "one or two complaints" or had "one or two notes of particular incidents" (472-475).

iii) Category 3: 6 claimants who were "able to rely on slightly more contemporaneous records" than category 2, but still fell short of the threshold (476-495).

iv) Category 4: the 7 original complainants, who had arguable claims, but only two of whom (Mr Clark and Mr Hobbs) passed the defined threshold.

57. He then commented on the quantum of damages (***J – Quantum***), concluding that for any claims which had succeeded, an appropriate level of damages would have been £1,000 per year (542-560).

58. He concluded with some **General Observations** and **Conclusions** (para 561-585).

Section 2: Analysis

59. In this section I will review the main features of the judge's discussion of the principles of nuisance, under the following heads:

i) Reasonable user, including -

a) Character of the neighbourhood

b) Planning permission and the waste permit

c) Beneficial activities

ii) Statutory authority

iii) Identifying a threshold

iv) Assessing the individual claims

(1) Reasonable user

60. The judge's concluding summary (para 256) included the following:

> "b) The relevant control mechanism, applicable in all nuisance cases, is whether or not there is reasonable user of the land in all the circumstances (*Cambridge Water*).
>
> c) Reasonable user has been equated to the principle of 'give and take' (*Cambridge Water*, *Stone v Bolton*). Although that principle was originally said not to arise in cases where the use was "not unnatural nor unusual but not the common and ordinary use of land" (*Bamford v Turnley*), the modern law of nuisance focuses on whether, in all the circumstances, the user is reasonable, and 'give and take' will usually be an element of that assessment, regardless of whether the use of the land could be said to be common or not (*Watson* being the most recent example)".

61. In his earlier discussion he had identified the "most important question" as "whether or not the use of the land in question can be described as reasonable in all the circumstances..." (para 205).

62. Mr Croxford, in his submissions to us, adopted and developed the same idea. He referred to "reasonable user" as "in essence a two stage test":

> "(i) whether in *principle* the activity is a "reasonable user" of land ("reasonable in principle") in general, taking due account of the potential impact of such land use on neighbours as well as the character of the locality; and, if so
>
> (ii) whether the activity is in *fact* a reasonable use of the land in question ("reasonable in fact"), taking account of all relevant factors including:

> (a) the controls put in place to diminish potential interference with a neighbour ("reasonable in operation"); and
>
> (b) the impact (proper controls notwithstanding) of the activity upon neighbours ("reasonable in impact")".

He added that in the context of European law this "two stage balancing test" is immediately recognisable as in substance the familiar test of "proportionality".

63. In view of the weight so placed on this expression, it is necessary to examine in a little detail the case-law on which it is said to be based.

64. The reference to "reasonable user" as the "control mechanism" comes from a passage in the speech of Lord Goff in *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264. The case itself concerned the possible application of the rule in *Rylands v Fletcher* [1866] LR 1 Ex 265, in a case about pollution of underground water supplies by chemicals from an industrial process. In the course of a discussion of the role of "foreseeability" in the law of nuisance generally (see p 297G), Lord Goff said :

> "... although liability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, even so that liability has been kept under control by the principle of *reasonable user* – the principle of *give and take* as between neighbouring occupiers of land, under which "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action:" see *Bamford v Turnley* (1862) 3B&S 62,83. The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it. Strikingly, a comparable principle has developed which limits liability under the rule in *Rylands v Fletcher*. This is the principle of natural use of land…" (p 299D-emphasis added)

65. It is to be noted that Lord Goff was not here seeking to redefine the ordinary law of nuisance. Rather he was citing well-established principles (going back to 1862) as a starting-point for considering the scope of the rule in *Rylands v Fletcher*. That comparison is itself not uncontroversial (see e.g. *Murphy's Law of Nuisance* para 1.14; Maria Lee *What is private nuisance?* [2003] LQR 298, 312-3), but that debate has no relevance to the present case.

66. Although no doubt apt for Lord Goff's purpose, the concept of "reasonable user" does not appear to have a very solid pedigree in the earlier case-law. The judge rightly referred to *Bamford v Turnley* as a "leading early case on this element of the common law" (para 189). It was one of a line of cases on smell by brick-burning. As Mr Tromans points out, it was an important turning point. The jury had found for the defendants, having been directed to do so (on the authority of *Hole v Barlow* 4 C. B. N. S. 334) if they concluded that the location where the bricks were burnt was "a proper and convenient spot", and the burning of them was under the circumstances a "reasonable use" by the defendant of his own land. This was held by the Exchequer Chamber to have been a misdirection.

67. Bramwell B himself did not in terms propose a test based on "reasonable" user. Although his concurring judgment is most often quoted, the majority judgment was in fact given by Williams J. In the course of it, he commented critically on the judge's use of the word "reasonable" in his direction to the jury:

> "If it be good law, that the fitness of the locality prevents the carrying on of an offensive trade from being an actionable nuisance, it appears necessarily to follow that this must be a reasonable use of the land. But, if it is not good law, and if the true doctrine is that, whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie, whatever the locality may be, then surely the jury cannot properly be asked whether the causing of the nuisance was a reasonable use of the land." (p 77)

68. *Bamford v Turley* was affirmed by the House of Lords in *St Helens Smelting Co v Tipping* (1865) XI HLC 642. Lord Wensleydale, approving the judge's direction to the jury, said:

> "… you must not stand on extreme rights… Business could not go on if that were so. Everything must be looked at from *a reasonable point of view*; therefore the law does not regard trifling and small inconveniences, but only regards sensible, inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected" (p 653-4)

"Reasonable" is there used in a narrow sense, to exclude "trifling" complaints. It is of interest to compare that with the terms in which Cockburn CJ in the lower court had rejected the pre-*Bamford* law (4 B&S 608, 615), in a concise statement which holds good 150 years later:

> "That decision establishes that where a case of nuisance is sought to be made out, *it is not a right question to put to the*

> *jury to say* whether the place where the act was done was a proper and convenient for the purpose, or *whether the doing of it in that place was a reasonable use by the defendant of his own land*. And if that question is to be excluded with respect to the relative positions of the plaintiff and the defendant, as private individuals, it is likewise inconsistent with sound reason to say that the matter can be considered with reference to the interests of the public. It is a new thing to me that, without compensation, an individual is precluded from redress for private injury arising from that injury."

69. To bring the discussion up to date, I refer to Lord Millett's comments on Lord Goff's use of this expression in *Southwark LBC v Mills* [2001] AC 1, 20 (noisy activities in adjoining flats):

> "The use of the word 'reasonable' in this context is apt to be misunderstood. It is no answer to an action for nuisance to say that the defendant is only making reasonable use of his land… What is reasonable from the point of view of one party may be completely unreasonable from the point of view of the other. It is not enough for a landowner to act reasonably in his own interest. He must also be considerate of the interest of his neighbour. The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him."

