Neutral Citation Number: [2024] EWCA Civ 433

Case No: CA-2023-001649

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Eyre
[2023] EWHC 1922 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2024

Before:

LORD JUSTICE COULSON
LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

- -

Between:

The King on the application of Gary Ball	**Appellant**
- and -	
Hinckley & Bosworth Council	**Respondent**
- and -	
Real Motorsport Limited	**Interested Party**

- -
- -

Piers Riley-Smith (instructed by **Richard Buxton Solicitors**) for the **Appellant**
Gordon Wignall (instructed by **Defendant Legal Department**) for the **Respondent**

Hearing dates: 5 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 29 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

1 Introduction

1. The issue raised by this appeal is whether a local authority has the power to vary an abatement notice which it has issued against a statutory nuisance under s.80 of the Environmental Protection Act 1990 ("the 1990 Act"). When granting permission to appeal, Lewison LJ said that he thought that the issue raised by the appeal was important. There is no authority directly on point.

2. I set out the relevant factual background in Section 2. I identify some of the important parts of the judgment below in Section 3. I set out the statutory framework in Section 4. In Sections 5 and 6, I ask whether, on an application of first principles, there is an implied power under the 1990 Act for the local authority to vary an abatement notice. In Section 7, I consider whether the authorities suggest a different answer. In Section 8, I offer a brief alternative analysis of how the power might be said to arise. I give short answers to the three grounds of appeal in Section 9. I am grateful to counsel for the appellant (a local resident) and the respondent (the local authority) for the clarity of their written and oral submissions. The interested party has taken no part in the proceedings either below or before this court.

2 The Factual Background

3. The interested party operates the Mallory Park Circuit ("the Circuit"). It is a well-known motor sports venue, and has been used for motor-racing since the 1950s. It is very close to the village of Kirkby Mallory and, in consequence, there have been ongoing issues of noise nuisance.

4. The first notice in respect of noise was served by the respondent in December 1985 under the Control of Pollution Act 1974 (the predecessor to the 1990 Act). It was served on the company then running the Circuit. It appears that the notice did not resolve the noise issues. Matters reached a head in March 2014 when the Local Government Ombudsman reported a number of complaints to the effect that the respondent had failed to take enforcement action for breach of the 1985 notice. As a result, the respondent served an abatement notice on 21 November 2014 ("the original Abatement Notice").

5. The original Abatement Notice stated that the noise from racing activities at the Circuit had given rise to a statutory nuisance which the respondent was satisfied was likely to recur. It required the interested party to restrict the recurrence of that nuisance and to cease operations at the Circuit from 1 January 2015 "other than in accordance with the Schedule hereto attached".

6. The Schedule laid down a regime for the operation of the Circuit, defining noisy days (themselves sub-divided into race days, high noise days and medium noise days), non-noise event days, and quiet days. There was an annual limit set on the number of high noise and medium noise days, and also limits on the number of noisy days within any seven day period. Clause 21 of the Schedule provided for possible variations to the restrictions in the Schedule in these terms:

> "The Operator may request any variation of this Schedule in writing and if a variation is agreed by the Council it shall take effect only on receipt by the

> Operator of written confirmation of the variation. In applying for any variation the Operator must remind the Council that the variation only takes effect from receipt by the Operator of the Council's written confirmation"

7. It appears that this procedure gave rise to variations to the Schedule in 2015, 2017, 2018 and in 2021.

8. On 1 December 2021, the interested party sought five variations from the local authority. There was a consultation exercise and the fifth variation was abandoned. In the written variation of 31 March 2022 ("the Variation of 31 March"), the respondent agreed to three of the four remaining variations requested, but refused the fourth. The generic reason given for allowing the three variations was that "there was no evidence of increased noise nuisance from previous variations and the level of control provided by the original notice would continue".

9. The variations in previous years had expressly been described as temporary. However, the three variations that were permitted by the Variation of 31 March were said by the respondent to be permanent, although they were said to be the subject of "an annual review undertaken by the Council, where the Council will consider the impact of the change and if it should remain or revert back to the original. The outcome of the review will be communicated to you in writing by the 30th November each year". Therefore, in order to understand all the applicable restrictions, it was necessary to consider the Variation of 31 March alongside the original Abatement Notice; it was not freestanding.

10. The appellant challenged the validity of the Variation of 31 March. He claimed that its effect would be to increase the impact which noise from motor racing at the Circuit will have on him and the other residents of the village. Permission was given to bring judicial review proceedings. The matter came before Eyre J ("the judge") on 19 July 2023.

3 The Judgment

11. The judgment is at [2023] EWHC 1922 (Admin). Having set out the background, the judge identified at [13] the appellant's case that the Variation of 31 March worsened the noise landscape. He noted at [14] that the respondent contested that. He said at [15] that the question of whether the Variation of 31 March did or did not have the effect of permitting increased noise would only be material if he concluded that the defendant could not lawfully vary the Abatement Notice to *reduce* the restrictions which had originally been imposed, but could make a variation which did not have that effect (presumably, a variation which potentially *increased* the restrictions). This led him to say at [16] that he was not concerned with a power to vary which restricted activities formerly permitted, where different considerations may well apply "from those which apply to a variation which either waters down the restrictions or modifies them while leaving the overall level of restriction unaltered and which is in accordance with the wishes of the party subject to the abatement notice".

12. These passages, which I confess I have not found very easy to follow, give rise to Ground 3 of this appeal, which complains that the judge wrongly excluded from his consideration the possible use of a variation power which *increased* the restrictions in an abatement notice.

13. The judge set out the legislative framework from [17]-[29]. He then addressed a debate as to the purpose of the 1990 Act. He agreed with the claimant that the references in the 1990 Act to "restricting" were to restricting the occurrence or recurrence of the nuisance, not the nuisance itself. At [39] he found that the 1990 Act contemplated the nuisance remaining in being, albeit with its effects minimised to the greatest extent practicable. He said at [40] that in consequence he did not accept the claimant's characterisation of the Act as operating "in absolutes". He went on:

> "40…The purpose of the Act is indeed to protect members of the public from statutory nuisances but that purpose is to be achieved against the background of a recognition of matters of practicality and of the interests of others. The purpose cannot be said to be that local authorities are to draw a balance between the competing interests because the primary thrust of the Act is clearly the prevention and removal of statutory nuisances. To the extent that there is a balancing exercise the scales start off weighted in favour of enforcement. However, that primary thrust is not unqualified and the balance can change. The purpose of the Act is to provide for the removal of statutory nuisances but for that to be done in a way which takes account of the existence of other factors including the fact that the total removal of a nuisance might not be practicable and that in such circumstances the taking of the best practicable means to counteract its effects might be the most that can be achieved."

14. At [44]-[70] the judge addressed the key question as to whether a power on the part of the local authority to vary an abatement notice arose by interpretation of and/or necessary implication into the 1990 Act. He concluded that it did; he found that there was an implied power on the part of the local authority to vary an abatement notice. In reaching that conclusion, he relied heavily on the decision in *R v Bristol City Council ex parte Everett* [1999] 1 WLR 92 (first instance) and [1990] 1 WLR 1170 (on appeal) ("*Everett*"). That was a case concerned with whether or not there was an implied power on the part of a local authority to withdraw an abatement notice.

15. The judge concluded at [60] that the difference between a power to withdraw an abatement notice and a power to vary such a notice "is not material for the purposes of the approach to be taken when considering the necessary implication of such a power". He went on:

> "60…Although the withdrawal and the variation of an abatement notice are different acts the material considerations are the same in respect each of those powers. The considerations which led the courts in *Everett* to find that there was a power to withdraw are also present when considering whether there is a power to vary. Such differences as exist between the acts are not relevant to the considerations which caused the courts in *Everett* to conclude that there was an implied power to withdraw a notice.
>
> 61. As a consequence the approach taken in *Everett* to a power to withdraw a notice applies equally to a power to vary and I am bound to conclude that a local authority can lawfully exercise the latter power…
>
> 63. It is apparent that Richards J was particularly influenced by the fact that a local authority has a discretion as to whether or not to prosecute for non-

> compliance with an abatement notice. He concluded that it was inconsistent with the existence of that discretion for there not to be a power to withdraw the notice. The same consideration applies and arguably does so with greater force to the question of a power to vary the notice."

