Neutral Citation Number: [2022] EWHC 2709 (KB)

Case No: QA/2022/MAN/000002

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM MANCHESTER MAGISTRATES' COURT
IN THE MATTER OF PROCEEDINGS UNDER
S. 82 OF THE ENVIRONMENTAL PROTECTION ACT 1990

Nottingham Crown Court
60 Canal Street, Nottingham, NG1 7EL
Date: 01/11/2022

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

Merren Jones **Stephen Covey-Crump** **David Howe**	**Appellants**
- and -	
Chapel-en-le-Frith Council	**Respondent**

- -
- -

Piers Riley-Smith (instructed by **Richard Buxton Solicitors**) for the **Appellants**
Philip Byrne (instructed by **Rradar**) for the **Respondent**

Hearing date: 8 July 2022
Written Representations Received: 5 September 2022

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Approved Judgment

This judgment was handed down at 09.30am on 1 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE TURNER

The Hon Mr Justice Turner :

1. The appellants all live close to a Multi Use Games Area ("MUGA") and Skate Park both of which are located in the Chapel-en-le Frith Memorial Park in Derbyshire and responsibility for which lies with the respondent.
2. They allege that the noise emanating from the activities carried out on the MUGA and the Skate Park is such as to amount to a statutory nuisance.
3. They applied for an abatement order but that application was dismissed by Judge (Magistrates' Courts) McGarva on 4 November 2021. He held that there was a sharp legal distinction to be drawn between, on the one hand, noise which was generated as a result of the "intended use" of the MUGA and Skate Park and, on the other, "anti-social use" (such as the playing of loud music and the continued use of the facilities after they were intended to be closed). He concluded that the latter did not fall to be taken into account in his assessment as to whether the allegation of nuisance had been made out.
4. He also found that the appellants had been rendered hypersensitive by the anti-social behaviour elements of what had been going on at the MUGA and the Skate Park but for which they would not have been so adversely affected by the noise arising from their intended use.
5. The appellants challenged these findings on an appeal to this court by way of case stated on the basis that they were founded upon a misunderstanding of the law. In a judgment dated 25 July 2022, I answered the three questions raised by the District Judge as follows:

> "1. **Was I wrong not to deal with the issue of whether the noise was injurious to health given that I found that it was the antisocial behaviour rather than the intended use of the MUGA and the Skate Park which led to sleeplessness?**
>
> Yes. Consideration should have been given to the impact upon health of all noise emanating from the MUGA and the Skate Park regardless as to whether it fell to be as a result of intended use or anti-social behaviour.
>
> 2. **Was I wrong to distinguish between noise generated by the intended use of the premises and noise emanating from antisocial behaviour associated with the premises?**
>
> Yes. This is not a distinction which falls to be made under the statutory regime.
>
> 3. **Can antisocial behaviour which includes noise that derives from the nuisance causing premises prevent a finding of statutory nuisance on the basis that such antisocial behaviour has resulted in the complainants being found to be hypersensitive due to the antisocial behaviour?**

> Not in the circumstances of this case. Since it was impermissible to distinguish between intended and anti-social noise, it was also impermissible to treat anti-social noise, in part, as a cause of hypersensitivity such as to negate a finding of nuisance. In any event, the existence of hypersensitivity is not a defence where even a person of normal resilience would have found the noise to be unreasonable."

6. The reasons upon which my findings were based are to be found at [2022] EWHC 1909 and no purpose would be served by rehearsing them here.
7. Having determined the questions arising on the case, I was asked by counsel for the appellants to reserve any decision on the appropriate remedy in order to give the parties the opportunity to consider the implications of my judgment. Bearing in mind that the respondent had chosen not to appear on the appeal or make any written submissions, I concluded that such time could be well spent.
8. However, the subsequent discussions did not bear fruit and the parties now seek my adjudication upon the issue of the appropriate remedy. To this end, I have the advantage of skeleton arguments from both sides which have enabled me to proceed on the papers without the need for further oral submissions.

REMEDIES

9. Under s.82 of the Environmental Protection Act 1990, a person aggrieved by a statutory nuisance can apply to the Magistrates' Court for an abatement order (Abatement Order). Under s.82(2):

> "*If the magistrates' court ... is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises…. the court…..shall make an order for either or both of the following purposes—*
>
> *(a) requiring the defendant … to abate the nuisance, within a time specified in the order, and to execute any works necessary for that purpose;*
>
> *(b) prohibiting a recurrence of the nuisance, and requiring the defendant or defender, within a time specified in the order, to execute any works necessary to prevent the recurrence;*
>
> *and, in England and Wales, may also impose on the defendant a fine not exceeding level 5 on the standard scale.*"

10. The Court's powers on a case stated are set out at section 28A (3) of the **Senior Courts Act 1981**:

> *"The High Court shall hear and determine the question arising on the case (or the case as amended) and shall—*
>
> *(a) reverse, affirm or amend the determination in respect of which the case has been stated; or*
>
> *(b) remit the matter to the magistrates' court, or the Crown Court, with the opinion of the High Court, and may make such other order in relation to the matter (including as to costs) as it thinks fit.*"

THE COMPETING SUBMISSIONS ON REMEDIES

11. The appellants argue that I should make an order in the following terms:

> "It is Ordered that Chapel-en-le-Frith Parish Council (the Respondent) abate the noise nuisance emanating from its premises at the earliest possible stage and at any event by 28 February 2023 by executing all and any works necessary for that purpose including removing all the MUGA and Skate Park equipment and further prevent its recurrence by permanently grassing over the relevant areas of land."