70. His own summary of Bramwell B's judgment (p21A) did not use a test of reasonableness:

> "His conclusion was that two conditions must be satisfied: the acts complained of must (i) 'be necessary for the common and ordinary use and occupation of land and houses' and (ii) must be 'conveniently done', that is to say done with proper consideration for the interests of neighbouring occupiers. Where these two conditions are satisfied, no action will lie for that substantial interference with the use and enjoyment of his neighbour's land that would otherwise have been an actionable nuisance." (p 21A)

71. None of this history would matter if "reasonable user" in the present case was being used as no more than a shorthand for the traditional common law tests, as I understand it to have been used by Lord Goff. However, it is apparent that the judge, following Biffa's submissions, saw this concept as an important part of the argument for taking account of the statutory scheme and the permit, to which I will come in the next section.

72. In my view, these complications are unsupported by authority, and misconceived. "Reasonable user" should be judged by the well-settled tests. The matter is stated simply and accurately by Tony Weir (whose death last December was a sad loss to all who knew him or learnt from him):

> "Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot by being unduly sensitive, constrain one's neighbour's freedoms), but what objectively a normal person would find it reasonable to have to put up with." (Weir *An Introduction to Tort Law* p 160)

Character of the neighbourhood

73. The acceptability of the use has to be judged by reference to the character of the neighbourhood. That is in itself uncontroversial. The judge referred to *Sturges v Bridgman* (see above), and *Polsue and Alfieri v Rushmoor* [1906] 1 Ch 234, noting correctly that in the latter the claim in nuisance was successful, even though the noise arose from printing presses in an area already habitually used for that purpose. As he said –

> "... the essence of the nuisance was that printing presses had not previously been used there at night, and it was their nightly usage which constituted the specific nuisance in that case".

74. He did not draw what seems to me the obvious parallel with this case. The character of the Westmill neighbourhood has long included quarrying and tipping, alongside residential areas. The "essence" of the nuisance lies not in that established activity, but in the introduction of a new and more offensive form of tipping. Adapting the words of Stirling LJ (p 249 – echoed later by Tony Weir) the question is whether the introduction of tipping of pre-treated waste, in an area with a history of quarrying and tipping, created an amount of discomfort in excess of that which "an ordinary person could reasonably be expected to put up with".

Planning permission and the waste permit

75. More problematic is the relevance in that context of the planning permission. The judge summarised the effect of the cases as follows:

> "f) The granting of planning permission will not of itself sanction the nuisance (*Wheeler*). However it may be relevant to issues surrounding the character of the neighbourhood (*Gillingham, Watson*), and generally (*Mid Suffolk*)."

Although this proposition seems uncontroversial as it stands, its significance in the present case does not emerge until later in the judgment, when the judge seeks to apply a similar approach to the 2003 waste permit:

> "371. In all the circumstances, the grant of the permit in 2003 can therefore be said to have redressed the overall balance: to have made plain that this had not somehow become a purely residential locality, but instead remained a mixed use area. To put it another way: even though the housing was creeping progressively northwards up to the A10 during the period between the two permits of 1980 and 2003, this expansion did not mean that the area had suddenly become a purely residential locality. It was and remained a mixed use area, with a lengthy history of gravel extraction and landfilling, which the permit of 2003 only served to emphasise. Moreover, in my judgment, the grant of the tipping permit in 2003 was clearly strategic. Westmill 2 was the first landfill site of its kind, because it was taking pre-treated waste, and so it was always going to give rise to inevitable teething troubles."

76. I am unable to agree with this interpretation, either in principle or on the facts of this case. This does not mean that the terms of any permission or permit are irrelevant. An activity which is conducted in contravention of planning or environmental controls is unlikely to be reasonable. But the converse does not follow. Sticking to the rules is an aspect of good neighbourliness, but it is far from the whole story - in law as in life.

77. The leading authority on the relevance of planning permission at the time of the hearing before us was *Watson v Croft Promo-Sport* [2009] EWCA Civ 15. It will be necessary to look at the case in more detail later in connection with the "threshold" question. At this stage it is enough to summarise the Chancellor's summary of the effect of earlier authorities (including *Gillingham Council v Medway Dock Co.* [1993] QB 343, *Wheeler v JJ Saunders Ltd* [1996] Ch 19, *Hunter v Canary Wharf Ltd* [1997] AC 655):

> "First, it is well established that the grant of planning permission as such does not affect the private law rights of third parties… Second, the implementation of that planning permission may so alter the nature and character of the locality as to shift the standard of reasonable user which governs the question of nuisance or not…
>
> In the light of these two well established principles I find it hard to understand how there can be some middle category of planning permission which, without implementation, is capable of affecting private rights unless such effect is specifically authorised by Parliament. It has not been suggested to us that there is any section in the statutory code governing the application for and grant of planning permission which could have that result. For that reason alone I would reject the second ground of appeal put forward by the defendants."

He noted also the argument that the character of the locality might be changed by a planning permission for a "new and distinctive feature" which was "strategic in nature". He commented, that even if there was such a "middle category" neither of the permissions relied on could be regarded as "strategic" (para 29, 34).

78. The word "strategic", as used in argument in that case, and adopted by the judge in this, comes from an *obiter dictum* of Staughton LJ in *Wheeler v Saunders* (above). It was there held that the grant of permission for two houses for pig-breeding did not give any form of licence for the resulting nuisance. Staughton LJ considered the previous authorities, including *Gillingham BC v Medway (Chatham) Dock Co Ltd* [1992] 3 All ER 923 in which the implementation of permission for the new docks (granted by the plaintiff council itself) had altered the character of the neighbourhood against which the alleged nuisance (heavy goods vehicles using local roads) was to be judged. Not surprisingly, he saw no parallel with the instant case. He thought it a "a misuse of language" to describe what had happened as a change in the character of a neighbourhood:

> "It is not a *strategic planning decision affected by considerations of public interest*. Unless one is prepared to accept that any planning decision authorises any nuisance which must inevitably come from it, the argument that the nuisance was authorised by planning permission in this case must fail. I am not prepared to accept that premise. It may be -- I express no concluded opinion -- that some planning decisions will authorise some nuisances. But that is as far as I am prepared to go…" (p 30, emphasis added)

79. Although the other members of the court agreed in general, they did not in terms adopt this formulation:

i) Peter Gibson LJ commenting on the *Gillingham* case, said

> "Prior to the *Gillingham* case the general assumption appears to have been that private rights to claim in nuisance were unaffected by the permissive grant of planning permission, the developer going ahead with the development at his own risk if his activities were to cause a nuisance. The *Gillingham* case, if rightly decided, calls that assumption into question, at any rate in cases, like *Gillingham* itself, of *a major development altering the character of a neighbourhood with wide consequential effects such as required a balancing of competing public and private interests before permission was granted*. I can well see that in such a case the public interest must be allowed to prevail and that it would be inappropriate to grant an injunction (though whether that should preclude any award of

> damages in lieu is a question which may need further consideration). But I am not prepared to accept that the principle applied in the *Gillingham* case must be taken to apply to every planning decision. The Court should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge." (p 35E-G emphasis added)

ii) Sir John May said:

> "It is clear on the authorities… that, first, the exercise of the permission to develop granted by the local planning authority may have the result that the character of the neighbourhood changes and that which would previously have been a nuisance must be held no longer to be so…
>
> In my opinion, however, the effect of the grant of planning permission cannot be treated, even in a limited sense, as the equivalent of statutory authority…." (p 37B-C)

80. The judge also referred to *Hunter v Canary Wharf Ltd* [1997] AC 655, where Lord Cooke (dissenting) applied Staughton LJ's formula in considering interference by developments at Canary Wharf with local television reception. The Canary Wharf project, including the tower at One Canada Square, was of a scale "totally transforming the environment", and fell fairly within the scope of "a strategic decision affected by considerations of public interest" (p 722D-F).