16. The judge considered himself bound by the decision in *Everett* and concluded that there was a power to vary, which at [65] he described as a "lesser step" than the power to withdraw:

> "65. The variation of an abatement notice is a lesser step than its withdrawal. As a matter of strict logic it does not necessarily follow that the power to take the greater step must carry with it the power to take the lesser. It would be possible to have a regime which allowed withdrawal of an abatement notice but not its variation. That would, however, be highly unusual arrangement and the normal approach is to regard a power to take a greater step as carrying with it a power to take a lesser step. The absence of a power to vary an abatement notice would not fit easily with the existence of a power to withdraw such a notice and would, as already explained, be inconsistent with the view taken in *Everett* of the consequences of a local authority's discretion to prosecute…"

17. Although the judge went on to say at [70] that, even if he were not bound by *Everett*, he would reach the same conclusion, he was clear that that was because he considered that the circumstances of *Everett* "are closely analogous to those here and the reasoning adopted there is highly persuasive as to the approach to be taken".

18. The judge's heavy reliance on the decision in *Everett*, either directly or by analogy, is the subject of Grounds 1 and 2 of the appeal: Ground 1 complains that the judge was wrong to find that *Everett* was binding, and Ground 2 that in any event the judge was wrong to find that a power to vary arose by necessary implication. I address some of the other paragraphs in the judge's judgment in greater detail when considering the primary issue of necessary implication, and those two grounds of appeal.

4 The Statutory Framework

19. Under s.79(1)(g) of the 1990 Act, statutory nuisances include "noise emitted from premises so as to be prejudicial to health or a nuisance". Following the full list of statutory nuisances in s.79(1) (which includes noise), the section goes on to impose a duty on every local authority "to cause its area to be inspected from time to time to detect any statutory nuisances which ought to be dealt with under s.80 below…and, where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practical to investigate the complaint."

20. It is necessary to set out much of s.80 in full. It is entitled 'Summary Proceedings for Statutory Nuisances':

> "(1) Subject to subsection (2A) where a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, in the area of the authority, the local authority shall serve a notice ("an abatement notice") imposing all or any of the following requirements—

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

(b) requiring the execution of such works, and the taking of such other steps, as may be necessary for any of those purposes, and the notice shall specify the time or times within which the requirements of the notice are to be complied with.

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

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

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

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

(2A) Where a local authority is satisfied that a statutory nuisance falling within paragraph (g) of section 79(1) above exists, or is likely to occur or recur, in the area of the authority, the authority shall—

(a) serve an abatement notice in respect of the nuisance in accordance with subsections (1) and (2) above; or

(b) take such other steps as it thinks appropriate for the purpose of persuading the appropriate person to abate the nuisance or prohibit or restrict its occurrence or recurrence.

(2B) If a local authority has taken steps under subsection (2A)(b) above and either of the conditions in subsection (2C) below is satisfied, the authority shall serve an abatement notice in respect of the nuisance.

(2C) The conditions are—

(a) that the authority is satisfied at any time before the end of the relevant period that the steps taken will not be successful in persuading the appropriate person to abate the nuisance or prohibit or restrict its occurrence or recurrence;

(b) that the authority is satisfied at the end of the relevant period that the nuisance continues to exist, or continues to be likely to occur or recur, in the area of the authority.

(2D) The relevant period is the period of seven days starting with the day on which the authority was first satisfied that the nuisance existed, or was likely to occur or recur.

…

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

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

> (7) Subject to subsection (8) below, in any proceedings for an offence under subsection (4) above in respect of a statutory nuisance it shall be a defence to prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance."

21. In summary, there is an obligation on the relevant local authority, if it is satisfied on the balance of probability that a statutory nuisance exists, to serve an abatement notice. The only limited discretion arises where, in the case of an noise nuisance, the perpetrator may be granted a 7-day 'grace' period in which the local authority can seek to persuade that person to abate the nuisance or prohibit or restrict its occurrence. An abatement notice under s.80(1) must require the abatement of the statutory nuisance, or the prohibition or restriction of its occurrence or recurrence (s.80(1)(a))[1]; and require the execution of such works, and the taking of such steps, as may be necessary for any of those purposes (s.80(1)(b)). The recipient of the abatement notice can appeal under s.80(3).

22. It is convenient to address here one of the key strands of Mr Wignall's argument. He said that, when taken in combination, the last part of s.79(1) (set out in paragraph 19 above) and s.80 (paragraph 20 above) imposed some sort of continuing duty on the part of the local authority to discuss and liaise with the perpetrator of the statutory nuisance both before and after any abatement notice was issued.

23. I disagree: the 1990 Act does not envisage any such thing. On any proper reading of s.79 and s.80, they are dealing with abatement notices as a one-off event, following an inspection of the area carried out "from time to time". That is why an ensuing abatement notice remains in force indefinitely: see *R v Clerk to the Birmingham City Justices, ex parte Guppy* (1988) 152 JP 159 at 163B and 163H. The sections are not couched in the language of a continuing duty, and do not suggest that inspections and subsequent notices are to be regarded as part of an obligatory continuing dialogue both before and after service of the notice. Moreover, the existence of such a continuing duty has been rejected by the courts. In *R v Falmouth and Truro PHA, Ex p. South West Water Ltd* [2001] QB 445, which concerned whether the local authority under the 1990 Act was under a duty to consult the alleged perpetrator of a nuisance, Simon Brown LJ (as he then was) said at 458-D:

> "Often, certainly, it will be appropriate to consult the alleged perpetrator, at least on some aspect of the matter, before serving an abatement notice, but the enforcing authority should be wary of being drawn too deeply and lengthily into a scientific or technical debate, and warier still of unintentionally finding themselves fixed with all the obligations of a formal consultation process".

24. This is also how abatement notices have always been characterised by the Courts: as a one-off event. For example, when Lord Woolf was considering the 'background and context to the introduction of the EPA 1990' in *Aitken v South Hams District Council* [1995] 1 A.C. 262, he considered the service of noise abatement notices under s.58 of the Control of Pollution Act 1974. Central to that procedure, he said, was 'the service of a notice, contravention of which, without reasonable excuse, constitutes an

[1] At [36]-[38], the judge agreed with the appellant that "restricting" referred to restricting the occurrence or recurrence of the nuisance, not (as the respondent argued), restricting the nuisance itself. There is no challenge to that finding.

offence'. This suggests that the service of abatement notices is to be regarded as a one-off admonition, and not the start or continuation of a continuing dialogue.

25. Returning to the 1990 Act, s.81(7) gives effect to the further supplementary provisions in Schedule 3. Paragraph 1 of Schedule 3 gives the Secretary of State the power to make Regulations as to appeals. Paragraph 1(4)(c) expressly permits those Regulations to "prescribe the cases in which the decision on appeal may in some respects be less favourable to the appellant that the decision on which he is appealing". This expressly envisages the possibility, under regulations made under paragraph 1 of Schedule, that, on appeal, the abatement notice will be varied and the restrictions increased, not reduced. I return to that point below.

26. The grounds for any appeal against an abatement notice are set out in the Statutory Nuisance (Appeals) Regulations 1995 ("the relevant Regulations"). Regulation 2 lists the grounds on which an appeal under s.80(3) to the Magistrates' Court may be made. I note of particular relevance to the present appeal the following:

> "(2) The grounds on which a person served with such a notice may appeal under section 80(3) are any one or more of the following grounds that are appropriate in the circumstances of the particular case—
>
> …
>
> (c) that the authority have refused unreasonably to accept compliance with alternative requirements, or that the requirements of the abatement notice are otherwise unreasonable in character or extent, or are unnecessary;
>
> …
>
> (e) where the nuisance to which the notice relates—
>
> (i) is a nuisance falling within section 79(1)(a), (d), (e), (f) or (g) of the 1990 Act and arises on industrial, trade, or business premises,…that the best practicable means were used to prevent, or to counteract the effects of, the nuisance;
>
> (f) that, in the case of a nuisance under section 79(1)(g) or (ga) of the 1990 Act (noise emitted from premises), the requirements imposed by the abatement notice by virtue of section 80(1)(a) of the Act are more onerous than the requirements for the time being in force, in relation to the noise to which the notice relates, of—
>
> (i) any notice served under section 60 or 66 of the 1974 Act (control of noise on construction sites and from certain premises), or
>
> (ii) any consent given under section 61 or 65 of the 1974 Act (consent for work on construction sites and consent for noise to exceed registered level in a noise abatement zone), or
>
> (iii) any determination made under section 67 of the 1974 Act (noise control of new buildings)…"

27. The powers of the Magistrates' Court on any appeal are set out in regulation 2(5) which provides:

> "(5) On the hearing of the appeal the court may—
>
> (a) quash the abatement notice to which the appeal relates, or
>
> (b) vary the abatement notice in favour of the appellant in such manner as it thinks fit, or
>
> (c) dismiss the appeal;
>
> and an abatement notice that is varied under sub-paragraph (b) above shall be final and shall otherwise have effect, as so varied, as if it had been so made by the local authority."

