SHERIFF APPEAL COURT

[2022] SAC (Civ) 005
ABE-B418-20

Sheriff Principal DL Murray
Sheriff Principal CD Turnbull
Appeal Sheriff N Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in the appeal by

FRANK A SMART & SON LTD

Pursuer/Appellant

against

ABERDEENSHIRE COUNCIL

Defender/Respondent

Appellant: Garrity, advocate; Addleshaw Goddard LLP
Respondent: Campbell QC; Aberdeenshire Council Legal Department

14 January 2022

[1] This is an appeal under section 80(3) of the Environmental Protection Act 1990 ("EPA") against an abatement notice, dated 23 July 2020, served on the appellant by the respondent, in respect of an alleged statutory nuisance. The notice states:

> "This is a Formal Notice issued by Aberdeenshire Council ('the Council') because it is satisfied that a statutory nuisance under section 79(1)(a) of the Environmental Protection Act 1990 (as amended by Public Health etc. (Scotland) Act 2008) exists at or around Redstones, Torphins, Aberdeenshire, AB31 4PA arising from the volume and character of noise generated by the operation of two wind turbines located on land at Easter Tolmauds Farm, Torphins, Aberdeenshire … As the person responsible for the nuisance you are required to abate or prohibit the occurrence or

> recurrence of the nuisance by taking the following steps: You are required to abate the nuisance by 14th August 2020 and prevent recurrence."

Background

[2] The appellant operates two wind turbines at a farm, Easter Tolmauds, Torphins. Planning permission for the development of the turbines was granted in May 2015, having initially been refused by the respondent and subsequently granted on appeal following the appointment of a reporter. That decision records that the council's environmental health officers had not provided any comments in the original planning process in respect of any potential noise impacts from the proposed development. The appellant produced noise impact assessments suggesting that there would be no unacceptable noise impacts on any residential properties. These assessments were accepted by the reporter as robust and he concluded that the development would not cause any significant disturbance to the immediately nearby properties. However, he also acknowledged that the turbines may issue a noise in a quiet area and that they may be heard at nearby houses but that by normal standards that was unlikely to make living conditions in these properties unacceptable. The consent was subject to various conditions which are not relevant to this appeal, however, there was a condition that required a means of managing noise from the proposed turbines. This gave some further specification about noise levels and included a requirement that before the development began the appellant should secure a warranty from the wind turbine supplier or manufacturer that the sound levels would not exceed the levels in the appellant's environmental report. The turbines were erected during the course of 2016 and commenced operation in September 2016.

[3] The original abatement notice dated 23 July 2020 bore the issues referred to under section 79(1)(a) of the EPA and a further notice was served on 21 August 2020 which

referred to section 79(1)(g). The appellant appealed to the sheriff in terms of section 80(3) of the EPA and the Statutory Nuisance (Appeals) (Scotland) Regulations 1996. Interim suspension of the abatement notice was granted at the time of warranting. Before the sheriff, and before this court, parties confirmed that no account should be taken of any informality in the original notice and the appeal proceeded, as before the sheriff, on the basis that the notice alleged the existence of statutory nuisance in terms of section 79(1)(g). In his Note the sheriff makes reference to a separate enforcement notice which had been served on the appellant. That enforcement notice was declared a nullity in separate proceedings and the appellant has not been found to be in breach of any valid enforceable condition attached to its consent for the wind turbines. There is no extant complaint against the appellant in that regard.

[4] The appeal called for a debate before the sheriff to consider two matters: whether the abatement notice was valid, and were the respondent's averments sufficiently relevant to allow the matter to proceed to proof. This appeal proceeds against the sheriff's decision to repel the appellant's preliminary pleas and allow a proof.

Statutory framework

[5] The EPA applies throughout the United Kingdom and according to its preamble is intended to make provision for:

> "improved control of pollution arising from certain industrial and other processes … restate the law defining statutory nuisance and improve the summary procedures for dealing with them …"

[6] Part III of the EPA deals with statutory nuisances and clean air. Section 79 makes provision for acts which constitute "statutory nuisances". In terms of section 79(1)(g) a

statutory nuisance includes "noise emitted from premises so as to be prejudicial to health or a nuisance".

[7] Section 80(1) of the EPA in its application to Scotland provides:

> "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."