81. I cannot see how this line of authority assists Biffa's arguments in this case. The scope of the "*Gillingham Docks* exception" remains unsettled. It is a matter of continuing debate among environmental lawyers: see, for example, in recent months, Maria Lee *Tort Law and Regulation: Planning and Nuisance* [2011] JPEL 986; William Norris QC *Wind Farm Noise and Private Nuisance Issues* [2012] JPEL 230.

82. Whatever the scope of that exception, it has no relevance to this case. Contrary to the suggestion in the passage of the judgment quoted above, there was no evidence of a pre-determined "strategy" of the Environment Agency, let alone the planning authority, to transform this area into one for the tipping of pre-treated waste. Had any such strategy been proposed, and had the possible consequences been explained, one would have expected there to have been consultation followed by strong objections. In any event, there is no authority for extending such principles to a waste permit: granted by the Environment Agency, not the planning authority; and for purposes concerned, not with the balance of uses in the neighbourhood (which remained unchanged), but with the regulation of one particular activity within it.

83. For completeness I note a decision of this court, delivered since the hearing: *Coventry Promotions v Lawrence* [2012] EWCA Civ 26. In an action for nuisance by noise from motor-racing, this court held, that pre-existing motor-racing activities, carried on for more than a decade, under first an Certificate of Lawful Use and then a planning permission subject to detailed conditions, had become part of the "character of the neighbourhood", against which the alleged nuisance must be judged. Jackson LJ specifically approved the decision and reasoning in *Gillingham Docks*, which he recognised as leading to a "harsh outcome", adding:

> "The planning authority had made a decision in the public interest and the consequences had to be accepted" (para 57)

84. Having reviewed the subsequent authorities, he said:

> "65. In the light of the authorities cited above, I would summarise the law which is relevant to the first ground of appeal in four propositions:
>
> i) A planning authority by the grant of planning permission cannot authorise the commission of a nuisance.
>
> ii) Nevertheless the grant of planning permission followed by the implementation of such permission may change the character of a locality.
>
> iii) It is a question of fact in every case whether the grant of planning permission followed by steps to implement such permission do have the effect of changing the character of the locality.
>
> iv) If the character of a locality is changed as a consequence of planning permission having been granted and implemented, then:
>
> a) the question whether particular activities in that locality constitute a nuisance must be decided against the background of its changed character;
>
> b) one consequence may be that otherwise offensive activities in that locality cease to constitute a nuisance." (para 65).

85. Although we invited the parties' comments on this judgment, they do not affect my view of the issues in the present case. The judgment of Jackson LJ adds additional authority to the *Gillingham Docks* approach. It is also of interest that he appears to have seen the question of "change of character" as raising a simple question of fact, rather than one limited by epithets such as "strategic". However, I agree with Mr Tromans submission that there is no parallel between the permissions in that case,

granted some years before, and the waste permit in this case. The more direct analogy here would be with the various permissions, granted over a long period for quarrying and tipping as well as housing, the implementation of which has created the character of the neighbourhood as it now is. As Mr Tromans points out, there was no detailed consultation on the likely adverse implications of the permit in terms of odour, nor any balancing of the conflicting interests of the residents and the public interest in landfilling. In my view, the case gives no support to the proposition that a relevant change in character was effected by the grant of the 2003 waste permit.

Beneficial Activities

86. The judge's summary of the principles (para 256) included:

> "(g) The fact that the nuisance is caused by activities which are beneficial will not provide a defence to a nuisance claim (*Miller v Jackson*). Such benefit may be a relevant factor to be taken into account in weighing up the competing interests of the parties when assessing reasonable user/'give and take' (*Kennaway*), but this is not entirely settled and cannot be taken too far (*Transco*)."

87. In his earlier discussion he had accepted as "trite law" (citing *Miller v Jackson* [1977] QB 966) that:

> "... it is no defence to a claim in nuisance to show that the business or other activity was either useful or highly desirable in the public interest".

Although he found in a passage in *Clerk & Lindsell* para 20-01, and in *Kennaway v Thompson*, indications that the beneficial nature of an activity might be relevant to consideration of "give and take", he thought that this point had to be treated with "a good deal of care"; it "emphatically" could not be accorded too much significance. He noted doubts expressed by the House of Lords in both *Transco* and *Cambridge Water*, and cited *Dennis v Ministry of Defence* [2003] EWHC 793, in which noise from the Harriers at RAF Wittering was held to be a nuisance in law, in spite of the clear public interest in the training of pilots at RAF Wittering.

88. In practice, as I read the judgment as a whole, the judge did not in the end attribute any weight to the public significance of Biffa's activities in judging the issue of reasonableness. I have already noted in the main judgment (para 31) the lack of any specific clear finding of fact on this aspect, notwithstanding some evidence led by Biffa, and some passing references in the judgment to the "vital" importance of the activity.

(2) Statutory Authority

89. The judge's summary of the general principles (para 256) included the following:

> "e) In cases of emissions, environmental legislation may be relevant to, and even dictate, the court's approach to common law nuisance claims (*Cambridge Water*, *Dennis*, *Transco*)."

The issue was dealt with in more detail in the next section of his judgment, dealing with the statutory framework, the effect of which he summarised as follows:

> "303. In summary, therefore, this cascade of legislation provided as follows":
>
> a) But for the permit, the use of the land at Westmill 2 for waste disposal would have been a criminal activity (s.33 of the EPA 1990);
>
> b) Waste disposal and landfilling were permitted because of the terms of the permit and Biffa's compliance with the terms of the permit (s.33 of the EPA and PPC Reg 9);
>
> c) The policing of the terms of the permit was undertaken by the EA, a statutory body with wide powers which was set up to meet the UK's obligations under the relevant European Directives;
>
> d) Biffa could be liable for a wide range of breaches of the legislation, but any such claims would have to demonstrate that Biffa had failed to use best available/practicable techniques or had failed to exercise all due diligence (EPA, in particular section 33; IPPC Directive, in particular Article 3a); and PPC Regs 11(2) and 12);
>
> e) All of the legislation expressly accepted that a site such as Westmill 2 would create odour, at least from time to time. That was seen as the necessary price for dealing with the disposal of waste in a way that was sympathetic to the environment (IPPC Directive, in particular Article 3b); and PPC Regs 11(2) and 12). This explains the emphasis on preventing emissions or, where that was not practicable, minimising emissions, including odour.