28. It is also relevant to note that a person who, without reasonable excuse, contravenes an abatement notice, or fails to comply with any requirement or prohibition in such a notice, is guilty of a criminal offence by virtue of s.80(4) of the 1990 Act. Prosecution of such an offence will typically be by the local authority under their powers set out in s.81(3) of the 1990 Act, which also allows them to "abate the nuisance and do whatever may be necessary in execution of the notice". It is also open to others to bring a private prosecution: in *Sovereign Rubber Ltd v Stockport NBC* [2000] ENV LR 194, Sedley LJ said that such a prosecution might be brought by "an aggrieved neighbour". In addition, s.82 of the 1990 Act provides for a person "aggrieved by the existence of a statutory nuisance" to make a complaint to the Magistrates' Court.

29. If the person on whom the abatement notice is served is charged with a criminal offence under s.80(4) then, in addition to a defence of reasonable excuse, s.80(7) provides that it is a defence for the person charged to prove "that the best practicable means were used to prevent or counteract the effects of the nuisance". This is sometimes known as "the BPM defence". The BPM defence can also be a relevant factor in an appeal against a noise abatement notice: see Regulation 2(2)(e), set out in paragraph 23 above. The BPM defence may, as Mr Riley-Smith observed, involve a fact-specific analysis and its availability and/or its strength could change, at least from time to time, as the relevant technology changed.

30. It is again convenient to address at an early stage of this judgment another of the critical elements of the appeal: the unique features of the BPM defence. The courts have repeatedly said that it is not for the local authority to assess whether the recipient of an abatement notice has a BPM defence. By way of example, *Manley v New Forest* (1999) WL 478012[2] concerned a noise complaint made regarding the howling of a pack of Siberian huskies, bred in the applicants' back garden. They submitted that the abatement notice that had been served on them was not justified and that a BPM defence arose under the 1990 Act. The issue arose as to whether the local authority was entitled to consider the BPM defence. The Divisional Court said:

> "…the local authority's duty is to issue a notice, but that done, the effect of the notice is not dictated by their duty but by the terms of the Act, the appeal regulations and the availability of a ground of appeal…"

[2] The parties have rightly noted that this is a recent citation used by Westlaw for this unreported case, not used when the case was cited in *NYKK*.

This view was reaffirmed by the High Court in *Tewkesbury BC v Deacon* [2003] EWHC 2544 (Admin), [2004] ENV LR 22 at [20], where Evans-Lombe J said:

> "It is not the duty of the local authority, as the guardian of the Environmental Protection Act within its area, to advise individuals or to assist them in reducing noise or giving them advice on how noise restrictions should be complied with."

31. Of similar effect was the Administrative Court decision in *R (on the application of South Kesteven DC) v Grantham Magistrates' Court* [2010] EWHC 1419 (Admin); [2011] ENV LR 3. There, the argument was that the Magistrates had confused the issue about whether or not there was a statutory nuisance with the subsequent issue of whether or not the statutory defence (BPM) had been made out. That submission was accepted by Wyn Williams J at [17]-[19]. The same result can also be found in the second iteration of *Manley,* at [2007] EWHC 3188 (Admin); [2008] ENV LR 26, where Moses LJ confirmed at [11] that it was not for the local authority to make suggestions in respect of a possible BPM defence. As he put it in trenchant terms at [11]-[12], not only was it not for the local authority to make any such suggestions, but it was for the perpetrator of the nuisance to demonstrate that he or she was doing something which constituted the best practicable means, so as to establish the BPM defence[3].

32. At one point during the oral submissions, Mr Wignall sought to argue, by reference to the decision in *Hounslow LBC v Thames Water Utilities Ltd* [2003] EWHC 1197 (Admin); [2004] QB 212, that this clear distinction would not work in practice because such matters were "far too complex for magistrates". To the extent that that argument was maintained (and Mr Wignall's post-judgment note suggested that it was not), I reject it. That was not the point that Scott Baker LJ was making in *Hounslow* at all: he was talking about the nature of the process 150 years ago and the change in the way public works are funded and carried out. In any event, there was nothing in the present case to say that the Magistrates would not understand whether or not the Circuit was exceeding the permitted noise levels.

33. The authorities therefore demonstrate that there are two distinct stages. First, the local authority has to decide whether there is a statutory nuisance. If it does so decide, it is obliged to issue an abatement notice. There is no relevant discretion. If there is an appeal, or a criminal prosecution, then it is at that second stage that the Magistrates' Court has to decide whether there is a BPM defence. This distinction between the powers of the local authority on the one hand, and those of the Magistrates' Court on the other, is of critical importance when considering the primary issue in this appeal. Whether or not the nuisance has been or can be addressed by the use of BPM is not a matter for the local authority: it falls outside their jurisdiction. In law, it is solely a matter for the Magistrates' Court. That is also consistent with my earlier conclusion that the abatement notice is envisaged as a one-off event which is the sole responsibility of the local authority. The abatement notice is not a gateway for the local authority's ongoing consideration of BPM.

5 Does the Local Authority Have The Statutory Power to Vary an Abatement Notice?

[3] The *Falmouth and Truro* case (paragraph 23 above) is also consistent with this approach, as is the passage from the judgment in *Sovereign Rubber,* cited at paragraph 67 below.

Part 1: The Existence of an Express Power

5.1 Preliminary

34. Whether the local authority has the statutory power to vary an abatement notice is the central issue in this appeal. In order to provide an answer to the question, both parties have delved back into the history of sanitary and environmental legislation, have identified many authorities concerning other statutory provisions, and continue to argue about the precise purpose of the 1990 Act, all in order to advance their respective cases. Whilst I address those matters below, I am not persuaded that they provide the most obvious assistance in answering the central issue. I propose, therefore, to consider that question by reference to first principles (Sections 5 and 6), and only then go on to consider the authorities (Section 7).

5.2 Is There an Express Statutory Power to Vary?

35. I should say at the outset that this analysis is based on the parties' common assumption, shared by the judge, that the central issue in this case is whether the local authority had the power to vary the notice by way of necessary implication. For the reasons explained in Section 9 below, that may not be the right question. The provisions that give local authorities implied powers in certain circumstances are s.111 of the 1972 Act and s.1 of the Localism Act 2011 ("the 2011 Act"). I address those briefly in Section 9 below. It will be seen that, even if they are the correct basis for the analysis, it makes no difference to the result.

36. The starting point for any consideration of the 1990 Act must be this: the respondent, as the relevant local authority, has no express power to vary the abatement notice. There is no such power, either in the 1990 Act or in the relevant Regulations. Nobody suggests to the contrary.

37. Does anyone else have the power to vary an abatement notice? If they do, even if it is a power limited or circumscribed by the 1990 Act and the relevant Regulations, that will make it more difficult to argue that a similar sort of power should also be implied in favour of a local authority. That is because an implication is usually necessitated by the absence of an express provision. What must be implied is that which "necessarily follows from the express provisions of the statute construed in their context", as Lord Hobhouse said in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563 at [45]. While it might be appropriate to imply ancillary powers reasonably incidental to existing provisions (see *Bennion on Statutory Interpretation,* 8th ed, (2023) at pp 427-428), it will not be possible to imply a different or wider power where such a power, even if it is in a particular form, already exists in the statute: see *Hazell v Hammersmith and Fulham LBC* [1992] 2 A.C. 1, where a detailed code governing borrowing meant that s.111 of the Local Government Act 1972 ("the 1972 Act") could not be used to imply additional, related powers.