12. Alternatively, I am invited to remit the matter back to the Magistrates' Court with a direction to make an order in identical terms.
13. The appellants argue that, once the false dichotomy of intended use and anti-social behaviour is removed, then the District Judge's findings of fact lead to the inescapable conclusion that the noise emanating from the antisocial use of the MUGA and Skate Park outside official opening hours led to the four appellants losing sleep. Sleeplessness is capable of being prejudicial to health (see ***Lewisham LBC v Fenner*** (1995) 248 ENDS Report 44).
14. The respondent accepts in its written submissions that it is likely that the Court's preferred course will be to require it to abate the noise but resists the suggestion that I should prescribe the manner of abatement and, in particular, that I should make an order the effect of which would be to require it to remove the MUGA and Skate Park equipment. It points out that not all noise amounts to a nuisance and so abatement does not necessarily require elimination. By way of illustration, they refer to the case of ***Frank A Smart & Son Ltd v Aberdeenshire Council*** [2022] WL 00309248 in which the nuisance arose from the noise generated by the operation of two wind turbines. The appellant challenged the validity of the notice on the basis that it lacked specificity. The court held:

> *"33. The notice states in terms that the volume and character of noise generated by the operation of the two wind turbines is believed by the respondent to constitute a statutory nuisance. In this context that means the noise generated is in excess of that which would be reasonably tolerable to those in the vicinity. The*

> *notice further requires the appellant to reduce that noise. The case law makes it clear that it is not for the local authority to specify the means by which compliance with the notice may be achieved. The absence of specification of the abatement required does not render the notice invalid. In this connection, we note the inherent flexibility in the words "abate" and "nuisance". The notice does not, as the appellant fears, force shutting down of the turbines on the basis that it is the only guaranteed method of stopping the noise. Not all noise amounts to a nuisance. Abatement does not necessarily require elimination.*
>
> *34. The Court of Appeal decision in Budd v Colchester Borough Council [1999] Env LR 739 is an illustration of a similar situation relating to an abatement notice. In Budd the abatement notice identified the nuisance as "dog barking" and required the nuisance to be abated within 21 days. The Court of Appeal accepted that the notice was valid and rejected the contention that the notice should have contained further details in relation to the nature of the nuisance and should have stated the action which the appellant was required to take. It was accepted that there were various ways by which the noise caused by barking could be reduced. That accords with the situation in the instant case. Here the respondent issued a notice having identified that the noise of the turbines was causing a nuisance. The appellant may be able to abate the noise in a variety of ways and as the Court of Appeal held in Budd :*
>
> > *"It is quite sufficient for the local authority to require the appellant himself to abate the nuisance in a manner which is the least inconvenient or expensive and the most acceptable to him."*
> >
> > *Whether the abatement notice would in fact require the appellant to cease using the wind turbines would be a matter for proof."*

15. Indeed, it is clear that the District Judge reached the view that not all noise emanating from the MUGA and Skate Park amounted to a nuisance.
16. I agree with the respondent that the District Judge's findings of fact, when seen through the lens of my answers to his questions, do not lead inevitably to the conclusion that removal of the MUGA and Skate Park equipment would be mandated by a finding that there was a noise nuisance arising from the inclusion of the consideration of unintended use.
17. A choice still remains to be made between making a general abatement order and ordering a re-trial. The appellants do not rule this option out as their third choice. Both sides, however, are understandably sensitive to the time, costs and stress that such a re-trial would inevitably entail. I share these concerns. Accordingly, I have concluded that the appropriate remedy is,

indeed, a general abatement order. The steps which fall to be taken should follow the factual findings of the District Judge but so as to incorporate the extent to which noise from the MUGA and Skate Park constituted a noise nuisance regardless as to whether such noise fell within their intended use.

18. I realise that there is a risk that the matter may well return for the Court's consideration in any event that such steps as are taken by the respondent fall short of those which the appellants consider to be adequate. I would hope, however, that a spirit of compromise will prevail. Close attention to the detail of the District Judge's findings will be needed.

COSTS

19. The parties have made written representations on the issue of costs. However, neither side appears to have given consideration to the course contended by the other. In particular, the appellants have raised complex arguments as to which costs regime should apply to the appeal. Does the EPA 1990 regime which applied in the proceedings below apply to the appeal? Alternatively, does the civil or criminal basis of assessment apply? Furthermore, consideration will have to be given to the costs relating to the determination of choice of remedy arising out of this judgment.
20. For these reasons, I am reluctant to resolve the issues relating to costs at this stage and would encourage the parties to come to terms on the topic. If this proves not to be possible, then I would expect the respondent to file and serve a skeleton argument dealing with the appellants' submissions by 5 December 2022 following which I will determine all outstanding issues on paper.

THE NEXT STEP

21. I would invite the parties to draft an agreed order for my consideration which reflects my conclusions on the issues in this judgment.