90. He added, following what he understood to be the approach of Lord Goff in the *Cambridge Water* case:

> "In my view, such is the weight and extent of the legislation in this area that it would be unsatisfactory, to say the least, if the common law did not generally march in step with the detailed legislation. But it is this view which goes to the heart of the issues of liability in this case." (para 304).

91. He rejected Biffa's primary case (renewed in the cross-appeal) that its activities were protected by statutory immunity:

> "I consider that Biffa do not have authority expressly granted by statute or by necessary implication, either by reference to the statutory duties imposed in the legislation noted above, or by reference to the statutory powers conferred to enable those duties to be complied with. That is the test formulated by Lord Scott in *Transco*. For the reasons that I have indicated, it is not a test that Biffa can meet." (para 321)

92. However, he decided that in effect the same result should be achieved by linking the statutory framework to his interpretation of the reasonableness principle. This is most fully stated in the next section of the judgment (G Reasonable User). Since this passage appears to be the central part of his reasoning in the case, I should quote it in full:

> "*a) The central issue*
>
> 342. As I have indicated, the central remaining issue in this case is whether a claim in nuisance, without negligence, can lie against the operator of a landfill site, in circumstances where the activities said to give rise to the nuisance have been carried out in accordance with a detailed environmental permit. Or, to put the question another way: does the legislation set out in Section D above, and the detailed terms of the permit set out in Section B2 above, mean that the use of land in accordance with the terms of that detailed permit was a reasonable user of that land? For the reasons set out below, I consider that, in the present case at least, the answer to the first question is No, and that the answer to the second question is Yes. I consider that the claimants' contention, that the legislation and the detailed terms of the permit are irrelevant to their claim in nuisance, such that the use of Westmill 2 as a landfill site was automatically an unreasonable user of the land, is wholly unrealistic, contrary to many of the authorities cited in Section C above and the modern trend in nuisance cases, and would give rise to an uncertain and unworkable position in law.
>
> *b) First Principles*
>
> 343. There is no binding authority that provides a definitive answer to the question that I have to decide (see paragraphs 256-257 above). Accordingly, it is necessary to start with first principles, to identify what the logical answer might be, and then to investigate whether that logical answer is supported by

the statutory regime, the terms of the permit itself, and the reported cases.

344. In my view, the appropriate starting point is the potential criminal liability that may exist on the part of a waste contractor in these circumstances. The legislation, to which I have referred in Section D above, makes plain that the use of land for the tipping of waste is a criminal activity unless the operator of the site is acting in accordance with a valid permit (s.33 of the EPA 1990). If the operator is carrying out his activities in accordance with a valid permit, then that permit provides a complete defence to any criminal charges. That, so it seems to me, is a logical and coherent position.

345. A similar position exists in respect of statutory nuisance (paragraphs 287-288 above). The emission of smell from the site could be pursued by the local authority as a statutory nuisance pursuant to section 79 of the EPA. But, as part of any defence to such a claim, Biffa would be entitled, pursuant to s.80(7), to argue that they had used "the best practicable means" to counteract the effects of the nuisance. In other words, if they had used the best practicable means they could not have been negligent and would not be liable for a claim in statutory nuisance.

346. Why should the situation at common law be any different from the position in criminal law and the position in respect of statutory nuisance? I can see no reason in principle why an operator's common law liability to his neighbours should not be subject to precisely the same limits. In this way, the carrying out of tipping activities outside the conditions of the permit (i.e. negligently and/or by failing to use best available techniques) would give rise to a common law liability, but the carrying out of activities in accordance with that permit would constitute compliance with all relevant legal obligations, and would therefore afford a complete defence to a claim in nuisance.

347. I consider that analysis to be common sense. 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. The real question is whether this answer is in accordance with the legislation, the particular terms of the permit in this case, and the earlier cases. For the reasons noted below, I consider

> that, on analysis, it is the answer expressly suggested by all three."

93. Notwithstanding the obvious care with which this passage was drafted, and with respect to Counsel for Biffa who were largely responsible for this line of argument, I regard this as the least satisfactory part of the judgment.

94. As the judge accepted (para 321), and as was clear from the cases (notably *Allen v Gulf Oil Refining Ltd* [1981] AC 1001), Biffa did not have statutory immunity, express or implied. The cross-appeal on this point is hopeless. Biffa's attempt to find an alternative route to the same effective end was misconceived. It depended on a misreading of Lord Goff's speech in *Cambridge Water*, a misunderstanding of the statutory framework, and a misinterpretation of the permit. I take those three points in turn:

95. First, in the *Cambridge Water* case, when discussing the future scope of the rule in *Rylands v Fletcher*, and in particular the possible development of a "general rule of strict liability for damage by ultra-hazardous operations" (p 304G) Lord Goff referred to the increasing number of legislative measures, national and international, taken for protection of the environment. He commented:

> "It does not follow from these developments that a common law principle should be *developed or rendered more strict* to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, 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." (p 305G-H)

This is talking about the future development of the common law in an uncertain area, not the rewriting of well-settled principles of the law of nuisance (which had been reaffirmed earlier in the same speech). It provides no support for a general principle that the common law must be modified (in the judge's words) to "march in step with" (para 304), "to operate in tandem with, and sometimes to take a backseat to" (para 354), or to "yield to" (para 359) the environmental legislation.

96. Nor is the argument assisted by reference to isolated comments of Lord Scott in *Transco plc v Stockport MBC* [2004] AC 1, or Lord Nicholls in *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42. They were both considering the functions of statutory undertakers operating under specific statutory duties and controls in different factual and legal contexts. Biffa is not a statutory undertaker; and, however beneficial its activities may be to the public, it is under no statutory duty to provide them. Nor is the argument improved by Biffa's introduction of isolated statements in authorities even further removed from the law of nuisance (e.g. *Johnson v Unisys* [2003] 1 AC 558 on related contractual and unfair dismissal remedies).