38. Furthermore, the existence of an express power may mean that any alleged implication is inconsistent with or contradicted by the express power. "An implication cannot properly be found which goes against an express statement": see *Bennion* at p.426, and the old maxim *expressum facit cessare tacitum* (statement ends implication). In this way, at least in broad terms, the position is similar to the test for implication of terms into a contract. If there is an express term that deals with a

particular right or duty, it will make it harder to imply a wider or different term dealing with the same or similar right or duty. In *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, the Privy Council said: "if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement".

39. The 1990 Act contemplates that the Magistrates' Court might be given, and the relevant Regulations, which are part of the legislative scheme, expressly provide that, in certain circumstances, the Magistrates have, a power to vary the terms of an abatement notice. Under regulation 2(5)(b) (paragraph 26 above), that power is reserved to the Magistrates' Court, which can, on appeal, vary the abatement notice in favour of the appellant "in such manner as it thinks fit". It might be thought, therefore, that in view of the power which the legislative scheme gives to the Magistrates' Court to vary an abatement notice, there was little or no room for any implied power for the local authority to do the same.

40. On behalf of the respondent, Mr Wignall argued that the express power to vary was, in reality, very limited, because it only arose if the interested party appealed the abatement notice, and that had to be done within 21 days. Thus, he argued, this was a circumscribed right, open only as a result of an appeal by the interested party, which was itself a right exercisable in a very short timeframe following the service of the abatement notice. He said that it would be wrong for this court to take that limited power into account when considering the question of necessary implication. The judge was of a similar view. He said at [67] of his judgment that:

> "The power to vary an abatement notice in the particular circumstances of an appeal and as part of the provisions governing an appeal is directed at those particular circumstances and is not to be seen as an indication as to whether there should or should not be the implication of a similar power to be exercised in the very different circumstances which apply once an abatement notice is in force."

41. With respect, I do not agree with that analysis. In my view, the respondent (and in this instance, the judge) have under-stated the legal significance of the express power which permits the Magistrates' Court to vary the abatement notice. There are a number of matters which need to be emphasised.

5.3 The Existence of an Express Power

42. By paragraph 1(4) of Schedule 3 of the 1990 Act, Parliament envisaged that the relevant Regulations might give the Magistrates' Court the power to vary. As noted in paragraph 25 above, paragraph 1(4)(c) expressly permits those Regulations to "prescribe the cases in which the decision on appeal may in some respects be less favourable to the appellant that the decision on which he is appealing", thus encompassing the possibility that, on appeal, the abatement notice will be varied and the restrictions increased, not reduced. The Secretary of State then made the relevant Regulations which gave the Magistrates' Court a wide power to vary (although only in favour of an appellant). That seems to me to be a very important feature of the legislative scheme. It expressly allows a court to adjudicate on any contested issues

arising out of the terms of an abatement notice. The legislative scheme does not give the local authority the same right.

43. I note that this express power to vary on the part of the Magistrates' Court is not new. Following the Control of Pollution Act 1974, which also gave a right of appeal against a local authority notice, the Control of Noise (Appeals) Regulations 1975 governed those appeals. Regulation 4(5) of the 1975 Regulations gave the Magistrates' Court precisely the same powers as the relevant Regulations, namely the power to quash the notice, vary the notice, or dismiss the appeal.

44. As for the 1990 Act itself, that power was conferred by the first version of the relevant Regulations (the Statutory Nuisance (Appeals) Regulations 1990) which came into force at the same time as the 1990 Act. That power is now set out in the (subsequent) relevant Regulations (paragraph 27 above).

45. In my judgment, the express power of the Magistrates' Court to vary an abatement notice (which was envisaged as a possibility by Parliament in paragraph 1 of Schedule 3 to the 1990 Act, and then confirmed by the Secretary of State in the relevant Regulations) is a critical pointer away from the necessary implication of such a power on the part of the local authority. It might be said that this also better protects the public interest, because if the Magistrates' Court did not have the power to vary, they would either have to allow the appeal (with the result that there was no protection for the public pending a new notice) or dismiss the appeal (even if the notice went too far).

46. Although the statutory provisions under consideration in *R (Kalonga) v Croydon LBC* [2022] EWCA Civ 670; [2022] P.T.S.R.1568, are very different to those which apply here, the judgment in that case provides some assistance here. My Lady, Elisabeth Laing LJ, said at [74] that the fact that there was express power for a local housing authority to change certain procedural requirements in some circumstances meant that a power to change the requirements in other circumstances would not be implied. As she said, at [75], "as a matter of language, the juxtaposition, in closely connected provisions, of an express power to change procedural requirements in some, and of its absence in another, is a strong indication that, by necessary implication, there is no such power in the provision from which the express power is missing". Broadly similar reasoning and a similar result pertained in the subsequent case of *R (Piffs Elm Limited) v Commissioner for Local Administration in England* [2023] EWCA Civ 486; [2023] 3 W.L.R. 610 ("*Piffs Elm*") at paragraphs 97-100.

5.4 The Deliberate Distinction Between the Powers of the Local Authority and the Magistrates' Court

47. Secondly, it seems equally clear that the local authority has no power to vary its own abatement notice because any such power resides with the Magistrates' Court. That is hardly novel: such a division of powers, with the local authority serving an original notice, but thereafter all matters arising out of it being exclusively for the Magistrates' Court, can be traced back at least to the Public Health Act 1875, s.95[4]. There was a division of powers then, and that has been maintained throughout the subsequent sanitary and environmental legislation of the twentieth century, culminating in the

[4] Still further back, Section XII of the Nuisances Removal Act 1855 limited the power of the local authority to causing a complaint to be made about the nuisance before a Justice of the Peace.

1990 Act. In my view, it would cut directly across that division if some sort of power to vary the abatement notice on the part of the local authority was now to be implied.

48. The distinction between a local authority's powers and those of the Magistrates' Court was considered in *R v Fenny Stratford Justices, Ex p. Watney Mann (Midlands) Ltd* [1976] 1 WLR 1101. That case (under a regime which has been superseded) concerned whether the Justices, having heard a complaint made under the Public Health Act 1936, were entitled to add words to a nuisance order made under s.94(2) of the 1936 Act. This stemmed from nuisance created by music from a jukebox in a pub. The pub's proprietors had applied for an order to "quash that part of the order that restricted the level of sound to 70 decibels". The High Court confirmed at 1103-H that the local authority was entitled "to serve, if it thinks fit, having regard to whether or not it considers there is a statutory nuisance within its jurisdiction, an abatement notice". That power was put, as it were, in binary terms.

49. At 1106-D of the judgment in *Fenny Stratford*, this obligation was contrasted with the position of the Justices, who "can add any additional term they choose to the simple order to abate, provided that, first, the term is practical in its effect; secondly, it is couched in such language as to be easily understood not only by those who claim to have been aggrieved by the statutory nuisance but also by any person upon whom the order is imposed; and, thirdly, words are used to specify, where appropriate, the action which has to be taken by the person upon whom the order is imposed to comply with this term". The order in *Fenny Stratford* was ultimately quashed because it was "void for uncertainty", not because the Justices had acted *ultra vires*.

50. Of course, *Fenny Stratford* arose under a different scheme, where the Justices were obliged to make a nuisance order if the local authority's notice was not complied with and the nuisance was found to exist; there was no right of appeal against the notice itself. But I consider that it shows that the Magistrates' Court has historically had wide powers to order variations, as long as they did so in a way which was clear and certain. In *Fenny Stratford*, the local authority's remit was limited to identifying the statutory nuisance and serving a notice in consequence. It was the Magistrates' Court that had greater, qualitative power over the final contents of any order.

51. I have already dealt at paragraphs 30-33 above, with the BPM defence which, as matter of law, is a point that the Magistrates' Court must take into account on appeal or in a criminal case concerning the abatement notice, but which - as the authorities make clear - is not a matter for the local authority. That again confirms the express division between the power of the local authority and the power of the Magistrates' Court, and is another reason why the existence of the express power militates against the implication of any power on the part of the local authority.

5.5 Inconsistency and Contradiction

52. Thirdly, any power granted to the local authority to vary an abatement notice would be potentially inconsistent with, and contradictory to, the express power that can be exercised by the Magistrates' Court. Again, the BPM defence is the best example. As previously noted, the courts have made it clear that this is not a matter for the local authority. But if the local authority had the power to vary the abatement notice then, contrary to the authorities there set out, it might be thought to follow that the local authority was entitled to consider the BPM defence too. On one view, that could

render the entire appeal procedure otiose. Indeed, there are other ways in which the implication of this power would have a similar effect.