97. Secondly, as to the statutory framework:

i) It was simply wrong to say (303(d)) that claims for breaches of the legislation would "have to demonstrate that Biffa had failed to use best available/practicable techniques". As the judge noted elsewhere (para 287, 349), in proceedings for statutory nuisance it would be for the defendant to allege and prove use of "best practicable means". In any event, statutory nuisance, including a form of best practicable means defence, has been part of the law since the Public Health Act 1875 or before (see e.g. Nuisances Removal Act 1855 s 27), since when it has co-existed with the common law of nuisance. It has never been suggested that they could or should be assimilated by judicial intervention, or that a best practicable means defence could by that means be made part of the common law. As Lord Hoffmann said of common law nuisance in *Transco* (para 26):

> "Liability in nuisance is strict in the sense that one has no *right* to carry on an activity which unreasonably interferes with a neighbour's use of land merely because one is doing it with reasonable care. If it cannot be done without causing an unreasonable interference, it cannot be done at all."

ii) I do not understand the statement that "*all* of the legislation *expressly* accepted" that a site such as Westmill 2 "*would* create odour from time to time". I find it impossible with respect to see how a provision which requires the use of best practicable means to "prevent or reduce emissions" (as in PPC reg 12) can be read as expressly or impliedly authorising them. (As it happens, PPC regs 11 and 12, to which the judge referred, are disapplied by the Landfill Regulations. But the wording is standard. For example, the recitals to the Landfill Directive, also quoted by the judge (para 269), refer to the need to "prevent or reduce" potential adverse effects on the environment.)

98. Thirdly, the same idea seems to be carried into the judge's view of the permission. The suggestion, though never clearly articulated or discussed, is that the permit itself impliedly authorised a level of acceptable smell. For example, late in the judgment, in the discussion of the need for a "threshold", he says:

> "A starting point or threshold was also required in this case because of the particular rights and obligations on the part of Biffa. The landfill site at Westmill 2, unlike the private motor circuit in *Watson*, was providing a necessary, indeed vital, environmental service. A certain amount of odour emission was always going to be inevitable and was never going to be actionable. Indeed, that was expressly encapsulated in the Directives, the UK legislation *and, critically, condition 2.6.12 of the permit*, which only prohibited odour 'at levels as are likely to cause serious detriment to the amenity' of the Vicarage Estate, and *therefore – by implication – allowed*

> *lesser odour emissions which did not cause such serious detriment*." (para 388 emphasis added)

99. He came back to the same idea in his General Observations at the end of the judgment, commenting on the "immovable obstacle" faced by the seven Category 4 Claimants:

> "Through no fault of their own, and for what I have to assume were sound environmental reasons, the Westmill 2 site was chosen to take pre-treated waste which was inevitably more odorous than other waste. *It was inherent in the granting of the original permit* that a certain degree of odour would escape from the Westmill 2 site, a reality that might be said to have been confirmed by the relatively 'hands-off' policing by the EA. That inevitability had long been expressly recognised in both the EU Directives and the UK Legislation…." (para 567)

100. In effect, as I understand his approach, the grant of the permit implied that the EA had, for "sound environmental reasons" approved this site as a suitable site for pre-treated waste, and had authorised any odours from that use, provided that they were at levels deemed less than "serious".

101. I find this approach impossible to reconcile, either with his other findings of fact, or with a reasonable construction of the permit. First, (as noted in my main judgment – para 12) he had himself noted, and expressed surprise, that the original Waste Management Plan had not made provision for the problems which arose from pre-treated waste. It is difficult therefore to understand his reference to a "sound environmental" judgment having been made as to the suitability of the Westmill site for this purpose.

102. Secondly, his reading of the condition (2.6. 12) turns it on its head:

> "There shall be no odours emitted from the Permitted Installation at levels as are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality outside the Permitted Installation boundary, as perceived by an authorised officer of the Agency."

The purpose of such a condition is to impose an additional control, more easily enforceable by the Environment Agency than the more general statutory controls. The source or precise purpose of the phrase "serious detriment to amenity" is not entirely clear. It may have been used as a general term, apt to cover for example visual intrusion, as well as nuisance by smell or noise. As Mr Tromans observes the condition refers also to "pollution of the environment". "Pollution" as defined by the regulations (PPC Regs 2000 art 2) sets a very low threshold, unqualified by any word such as "serious" ("emissions as a result of human activity… which *cause offence* to

any human senses"). In any event, there is no reason to read the condition as intended to impose a more generous standard than the law of nuisance. Still less could it be treated as cutting down the common law rights of local residents, without either their agreement, or apparently any prior consultation on its terms.

103. In this context, I should also note the judge's reference to the risk of Biffa being held liable in nuisance for complying with the requirements under the permit.

> "Examples would include a situation where Biffa had to carry out engineering works on site, say to repair defects in the gas management system or to increase the gas capture efficiency of the system. Such work may well be required under the detailed terms of the permit; it may constitute 'best available techniques'; but it may also lead to an increase in waste-based odour during the period that the work was carried out." (para 354)

As he rightly observed, it would be illogical for Biffa to be liable in common law for the adverse consequences of doing something which they were obliged to do under the permit. With respect, this is not in point. The common law of nuisance, without modification, is quite flexible enough to cater for the consequences of such necessary and temporary remedial works (cf *Andreae v Selfridge* [[1938] Ch 1).

104. Finally, under this head, I should note an alternative submission by Mr Croxford, also relying on the European legislation. He refers to the comprehensive nature of the regulatory scheme for waste under the European Directives. It includes not only regulation, but also a positive duty on member states to provide a network of waste disposal sites, in accordance with the "proximity" principle. The authorisation of the Westmill 2 site, he submits, should be seen as part of the performance of this public duty by the UK Government.

105. The foundation of the argument is in article 5 of the Waste Framework Directive 2006 (replacing an earlier version):

> "1. Member States shall take appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs…
>
> 2. The network referred to in paragraph 1 must enable waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health."

Mr Tromans points out that this has to be read with the preceding article 4 which requires Member States also to ensure that waste is disposed of without causing a nuisance by noise or smell.

106. In any event, the existence of this general duty, however important in public terms, does nothing to assist Biffa's defence under the common law. There is a close parallel, in a more modern context, with the *Metropolitan Asylum* case, where the duty imposed on the authorities to provide hospitals for infectious diseases provided no defence to an action for nuisance, notwithstanding the acknowledged difficulties in finding suitable sites. Now, as then, if there is a problem in meeting the need within the existing legal framework, its solution must rest with the legislature. Parliament has not yet chosen to provide statutory immunity from common law nuisance claims for waste sites provided in accordance with the Directive (as it has, for example, for certain "nationally significant" infrastructure projects, including hazardous waste sites, authorised by development consents under the Planning Act 2008 s 158).

(3) Identifying a Threshold

107. The judge's summary of the principles (para 256) included the following:

> "d) In addition, the more recent cases have assessed the reasonable user principle by reference to some kind of threshold or starting point, a finite experience of a situation beyond which a nuisance claim has been made out (*Kennaway*, *Watson*)."

In the preceding discussion, the judge had referred to the same two cases as supporting the proposition that –

> "... in most common nuisance situations, the court should endeavour to work out a threshold against which to evaluate the nuisance complained of; that is to say, a starting point, which will represent a certain experience of inconvenience which, in the modern world, should be regarded as reasonable, but which, if it is exceeded, would give rise to actionable complaint." (para 210)

This approach assumed considerable importance when he adopted a 52-day odour complaint day threshold, as a basis for evaluating the individual claims.

108. I observe at the outset that this approach is difficult to reconcile with his professed intention to secure convergence between the permit and the common law. "Serious detriment" at any time is proscribed by the condition. Thus the prosecution for events on nine days in 2004-5 did not fail merely because the Environment Agency could not prove incidents on 52 days per year.

109. In any event, in my view, neither the two cases, nor the general law, provided any support for the judge's approach to this issue.

The cases

110. Both cases concerned nuisance by noise, the first from power-boat racing on Mallam Water (*Kennaway v Thompson* [1980] EWCA Civ 1, [1981] QB 88, the second from motor-racing *Watson v Croft Promo-Sport*, referred to above).

111. The first, as appears from the opening of the judgment of the court (given by Lawton LJ), was "about remedies not liability". It is therefore of no direct relevance to the issue in this case. Further, the plaintiff could not, and did not, complain of racing activity at the levels which were experienced when she built her house. As the court explained:

> "Our task has been to decide on a form of order which will protect the plaintiff from the noise which the judge found to be intolerable but which will not stop the Club from organising activities about which she cannot reasonably complain.
>
> When she decided to build a house alongside Mallam Water she knew that some motor-boat racing and water skiing was done on the Club's Water and she thought that the noise which such activities created was tolerable. She cannot now complain about that kind of noise provided it does not increase in volume by reason of any increase in activities. The intolerable noise is mostly caused by the large boats; it is these which attract the public interest."

112. The order met this problem by limiting the number and spacing, each racing season, of international events national events, and club events; at other times no boats creating a noise of more than 75 decibels were to be used on the Club's Water.

113. Similar issues arose in *Watson*, to which I have already referred in connection with the planning permission issue. In the present context it is necessary to summarise the facts relevant to both issues. The case concerned the use of an airfield for motor-racing. Permission had been granted on appeal in 1963, to meet a perceived need for a motor-racing track in the north-east. That had been subject to conditions, but none restricting the periods of use. In 1998 a new permission was granted, again on appeal, subject to a section 106 agreement made with the local planning authority. That laid down detailed conditions, including a limit on the number of days use by reference to a table of specified noise levels, ranging from N1 (the highest – up to 10 days a year) down to N5 ("unlimited") (para 10). The inspector described the agreement as "a reasonable compromise between amenity… and the operation of the racing community" (para 13). It was not suggested that this detailed agreement with the responsible authority did not rule out a claim in nuisance.

114. The claimants did not object to some 20 racing fixtures at N1-2 levels, but did object to noise from other activities, including vehicle-testing and "track" days at noise levels reaching N2-4 levels (para 17). They accepted that "reasonable user" would

allow 20 N1-N4 days per year, and were willing to accept compensation for another 20 days (para 28). The judge decided, reasonably as this court held, that the introduction and intensification of motor-racing, following the 1963 permission, had not altered the "essentially rural" character of the neighbourhood; (para 19, 37). He refused an injunction, granting damages instead, partly because of the public benefit of the racing use. That part of his judgment was reversed, because in accordance with established principles it was only "in a marginal case where the damage to the claimant is minimal", that the effect on the public of the grant of an injunction was properly to be taken into account (para 51).

115. I find no support at all in those cases for a general approach of setting a "threshold" for evaluating past nuisance. They turned on their own facts, and in particular on the nature of the nuisance. The threshold was set primarily for the purpose of control in the future, rather than assessing whether there had been a nuisance in the past or judging reasonable user. In neither was there any dispute that the court could set such limits; the issue was as to the number of days or events and the permissible levels. Noise nuisance arising from an organised activity such as motor-racing is susceptible to such control. The racing days could be defined with precision, as could the maximum noise levels. From the local residents' point of view, fore-knowledge of the noisy days would enable them to order their lives accordingly.

116. The present case is quite different. There was no question of Biffa being willing or able to limit their smelly activities to particular days in advance. The smells arising from the Westmill site were transient and unpredictable in timing, and intensity. Nor is there any proven technology for assessing and setting enforceable limits to smells, as there is for noise. Not surprisingly, we were referred to no case of nuisance by smell where such an approach had been attempted or adopted by the courts.

The judge's approach

117. The judge recognised the problem, but unfortunately drew the wrong conclusion. He said:

> "In my view, the need for some sort of threshold in an odour nuisance case is imperative, not only because of the need to consider what might be reasonable user in all the circumstances, and/or to ensure 'give and take',... but also because odour cases are particularly susceptible to subjective interpretation, and are impossible to evaluate by reference to objective or scientific measurements. Odour is the most nebulous of the attacks on human senses. Unlike noise or pollution, say, there are no tests that can be undertaken to 'prove' smell at a particular level. In an odour case, therefore, a reasonable balance cannot be struck between competing interests without identifying, in some way, the appropriate dividing line, the moment when 'give' becomes 'take'." (para 385)

118. He criticised the claimants for their failure to propose a specific threshold, given that their own evidence confirmed that the smells were intermittent, and even when there was odour, it was said to "vary enormously in intensity", and to be "localised".

119. He noted that most of the claimants had accepted in cross-examination that a certain amount of odour emission was inevitable, and that provided it was not too frequent and not too intense "they could live with it". That had been generally accepted in respect of the period after October 2009. He regarded that approach as "entirely reasonable and common sense" and in accordance with "give and take" principles. However, in his view it was-

> "a completely meaningless statement, if the witnesses do not then go on to say what frequency and/or severity they were saying was reasonable in all the circumstances, and how and why what had happened at other times went beyond that threshold." (para 388)

120. He described the omission as "a fundamental flaw" in their case, adding:

> "I should say, for the avoidance of doubt, that, in my view, this is not an accidental omission on the part of the claimants' lawyers. They maintained that no threshold was necessary because... they knew that, if any attempt was made to identify a starting point, it immediately showed that their Estate-wide approach to this claim was fundamentally flawed, and that, for different reasons, almost none of these claimants would have been able even to argue that the appropriate starting point had been exceeded." (para 393)

121. I have to say, with regret, that the judge's approach, and his criticisms of the claimants for failing to follow it, were misconceived. There is as I have said no precedent for requiring claimants to specify a precise limit of acceptable smell, and there is no accepted methodology for doing so. It is not surprising therefore that they were unable to assist the judge in the way he wanted. Their approach was no different in principle to that adopted by the claimants, and accepted by the courts, in cases such as *Polsue* and *Halsey*. They were entitled to have their cases assessed by the same standards, and not by reference to an arbitrary numerical test set by the judge.