53. Take, for example, a dilatory recipient of an abatement notice, (X), who does not wake up to his right of appeal until more than 21 days after the service of the notice. Under the statutory scheme, X would not then be able to seek a variation of the notice on appeal: the time limit for so doing had expired. But, on the respondent's case, that would not matter because X could seek the required variation from the local authority instead. He would thereby circumvent the time limit in s.80(3) altogether.

54. By way of another example of this same problem of inconsistency and contradiction, Regulation 2(5) makes any variation of the abatement notice by the Magistrates' Court "final". That too would be contradicted by the proposed power on the part of the local authority to vary the notice. On the respondent's case, the local authority would have an ongoing power to vary the abatement notice at any stage, even if that abatement notice had been varied by the Magistrates and had therefore become "final". It would remove at a stroke the level of certainty and finality provided by the statutory scheme.

5.6 Conclusion as to Express Power to Vary

55. For all these reasons, therefore, I consider that the express power to vary an abatement notice, which the legislative scheme gives to the Magistrates' Court and not to the local authority, provides a complete answer to the question as to whether the local authority has the implied power to vary its own notice. That follows a jurisdictional division that stretches back well over a century. The suggestion that the local authority does have such a power would be inconsistent with, and contrary to, the legislative scheme.

6. Does the Local Authority Have the Statutory Power to Vary an Abatement Notice?

Part 2: The Necessary Implication of a Power to Vary

6.1 Preliminary

56. Notwithstanding my conclusion at paragraph 55 above, I address the issue as to whether there is an implied power in any event because, even leaving aside the existence of the express power, I have concluded that the judge was wrong to find that there was, by necessary implication, a power to vary the abatement notice on the part of the local authority.

6.2 The Test for Necessary Implication

57. Again, assuming for this purpose that the crucial question concerns necessary implication of the powers, that has to be judged by reference to the express provisions of the statute concerned, construed in their context and having regard to their purpose: see Lord Hodge DPSC in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2023] AC255, Paras 29-31 and the judgment of the Chancellor in *Darwell v Dartmoor National Park Authority* [2023] EWHC 35 (2023] Ch 141 at [16]-[19].

58. How is the test of "necessary implication" to be applied in any given case? Lord Hobhouse in *Morgan Grenfell* said at [45] that:

> "…A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it could have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

59. It is unnecessary to enter the debate as to whether implication and interpretation are different things. I am quite prepared to accept that they are two parts of the same process, that of discovering the intention of the legislature. It is of course for that reason that the court was rightly reminded of Lady Hale's observation in *R (Black) v Secretary of State for Justice* [2017] UK SC 21; [2018] AC215 at [36] that "the goal of all statutory interpretation is to discover the intention of the legislation."

60. Two more recent decisions of this court are helpful guides to the test of necessary implication, and the relatively high hurdle that those seeking such implication must inevitably have to surmount. As my Lady, Elisabeth Laing LJ, put it in *Piffs Elm* at [93], "the test is whether such an implication is necessary, not whether it would be convenient." In *NYKK v Mark McClaren* [2023] EWCA Civ 1471 at [43] and [44], by reference to a number of authorities on the subject, Popplewell LJ noted that the case for implication must be "compellingly clear", and that "courts should be slow to give a statute an effect that is not expressly stated."

6.3 Flexibility and Economy

61. Mr Wignall did his best to clear this high hurdle but, in my view, he did not get close to surmounting it. His principal argument was that allowing the local authority the power to vary an abatement notice made the system more flexible, and that it was more economic for the local authority to vary an existing abatement notice rather than issuing a fresh notice.

62. I should say that I do not accept either of those arguments on their own terms: what may be gained by 'flexibility' for the local authority and the perpetrator of the nuisance may well be lost in terms of certainty for the public, who are entitled to the protection provided by the 1990 Act, properly enforced. Moreover, there was no evidence that issuing a fresh abatement notice to reflect changed circumstances was any more expensive or difficult for the local authority than varying an existing notice. However, assuming that I am wrong in these conclusions, and there is more in these points of flexibility and economy than I currently accept, they cannot justify implying into the 1990 Act powers that are not there. Permitting something for which there is no express power merely because it is said to be administratively more convenient or cheaper, is not a legitimate foundation for the necessary implication of that absent power: see *Piffs Elm*.

6.4 The Purpose of the 1990 Act and the Alleged Need for 'Balance'

63. Of course, the first problem with identifying the purposes of legislation as detailed and complex as the 1990 Act is that it can depend on whether one is considering the Act overall, or particular parts of it, or even particular sections. The fact that there might be something in it for everyone can make it an exercise of limited utility. But my analysis of the purposes of the 1990 Act only serves to strengthen the conclusions that I have so far reached.

64. In my view, one of the salient purposes of the 1990 Act was to protect the environment: it might fairly be said that the clue was in the title. As part of the scheme to achieve that, it was designed to protect members of the public from statutory nuisances. That is what s.80 is all about: the whole process is predicated on the basis that, if there is a statutory nuisance, it needs to be abated/prohibited/restricted. That has been the preoccupation of each of the precursors to the 1990 Act. In *Great Western Railway v Bishop* [1871-72] LR 7 QB 550, the intent of the 1855 Nuisances Removal Act was expressed as being 'to protect the public health and private health of individuals living in towns'. Later, Part III of the Public Health Act 1936 framed 'statutory nuisances' as that which was 'prejudicial to health or a nuisance'.

65. Mr Wignall argued that the purpose, or at least one of the purposes, of the 1990 Act was to maintain a balance between the local authority and the perpetrator of the nuisance, and that the local authority needed to maintain a continuous dialogue with the recipient of the notice. I disagree with that: for the reasons that I have set out already, I reject the notion that the maintenance of some sort of balance between local authority and the perpetrator of the nuisance was the purpose (or even one of the principal purposes) of the 1990 Act.

66. I accept at the outset that s.80 does allow for some limited flexibility in any consideration of the perpetrator's position because, in certain circumstances, an abatement notice may not eradicate a nuisance altogether. That flexibility can be seen at the first stage, in the terms of the abatement notice served by the local authority. That was referred to by Sedley LJ in *Sovereign Rubber* as "some sensible co-operation between the persons served and the local authority in producing an intelligible and workable abatement notice". But the fundamental principle remains that, if there is a statutory nuisance, the local authority is obliged to issue an abatement notice.

67. That flexibility can also be seen at the second stage, and the defence of BPM before the Magistrates' Court (on appeal or to meet a criminal charge). Importantly, at that point, of course, it is nothing to do with the local authority. As Sedley LJ also said in *Sovereign Rubber* when describing the position after the abatement notice has been served:

> "Whatever the local authority's officer may have been disposed to accept, the proper balance between the factory operations and the residence tranquillity was now a matter for the Justices. It was their view, not Mr Brown's, which mattered."

That is, of course, further support of the distinction I have previously drawn between the powers of the local authority and the powers of the Magistrates' Court.

68. Moreover, I consider that this flexibility at both stages is limited and does not detract from the overall purposes of the 1990 Act. Indeed, in my view, that limited flexibility enhances the purposes of the 1990 Act (because it makes achieving the necessary public protection subject to some restraints of practicality and realism), and confirms that there is no reason to give the local authority additional and unexpressed powers to vary the abatement notice too. To that extent, therefore, I consider that the judge's observations at [40] (paragraph 13 above) rather overstate the existence of a need to balance the interests of the local authority with those of the recipient of the notice.

69. Mr Wignall's submission as to the need to maintain a balance between the local authority and the perpetrator of the statutory nuisance was founded on two misconceptions of law, both of which I have already addressed. The first was his submission that s.79(1) and s.80 gave rise to some sort of continuing duty on the part of the local authority to keep the terms of an abatement notice under constant review. There is no such duty in s.79 and s.80: see paragraphs 22-24 above.

70. Secondly, I consider that Mr Wignall was wrong as a matter of law to say that negotiations and give and take were inevitable because of the need on the part of the local authority to consider at all stages the BPM defence. For the reasons, and by reference to the authorities, set out in paragraphs 30-33 and 67 above, issues concerning the BPM defence are not a matter for the local authority.