Injunctive remedies

122. Before leaving the cases under this head, I should note a rather different argument by Mr Croxford, based on the strict approach to injunctive relief, laid down in *Shelfer v City of London Electric Co* [1895] 1 Ch 287), and followed in *Watson*. The submission, as I understood it, was that in determining the appropriate threshold the court should have in mind the limited discretion available to the court on an application by a resident for an injunction. It could not be right that one or two isolated transient incidents of smell might result in an important service having to be

closed down at the instance of a few local residents, when the Environment Agency might have decided for good reasons that enforcement action was not appropriate.

123. As Mr Tromans says, it is odd to find the *Shelfer* principle, designed for the benefit of claimants, being advanced as a reason to deny them a remedy of any kind. In any event, it is unhelpful to speculate as to how the court would have responded to a hypothetical application for an injunction, for example when the problem was possibly at its worst in summer 2005. Faced with such an application, one assumes, Biffa would have adduced evidence, on the one hand, of the importance of the activity, and, on the other, of the nature of problem, and what it was doing to solve it. If appropriate, the court might have agreed to suspend an injunction to allow time for remedial measures to be put in place. On the other hand, if it appeared that there was no clear prospect of a solution within a reasonable time, the court might well decide that it was necessary to prevent further working, at least in those areas closest to the Estate. If such application of the law in accordance with established principles creates problems for the waste industry, then their recourse must be to Parliament.

124. I would add that, although I do not of course question the application of the *Shelfer* principle to the facts of the *Watson* case, I do not necessarily regard the judgment in the latter case as the last word on the scope of the discretion as a matter of law. Other cases have suggested a more flexible approach where important public interest issues are at stake (see e.g. *Wheeler v Saunders* per Peter Gibson LJ; I also see force in the observation of Professor Maria Lee in *Tort Law and Regulation* [2011] JPL 986: "The continued strength of private nuisance in a regulatory state depends on a more flexible approach to remedies." There is scope for further academic debate on the issues raised by her interesting article, and indeed by the discussion in the present case.).

(4) Assessing the individual claims

The evidence

125. The main evidence consisted of witness statements and oral evidence from many individual claimants, supported by the contemporary records of a few, principally the diaries of those claimants who kept them, and the records of the Environment Agency. Biffa accepted, and the judge agreed, that these two documentary sources provided the most reliable guide as to the number of "material odour days" (para 398-9).

126. Conversely, the Biffa records were not to be regarded as entirely reliable, both because in the early days "there appeared to be no sensible system in place within the Biffa management of the site", and latterly they tended to "reflect the increasing acrimony in the relationship with the EA". Nonetheless they had value as giving "the same broad picture as the claimants' own contemporaneous evidence, namely that odour was irregular, variable in intensity and transient" (para 432).

127. The judge placed no value on two categories of documentary records, the Nuisance Record Forms (NRTs) and Odour Nuisance Tables (ONTs) used by Hugh James after their involvement in summer 2007, while seeking evidence from potential claimants over the whole Estate (para 401-7). The former had been filled in by only a handful of complainants. The latter expected claimants to remember events four or five years later, even though the vast majority had not complained at the time and had no contemporaneous records. They were largely abandoned by the claimants in their oral evidence.

128. In my view, the judge was fully entitled to disregard these two sources of evidence. The ONTs, of which the judge took "a wholly negative view", were worse than useless. Not only did they provide no positive support for the claims of those who filled them in, but they were used as powerful ammunition against them in cross-examination.

129. Another important consideration for the judge was the effect of the claimants' group litigation "strategy", maintained as he saw it at the expense of the genuine complaints of a much smaller group, such as the original seven complainants. He returned to this point at the end of the judgment:

> "The claims of the vast majority of the claimants, those who had done little or nothing over the relevant period, were always likely to fail on the facts. Yet it has been the participation of this silent majority which has complicated and expanded these proceedings (which could otherwise have been dealt with in the County Court), to no obvious advantage, certainly not to the seven claimants who were in an entirely different position on the facts. The Group Litigation has, in the end, not been of any benefit to anyone at all except the lawyers." (para 568)

130. Following the same theme, the judge regretted the claimants' tendency in submissions to play down the significance of written records as against the witness statements. The judge described this as "an illegitimate attempt to elevate the meaningless generality in place of the verifiable specific", which he attributed to the desire to hang on to the Estate-wide Group Litigation policy pursued by Hugh James." (para 411)

131. It is important, however, to note that the judge for the most part accepted the credibility of the oral evidence (para 461-4). Apart from some "unconscious exaggeration to which odour cases are prone" and what he described as "a clumsy and unsuccessful attempt" to persuade him that "each odour complaint day established a nuisance", he regarded the witnesses as generally honest. Of Biffa's approach to the evidence he said:

> "Given that Biffa say that they accept the accuracy of the complaint records, and given that it was overwhelmingly likely that the court would prefer those records to the oral evidence of the claimants (if different), it remains difficult to see how or

> why it was necessary for almost every claimant to be so extensively cross-examined."

Four categories

132. For the purpose of assessment the judge divided the thirty individual claims into four groups:

i) Category 1: twelve claimants who had made no contemporaneous complaint and had no other record of particular incidents (para 465-71).

ii) Category 2: five claimants who had made "one or two complaints" or had "one or two notes of particular incidents", but were found to be in the same position as category 1: "the threshold whatever it might be was not crossed" (472-475).

iii) Category 3: six claimants who were "able to rely on slightly more contemporaneous records" than category 2, but still fell short of the threshold (476-495).

iv) Category 4: the seven claimants who the judge regarded as having arguable claims, but only two of whom (Mr Clark and Mr Hobbs) passed the defined threshold (para 496-541).

Category 4

133. It would have been much more useful, in my view, to have started with category 4. These were the seven claimants who as he accepted had at least arguable claims, supported by good contemporary records. He accepted also that the location of their homes close to the tip added credibility:

> "Mr Clark, Mr Hobbs, Mrs Rimmer, Mr Chambers all live on Wheatsheaf Drive or Greyfriars, which were the closest properties to the Westmill 2 site, and Mr Packham, Mr Barr and Mrs Chandler all live only slightly further away. It is perhaps inevitable, therefore, that they would be the most affected of the claimants. And it is also far from coincidental that these seven claimants featured, almost to the exclusion of any others, in the events, meetings and correspondence with Biffa…" (para 497).

Had he not been so committed to his 52-day threshold, these would have provided him with a solid benchmark against which to judge the other claims. They could also have been related to the zones 1, 2 and 3 by reference to which the 30 selected claimants had been grouped (para 4), and to the evidence as to the periods when tipping came closes to the estate.

134. Instead, the judge's consideration of even these seven claims was dominated by the 52-day test. For illustration, it is sufficient to take two: Mr Derek Barr, the lead claimant, and Mr Roger Hobbs. Mr Barr failed the threshold test altogether; Mr Hobbs passed it, but only for 2005.