71. One of Mr Wignall's main submissions was that the power to vary was needed because, since the 1990 Act was passed, industry and technology have changed a good deal, so that the legislation passed in 1990 (which was itself adapting the existing statutory nuisance scheme) has not been able to keep up. He referred to the potential ossification of the system if there was no power to vary; that the legislation should be deemed to be "always speaking": *TW Logistics v Essex C.C.* [2021] UKSC 4, [2021] A.C. 1050 at [73]. But those submissions are usually deployed in respect of much older statutes, not one from 35 years ago which is still in vigorous good health. Moreover, with respect, that line of argument does not address the authorities summarised in the earlier paragraphs of this judgment, which make plain the limits of the local authority's powers.

72. For the same reasons, I also reject Mr Wignall's related argument that a finding that there was no power on the part of the local authority to vary an abatement notice would "set local authorities back many years". There was no evidence of that, either on the facts of this case or more broadly. On the contrary, it seems to me that it is much more likely to create difficulties for local authorities if the perpetrators of statutory nuisance can regularly and persistently apply for endless variations of the original abatement notice, without any obvious reference to the public. I expand on that conclusion in Section 6.6 below.

73. Moreover, throughout his submissions on the alleged need for balance, Mr Wignall repeatedly referred only to the local authority and the perpetrator of the nuisance, and made no mention of the public and, in particular, those adversely affected by the statutory nuisance which the abatement notice was designed to protect. In my judgment that is looking at the 1990 Act from the wrong angle. As I have emphasised above, what ultimately matters for the purposes of the 1990 Act is the proper protection of the environment and the public's enjoyment of the environment, not the

maintenance of dialogue between the local authority and the perpetrator of the statutory nuisance.

74. This importance of protecting the public interest under the statutory scheme is also emphasised by regulation 3 of the relevant Regulations. Although it is unnecessary to set it out here, I note that it is concerned with the suspension of an abatement notice pending appeal. Regulation 3(2)(b) expressly envisages the perpetrator carrying out works to comply with the notice, despite any appeal, if that expenditure "would not be disproportionate to the public benefit".

75. None of the authorities to which we were referred suggest any sort of balancing exercise of the kind described by Mr Wignall. For example, he referred to the two *Manley* decisions in support of his submission that the court will always give primacy to a business doing its best to address any nuisance. That misses two points. First, it was not a question of primacy; the *Manley* decisions were examples of the court's consideration of the BPM defence. Secondly, neither case had anything to do with a local authority's power to vary an abatement notice; indeed, both cases operated on the presumption that, because there was a statutory nuisance, an abatement notice was required. There is no suggestion in either case of any balancing exercise of the sort contended for by Mr Wignall.

76. Perhaps most importantly for present purposes, I consider that, even if full acknowledgment is made of the need for a co-operative relationship between the local authority and the perpetrator of the statutory nuisance, that cannot meet the test of necessary implication in relation to the proposed power to vary the notice, either. Mr Wignall used as one example of this need for co-operation, and therefore why the power to vary should be necessarily implied, the possibility of the perpetrator acquiring completely new machinery for its operations. He argued that that would be a situation in which a variation of the abatement notice was required.

77. But in my view, his example demonstrates the opposite. New machinery would be, in my view, a paradigm situation where a *new* abatement notice was required. If there is new machinery, some parts of it may make less noise than before, but other parts of it may make more. There may be differences as to when or for how long the new noise is created. That could all amount to a material change of circumstances. An inspection would be required under s.79(1) and, so it seems to me, a fresh abatement notice required. It would be a matter for the local authority whether or not they withdrew the original abatement notice; if that was based on the old machinery which had been replaced, then withdrawal – which is permitted as per the decision in *Everett* (see below) – would seem the obvious course. Furthermore, since new machinery may well be a product of a change of ownership, a new abatement notice would be required anyway, since s.80(4) makes the notice binding only on the recipient of the notice, not a new owner of the site or premises.

78. Accordingly, I am not persuaded that the nuanced arguments about the purpose of the 1990 Act are of any significant assistance on the question of necessary implication and, to the extent that they are, they favour the appellant, not the respondent. Moreover, standing back, there are a host of other reasons why, in my judgment, an alleged power to vary on the part of the local authority does not meet the high test of necessary implication.

6.5 Contrast with Town and Country Planning

79. An abatement notice under the 1990 Act has certain similarities with an enforcement notice under s.172 of the Town and Country Planning Act 1990 ("TCPA"). It is instructive to note that, pursuant to s.173A of the TCPA, which is headed "Variations and withdrawal of enforcement notices", the local planning authority has an express power under 173A(1)(b) to "waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9)." In other words, the local planning authority has the express power to vary an enforcement notice under the TCPA.

80. In my view, that again militates against the suggestion that such a power can simply be implied into the 1990 Act. Parliament plainly considered that, in order to give a local planning authority the power to vary its own enforcement notice, such a power needed to be expressly included in the TCPA. That only serves to confirm my view that it is not possible to imply such a power here: it must either be an express power, or it does not exist. *NYKK* (paragraph 60 above) is authority for the proposition that "it is a relevant factor against making the implication if it would have been easy enough for the instrument to have said it expressly but did not do so": Popplewell LJ at [44]. The TCPA confirms just how easy it would have been to include such an express power on the part of a local authority in respect of an abatement notice, if that had been Parliament's intention.

6.6 Other Factors Militating Against Necessary Implication

81. There are a number of other practical considerations which militate against the necessary implication of a power to vary. I deal with them briefly. First, I consider that the 1990 Act does not envisage the sort of regime of repeated variations which has apparently been operated in this case. On any fair reading of s.80, it is dealing with abatement notices as a one-off event: see paragraphs 22-24 above. The same is true of the relevant Regulations which provide that, if and when the Magistrates' Court varies the abatement notice, the varied version will be "final". That positively militates against the sort of variation regime which has been operated here.

82. Secondly, I consider that, if there was a power to vary the terms of the abatement notice, it would lead to considerable uncertainty. It needs to be remembered that a breach of the abatement notice is a criminal offence. That does not sit comfortably with an alleged power to vary by the very authority who issued the notice in the first place. It could give rise to all sorts of potential complications. The interested party may say that they were not in breach of the abatement notice to the criminal standard because they had applied for a variation which, it had been informally suggested, would be agreed, even if agreement had not been formally announced. Certainty is a vital requisite of the criminal law. It would be lost if the precise terms of the abatement notice – the cornerstone of any criminal offence in this regard – could be varied in a haphazard and random fashion.

83. Furthermore, there would be at least the risk of considerable uncertainty for the public. It is unclear how the public would know that a variation had been applied for, let alone granted. The risks would be increased further if, as appears to be the position in the present appeal, the variation mechanism is intended to operate on a regular basis. I note that, here, the respondent proposed to tell those operating the circuit

whether any proposed variations were agreed in the November before the next calendar year. Even assuming that the public were informed at the same time, it would give them very little time to challenge the proposed variation (even assuming that such a challenge was possible at all). In my view, all of this would be inimical to certainty and finality.

84. At [64], the judge said that a variation could operate "to formalise and publicise the approach which the local authority is taking as a matter of its discretion." I do not follow that. Formality and publicity could only be achieved if there was a specific process that dealt with the registration and publication of the variation. But there are no such rules (because there is no express power to vary). The judge's comment assumes in favour of a local authority that it would deal with each application in an open, timeous and balanced way but, in the absence of any express provisions regulating how such variations are to be treated, such an assumption is unwarranted.

85. Thirdly, it is unclear to me how the process of local authority-sanctioned variations could be in accordance with the 1990 Act or public law more generally. Take, for example, the process of consultation. In the present case the defendant says that it consulted on each variation. But what if it had not? An aggrieved person might complain about a nuisance, only to discover that the abatement notice had been varied by the local authority months before, to permit that particular nuisance, without any reference to the public at all.

86. Another complication is the nature of the request for a variation in the first place. Both the judge and the respondent appeared to assume that it would only be the perpetrator of the nuisance who would seek a variation. But there is no reason why, if there was such a power, it should or would be limited in that way. The local authority may decide to vary the notice of its own motion: it is easy to imagine the possible arguments with the perpetrator of the nuisance if that happened. But a member of the public could also request a variation, if there was such a power, and again it is entirely unclear what checks or balances would apply.