135. *Mr Barr* Of him the judge said:

> "523. Mr Barr was not the lead claimant by accident. Living in Dovedale, he lived as close as possible to the Westmill 2 site. The EA telephone log indicates that, between 26th July 2004 and 8th July 2009, Mr Barr made 204 separate complaints about the odour on site. It is clear from this log that he regularly suffered from odour emissions from the site and endeavoured to do all he could to resolve the problem. He too provided a statement to the EA in support of their prosecution, which was easily the most detailed of the statements that they obtained."

136. Mr Barr's Odour Log was described by the judge as "the most useful single document" provided by any of the claimants, and represented clear evidence of odour emissions throughout the period from August 2004 to October 2009. In spite of "vigorous cross-examination", which the judge described as "fruitless" his records "make only too clear that Mr Barr's claim was, unlike so many, firmly rooted in reality". On the other hand he did not accept the suggestion that Mr Barr's complaint days excluded "faint or background" odours. He had no doubt that Mr Barr recorded and complained about "any odour, of whatever strength, whenever he could get to the telephone".

137. He concluded on this case:

> "528. On this basis, I am unable to say that Mr Barr has demonstrated that *he crossed the necessary threshold*. His highest numbers of odour complaint days were 35 in 2005, 36 in 2006, 47 in 2007, and 39 in 2008. I find that those were in respect of any odour, regardless of intensity, duration or location. *They do not cross the once a week threshold that I have outlined*. On the contrary, his records show that, although there was an odour problem, it was infrequent, often transient and localised and, although there were occasions when it was significant, or had a significant effect, those occasions were not frequent enough to ground a claim. Accordingly, Mr Barr's claim would fall to be dismissed on the facts in any event."

138. *Mr Hobbs* lived in Greyfriars. He had made 77 separate complaint calls to the EA. Taking account of his other records, his "odour complaint days" amounted to 15 in 2004, 64 in 2005, 13 in 2006, 8 in 2007, 15 in 2008, and 4 in 2009. The odours were described in sometimes "graphic terms"; on occasions "absolutely stinking", but on

others only "faint and transient". He was described as "in many ways, the most careful recorder of all" and "a clear and careful witness". The judge concluded:-

> "… other than for 2005, *the frequency of his complaints gets nowhere near the threshold*… On the other hand, for 2005 at least, when Mr Hobbs identified 64 odour complaint days, the threshold of 52 days was passed."
>
> "As a result of his detailed records and his oral evidence, I am in no doubt that, on the facts, he had an arguable claim in nuisance, but one which, for all but 2005, fell below the necessary threshold or starting point. However, *for that one year, Mr Hobbs has demonstrated that the threshold was exceeded*, because there were 64 odour complaint days, 12 more than the threshold that I have fixed. Accordingly I find that, but for the point of principle [relating to "reasonable user"], Mr Hobbs would have made out a claim in nuisance, limited to 2005 only." (para 513, 517)

139. These extracts show clearly how the threshold test permeated his consideration of even the seven strongest cases. Had he not so constrained his assessment, it would have been difficult to avoid the conclusion that at least for substantial part of the five year period, particularly in the summer, there was a serious interference with the ordinary enjoyment of their homes, judged by the traditional tests.

Category 1 - "The silent majority"

140. At the other end of the spectrum was category 1, those who had made no specific complaints. Of these he said:

> "466. Although I find that these 12 claimants noticed some odour from time to time, as recorded in their witness statements and in their oral evidence, I am also in no doubt that those odour emissions were infrequent, of low intensity, and not such as to cause them to consider that what was happening was beyond the ordinary give and take of modern life. I repeat my conclusion that, had they considered that the odour emissions were more frequent or more intense than was reasonable, they would either have complained to the EA, or would have made some other contemporaneous record of the event. *Whatever an acceptable threshold or starting point might be*, the experience of these 12 claimants was not such as to put the odour which they experienced beyond or outside that threshold or starting point. Their claims in nuisance therefore fail on the facts." (para 466)

141. As a starting point, I can see no objection to this. Although lack of prior complaints does not necessarily invalidate an action in nuisance (cf *Halsey*), the judge was entitled to see it as a powerful factor in the circumstances of this case, where there was no lack of those encouraging their fellow residents to complain. However, it should not have precluded consideration of individual circumstances where the evidence justified it and the lack of specific complaints could be explained.

142. As an illustration of such a case, Mr Tromans refers to that of Mr Southcombe who lived in Greyfriars, near Mr Hobbs. The judge said of him:

> "Mr Southcombe said that it was 'difficult not to be emotional' about the odour, particularly as he had bought the house next to Mr Clark after the problems had first manifested themselves. He had spoken to both Mr Hobbs and Mr Clark about the problems but the general effect of his evidence was that the odour had little impact upon him or his family." (para 468(h))

143. Mr Tromans contrasts that brief summary with Mr Southcombe's statement, which makes clear that during the spring and summer of 2005 the smell had been strong enough to force him to go indoors, and had affected an important family event to celebrate their first child's birthday in September 2005. To avoid similar embarrassment the family did not hold similar events at home, and almost gave up inviting friends and family to their home in the summer. He had not complained, partly because they were preoccupied with a young family, and problems affecting them, and also because they knew their neighbours were actively complaining. By August 2009, he said, the problems had "improved and almost tainted my recollection of the problems". The cross-examination (Day 6 p 172) was brief, including a somewhat inconclusive discussion of his use of the word "tainted".

144. In my view, Mr Tromans is right to question the judge's rejection of this case outright, simply because there were no specific complaints. As I read the transcript, there was no significant challenge to his evidence as to the impact of the smell in the earlier years. It is difficult to understand the judge's comment that the smell "had little effect on his family", at least in 2005. His evidence for that period was consistent with that of his more vociferous neighbours and the Environment Agency records.

145. That case, in my view, shows that even in respect of categories 1 and 2, the judge's approach was too mechanistic. The lack of specific complaints was a legitimate starting point, but it should not have been treated as the only consideration without regard to the general picture created by the evidence as a whole, and the plausibility of the individual witnesses.

Conclusion to Part II

146. This case is a sad illustration of what can happen when apparently unlimited resources, financial and intellectual, are thrown at an apparently simple dispute such

as one about nuisance by escaping smells. The fundamental principles of law were settled by the end of the 19th century and have remained resilient and effective since then. Isolated statements in individual cases, at whatever level, are of limited value unless they have been absorbed into the stream of accepted authority. Parliament may alter by statute, or the higher courts by reinterpretation of the old cases. But there is a salutary presumption that neither does so without making their intention clear. Parliament may also enact parallel systems of regulatory control; but, unless it is says otherwise, the common law rights and duties remain unaffected. The judge was faced with a very difficult task, given the way the case was developed and presented on both sides. But he should not have allowed himself to be deflected from his ordinary task of assessing the evidence against the established legal principles and exercising his judgement on the facts of the case.

147. As already indicated in the main judgment (para 50), and for the reasons given more succinctly there, I would allow the appeal and dismiss the cross-appeal.

Patten LJ :

148. I agree.

Arden LJ :

149. I also agree.