87. Fourthly, there is the question of time limits. Section 80(3) provides a very tight timetable for appeals: 21 days from the date of the notice. An unlimited power on the part of the local authority to vary the notice gives rise to all sort of issues as to appeals. Is there a right of appeal against a variation at all? If so, what are the rules relating to such appeals? Does the 21 day period apply, or some other period? When does the 21 days (or other time limit) run from? What is the scope of any appeal? Is it limited to the variation? What about other parts of the existing notice which were uncontroversial but have been brought into sharper focus by the variation? And so on. By contrast, no such lacunae are presented by the relevant Regulations and the Magistrates' Court's power to vary because that power slots easily into the existing procedural regime of the 1990 Act. An implied power of variation for local authorities does not.

88. In this way, the necessary implication in this case would have to extend far beyond the local authority's simple right to vary their own notice, and would need to bring with it a raft of other implied rights and duties as to notification, consultation, appeals and the like. There is again a similarity with the difficulties of implication noted in *Piffs Elm* where at [103] my Lady, Elisabeth Laing LJ, pointed out that, if there was the implied power alleged "there is no clue in the language of section 12 or in the

statutory context about the circumstances in which it could be exercised, or about the limits of any such power." She went on to note that in that case, the test which had been advocated "was a recipe for complete confusion and error". In my view, the same is true here.

89. I am confident that none of these potential complications were what Parliament intended for a noise abatement notice under s.80. If it had, there would have been a separate section of the 1990 Act (and/or a separate provision in the relevant Regulations) in order to deal with the applicable rules. There is neither.

6.7 Summary as to Necessary Implication

90. For all these reasons, therefore, I consider that, as a matter of statutory interpretation, it is not necessary to imply a right to vary an abatement notice on the part of the local authority into the 1990 Act. In the current legislative scheme the power to vary an abatement notice has been given to the Magistrates' Court, not the local authority. In a somewhat different context, where Parliament wanted to give the authority responsible for a notice affecting the use of land the power to vary that notice, it did so expressly: see s.173A of the TCPA.

91. I also consider that the implied right would be inconsistent with and contradictory to that express power. The respondent's case on necessary implication, that it would allegedly provide flexibility and economy, does not begin to meet the high hurdle required for necessary implication. Furthermore, an analysis of the purposes of the Act, as well as a consideration of various practical matters, all combine to further confirm that there is no implied power on the part of the local authority to vary the abatement notice.

92. I now turn to the authorities, to see whether or not they suggest that what seems to me to be the clear answer to the question is, on analysis, wrong.

7 Do the Authorities Compel a Different Result?

7.1 Everett

93. As I have indicated, there is no authority dealing with the power to vary an abatement notice. That, in itself, is telling. Given that the notice regime has been in existence, in one form or another, for well over a hundred years, it might be thought that, if a local authority's implied power to vary was in the common usage that Mr Wignall suggests, the issue would have arisen before now.

94. *Everett*, on which the judge relied so heavily, is about the power to withdraw an abatement notice. It says nothing about an alleged power to vary that notice. It is, on analysis, a very slender thread on which to hang the alleged right to vary such a notice.

95. The first point to note about *Everett* is that what the court said about the withdrawal of the notice was all *obiter*. The primary issue in *Everett* was whether a steep staircase could, in principle, be considered a statutory nuisance. Richards J (as he then was) found that it could not, and in that he was upheld by the Court of Appeal. The second issue was whether, if it was capable of being a statutory nuisance, the Council was

entitled to conclude that, as a matter of fact, the staircase in question was not a nuisance. Again the answer was in the affirmative. The tertiary question, of whether the abatement notice could be withdrawn, only arose if Richards J was wrong to hold that a steep staircase could not in principle be a statutory nuisance, there being no debate that, if there was no nuisance, the notice was a nullity and could be withdrawn.

96. This is important because the judge said that *Everett* was addressing the question of withdrawal "on the hypothesis that the staircase was capable of being a nuisance". That is not quite right. By the time of the hearing before Richards J, the Council no longer considered the staircase to be a statutory nuisance as a matter of fact. So the question of the power to withdraw an abatement notice arose in a very circumscribed and hypothetical situation. On any view, therefore, *Everett* is an entirely different situation to the present case.

97. Richards J dealt with the Council's entitlement to withdraw the abatement notice at 105D-106G. He confirmed that, if there was no nuisance, there could be no valid notice at 105D-E in these terms:

> "Mr. Westgate accepted at the outset of his submissions that if the situation was not capable of falling within section 79(1(of the Act of 1990 (as I have held to be the case), the abatement notice served by the council in 1994 was not a valid notice and it would be pointless for the council to maintain it. He would not argue that its withdrawal in those circumstances was unlawful. Accordingly, my conclusion on the first issue is also effectively determinative of the third issue."

He then went on to consider the position if he was wrong on the point that the staircase constituted a statutory nuisance. He said at 106D:

> "I accept Mr. Bhose's submissions on this issue. In the absence of an implied power to withdraw an abatement notice, the enforcement provisions would in my view be unduly rigid. It seems senseless that an authority should be unable to withdraw an abatement notice which, for whatever reason, it no longer considers to be appropriate. It is particularly unsatisfactory that the recipient of the notice should remain subject to it and, by reason of a failure to comply with its requirements, should remain in breach of the criminal law in circumstances where the local authority does not consider the notice to be appropriate and has no intention of bringing a prosecution for breach of it. A power of withdrawal is therefore consistent with, and serves to promote rather than to undermine, the legislative scheme. I see no difficulty in implying such a power."

Although slightly different points arose in this court ([1999] 1WLR 1170), the appeal was dismissed, and Mummery LJ noted at 1180A that, if Richards J had been wrong on the main point (which he was not) the Council clearly had an implied power to withdraw the notice, and it had exercised that power lawfully.

98. It is quite clear from the judge's analysis in the present case that he considered that the power to withdraw an abatement notice was not materially different to a power to

vary a notice and that, in many ways, the power to vary was a lesser power, and therefore encompassed within, the power to withdraw the notice. That was also Mr Wignall's submission to us.

99. I am unable to accept that premise. In my view, a power to withdraw an abatement notice is a very different thing to a power to vary an abatement notice. It would be a nonsense, as *Everett* makes clear, if a local authority could not withdraw an abatement notice in circumstances where it had changed its mind, and had concluded that the subject matter of the abatement notice was not, in reality, a statutory nuisance at all. Indeed, if that did not make the notice a nullity, one might suggest that the local authority was obliged to withdraw the notice in any event.

100. But a power to vary an abatement notice could only be exercised on the entirely different premise that the underlying statutory nuisance continues to exist. Instead of the state of affairs no longer constituting – or being considered to constitute – a statutory nuisance, as per *Everett*, that which had already been declared to be a statutory nuisance would continue to exist. The rights and duties of all parties, including the members of the public, in respect of that statutory nuisance would therefore continue to be governed by the abatement notice. That is an entirely different situation to *Everett*. It demonstrates why, in my judgment, the two situations are simply not comparable. The power to vary is not some sort of lesser power; it is an entirely different type of power altogether.

101. The judge identified three elements of the decision in *Everett* which, he said, applied with equal force to the alleged power to vary. I have considered each of them, and I have reached a different view on each.

102. First, in *Everett*, it was thought that the provisions relating to abatement notices would be "unduly rigid" without a power of withdrawal. I agree. But of course, there is a power of withdrawal, as *Everett* makes clear, so a local authority would never be stuck with an abatement notice which it no longer regarded as valid. But, in the different situation where everyone regarded the abatement notice as valid and important, because it addressed an ongoing statutory nuisance, it would not be "unduly rigid" if there was no power on the part of the local authority to vary that notice. That is because any proposed variation was a matter for the Magistrates' Court and/or because, if there had been a material change of circumstances, there could be a new notice.

103. As to this latter point, it seems to me that, if the local authority deem it necessary, they can withdraw the old abatement notice (as per *Everett*) and issue a fresh notice. Then everyone would know precisely where they stood. Indeed, when looked at in that way, it might be thought that, because it says an outdated notice can be withdrawn, the decision in *Everett* helped the appellant, not the respondent.

104. Secondly, in *Everett*, it was thought that the lack of a power of withdrawal would be inconsistent with the local authority's discretion to prosecute. The judge said at [63] that, by analogy, the same applied to the power to vary because, if a local authority concluded that they would not prosecute because of BPM, it would be senseless for them not to vary the notice to reflect that decision. But that reasoning equates the terms of an abatement notice with the local authority's entirely separate consideration of any decision to prosecute. Again, they are different things: the latter brings with it

the duties imposed on any prosecuting authority, whilst the former does not[5]. In *Everett*, by contrast, there could never have been a prosecution because the local authority did not believe there was a nuisance.

105. Moreover, the judge's consideration of this point focused solely on the local authority as the putative prosecutor. But they are not the sole arbiters: a private prosecution is quite possible (see paragraph 27 above). That confirms my view that the judge was muddling together two different things and looking at prosecution solely through the eyes of the local authority.

106. Further and in any event, a BPM defence is irrelevant to the issue of the abatement notice: again, see paragraphs 30-33 above. Consideration of the BPM defence is a matter exclusively within the powers of the Magistrates' Court. They are not matters for the local authority at all, and the judge was wrong to suggest otherwise.

107. Thirdly, it was said in *Everett* that the power of withdrawal would promote the purposes of the Act. So it would. But I have already explained why giving the local authority the power to vary their own notice would not assist with the abatement/prohibition/restriction of a statutory nuisance, and so would not promote the purposes of the 1990 Act. The argument is fallacious for two reasons: one, because it again relies on the suggestion that the local authority has an ongoing duty to consider the BPM defence; and two, because it relies on the purpose of the 1990 Act as being to maintain a balance between local authority and perpetrator, which is incorrect.

108. Standing back, I consider that the decision in *Everett*, to the effect that in the unusual circumstances there, a local authority plainly had the power to withdraw an abatement notice they no longer considered to be valid because there was no statutory nuisance, is a long way from the facts and principles in issue in this case. In my view, *Everett* is plainly right, but also plainly distinguishable. The existence of a power to withdraw the abatement notice does not undermine the analysis which I have set out in Section 5 above.

7.2 Other Authorities

109. I have already referred to the two decisions in *Manley*, and the decision in *Sovereign Rubber*, all of which were relied on by Mr Wignall, but each of which, in my judgment, provides no support for his central proposition. Although one or two other authorities dealing with the 1990 Act were included in our bundles, they were not on point and it is unnecessary to refer to them for the purposes of this judgment.

110. Mr Wignall sought to distinguish *Kalonga* and *Piffs Elm* on the basis that both those cases were concerned with a detailed scheme which did not include the particular power which was sought to be implied. He said that, by contrast, there was no detailed scheme in the present situation. There are two responses to that. First, the extent or otherwise of the express scheme is of limited relevance: in *Kalonga* and *Piffs Elm,* the fact that the statute did provide certain express powers was a reason why other

[5] The respondent's documents postdating the Variation of 31 March appear to suggest that they would not prosecute unless the noise reached a certain decibel level, which is higher than that set out in the abatement notice. That is not necessarily a criticism of the respondent; it simply shows that what goes into an abatement notice and what considerations may trigger a prosecution are not to be automatically equated.

express powers would not be implied. The same principle applies here, regardless of the detail of these express powers.

111. Secondly, I consider the fact that, in the 1990 Act, there is no detailed scheme *at all* envisaging the power to vary the notice on the part of the local authority, to be a significant point against the respondent. I have already said that if there was an implied power to vary, it would have to be part and parcel of a whole raft of implied provisions dealing with notice, consultation, time for appeal and so on. The fact that the 1990 Act gives no clue as to what those provisions would contain again confirms that there is no underlying power.

7.3 Textbooks

112. We were referred by Mr Wignall to the fourth edition of *Statutory Nuisance* by Robert McCracken KC and others, and in particular passages at 2.95-2.97 and 3.45-3.49. The judge referred to these passages at [65], suggesting that the learned editors assumed, without elaboration, that the power to withdraw a notice carries with it the power to vary the notice. This appears to be a reference to the heading before paragraph 2.95, "The power to withdraw or vary an abatement notice". Other than the heading, the learned editors make no reference to the power to vary an abatement notice, and go as far as to suggest that the rationale in *Everett* "is not entirely convincing". In my view, those paragraphs add nothing to the point at issue in this appeal, one way or the other.

113. Moreover, the later paragraphs, which talk about the BPM defence, appear to fall into the same error as the judge, in suggesting that the BPM defence is a matter for the local authority and may even mean that no abatement notice will be issued. As a matter of principle, as the 1990 Act makes plain, BPM is not a matter for the local authority, who are obliged to issue an abatement notice if there is a statutory nuisance, whatever means are being deployed to address it.

114. Accordingly, it does not seem to me that the textbooks to which we were referred add anything to the debate as to necessary implication, one way or the other.

7.4 Summary

115. In summary, therefore, I consider that *Everett* is plainly distinguishable from the present case, and there are no other authorities, and no passages in the textbooks, which compel a different result to the one indicated in Sections 5 and 6 above, namely that the local authority does not have the power to vary the abatement notice. On the contrary, all the authorities suggest the opposite.

8 The Alternative Analysis

116. I have so far assumed that the parties, and the judge, were right to conclude that the issue was whether the respondent local authority had an implied power to vary the notice as a matter of necessary implication. However, it may be that that is not the right question. There are two specific statutory provisions which give local authorities like the respondent implied powers. They are s.111 of the Local Government Act 1972 and s.1 of the Localism Act 2011. The former gives local authorities the power "to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions". The latter gives them the "power to do anything

that individuals generally may do". Those are the provisions considered in *Kalonga*, to which we expressly drew counsel's attention. The question is whether either of those statutory provisions assist the respondent here. In my view, they do not.

117. S.111 of the 1972 Act is plainly wide enough to enable a local authority to withdraw a notice. But, as explained in Section 7 above, a power to vary a notice is very different and is not included in a power to withdraw. Moreover, for the reasons that I have explained, the implication of a power to vary a notice under this provision would undermine the statutory right of appeal and is inconsistent with my analysis of the legislative scheme. It is not incidental to anything, but an entirely different power.

118. As to s.1 of the 2011 Act, which gives a local authority the "power to do anything that individuals generally may do", that would not help the respondent here because an individual does not have any powers in connection with an abatement notice, whether to issue, or it would follow, to vary one, and it was not suggested to the contrary.

9 Answers to the Grounds of Appeal

119. Turning finally to the Grounds of Appeal, I would uphold Ground 1 of the appeal, for the reasons I have given. The judge was wrong to find that *Everett* was not distinguishable. It does not provide an answer to this case, or justify the necessary implication of a wide-ranging power on the part of a local authority to vary its own abatement notice.

120. I would also uphold Ground 2 of the appeal. The judge was wrong to find that, even if *Everett* was not binding, a variation power would arise by necessary implication. I have explained in Sections 5 and 6 why I do not consider that to be the case.

121. Ground 3 of the appeal, to which I referred at paragraph 12 above, is concerned with the judge's exclusion from consideration the use of a variation power which might increase the restrictions originally included in an abatement notice. The judge appeared to consider that different considerations may apply, depending on whether the variation increased the original restrictions or reduced them. In my view, this point is academic, given the answers I have given to Grounds 1 and 2 of the appeal. But I can see the force of the appellant's argument that any alleged power to vary needs to be considered in the round, whatever the nature of the variation concerned. That is particularly so where, as here, there is likely to be an intense debate as to whether the variation has an upwards or a downwards effect on the noise nuisance. A power to vary in one direction, but not the other, particularly in circumstances where the direction of travel is unlikely to be agreed, would fail any sort of 'necessary implication' test. It is also contrary to the express power currently given to the Magistrates' Court on appeal, where the restrictions can only be decreased: see paragraph 42 above.

122. The judge himself accepted at [16] that different considerations might apply to a variation which imposed further restrictions (upwards) rather than one which relaxed them (downwards). That rather suggests that the judge thought that the purpose of the abatement notice regime might be undermined if a variation could impose further restrictions on the perpetrator of the nuisance. But depending on the facts, the statutory scheme regime is equally likely to be undermined, even if the variation was ostensibly upwards. That is because the public, whose protection against statutory

nuisance remains paramount, would not be guaranteed to have any input into the new arrangements.

123. In those circumstances, I would also uphold Ground 3 as well. It further supports my interpretation of the 1990 Act.

124. Accordingly, for these reasons, if my Lady and my Lord agree, I would allow this appeal.

LORD JUSTICE BAKER

125. I agree.

LADY JUSTICE ELISABETH LAING

126. I also agree.