[8] Section 80(3) provides the right of appeal in Scotland to a sheriff against an abatement notice served by the local authority. The procedure is regulated by the Statutory Nuisance (Appeals) (Scotland) Regulations 1996. Regulation 2(2) sets out the grounds on which a person served with such a notice may appeal; regulation 2(2)(a) that the abatement notice is not justified by section 80 of the 1990 Act; regulation 2(2)(b) that there has been some informality, defect or error in or in connection with, the abatement notice; regulation 2(2)(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; and regulation 2(2)(d) that the time, or where more than one time is specified, any of the times, within which the requirements of the abatement notice are to be complied with is not reasonably sufficient for the purpose.

[9] Section 80(4) provides that if the person on whom an abatement notice is served, without reasonable excuse, contravenes or fails to comply with any requirement or prohibition imposed by the notice, that person shall be guilty of an offence.

Submissions for the appellant

[10] Three grounds of appeal, were presented. The first was that the sheriff erred in finding the abatement notice to be valid. The second was that the sheriff erred in holding the abatement notice to be sufficiently specific when it did not identify the nature, extent or circumstance giving rise to the alleged nuisance, as a result of which it lacked necessary information to enable the appellant to understand what was required to abate the alleged nuisance. The third was that the sheriff erred in holding that the respondent had made sufficient averments, which if proved would discharge their burden of proof. Counsel for the appellant adopted his written note of argument and invited the court to recall the sheriff's interlocutor of 28 April 2021 and to quash the abatement notice.

[11] The appellant submitted that the sheriff was wrong to find that the abatement notice was valid. Whether or not a statutory notice is valid is a question of statutory interpretation (*Legal And Equitable Nominees Ltd* v *Scotia Investments Limited Partnership* 2019 SLT (Sh Ct) 193 at [22], [24] and [30]. Reference was made to *Community Windpower Limited* v *East Ayrshire Council* 2018 SCLR 339 in which the approach to the interpretation of a statutory notice was discussed. In that case the Second Division considered the validity of a stop notice which had been served alongside a planning enforcement notice regarding the development of a wind farm. *Community Windpower Limited* and *Trump International Golf Club Scotland Ltd* v *Scottish Ministers* 2016 SC (UKSC) 25 establish that a statutory notice which does not set out a prohibited activity with sufficient clarity is invalid as a matter of law and there is only a very limited scope for the use of extrinsic material as an aid to interpretation.

[12] The appellant accepted that an abatement notice which specifies work to be carried out need not meet the standards which would otherwise be required for a decree ad factum praestandum (*Cummings* v *Singh* 2019 SAC (Civ) 11) but submitted that does not detract

from, or alter, the test as to fundamental validity as considered in *Community Windpower Limited*. The sheriff had therefore misdirected himself in applying the test on validity which is set out at paragraph 54 of his Note:

> "Unless the requirements of the notice are so imprecise as to be void for uncertainty or are manifestly impractical so long as an abatement notice is stated in terms which ex facie fall within the terms of the 1990 Act it is valid."

[13] The need for clarity and precision is even more important where criminal liability might arise as a result of breach or non-compliance with an abatement notice. The notice must specify clearly what reduction in noise is required. It would be acceptable in the notice to require abatement of the noise to conform to the planning consent as that is a public document and it may be legitimately referred to. Regard should, however, not be had to other extrinsic evidence in consideration of the validity of the notice. Thus, account should not be taken of the pleadings or submissions which innovate and expand on the terms of the notice itself.

[14] The abatement notice was invalid as it failed to specify what the legal nuisance complained of amounts to. It was deficient as it did not specify any nuisance whatsoever at the location where it is said to exist. Noise is not of itself a nuisance, and nuisance is a matter of fact and degree in each case. It is a question of what is tolerable to the person said to be affected by the noise. In the context of the statutory regime, in order to be valid the notice required to specify and be clear as to the boundary or boundaries between noise which is not a legal nuisance and noise which is said to be a legal nuisance. Otherwise it is invalid, as the appellant is not in a position to understand what appropriate mitigation steps might be considered and undertaken.

[15] The appellant submitted that the sheriff erred in law by taking account of the averments and submissions as to the interpretation of the notice. The notice failed to give

any specification of the extent of the noise which was complained about or when or in what conditions it occurred. Neither did it refer to the planning consent. The appellant was therefore not in a position to know what they must achieve by way of abatement and the only certain way to comply was to cease operation of the two wind turbines. The appellant submitted that where a wind turbine is operating without any breach of a valid planning condition the abatement notice was invalid if it is in terms which require complete cessation of operations as the only means for compliance. The appellant invited the court to approach the matter by asking what legal nuisance is alleged to exist at Redstones, Torphins. If that answer cannot be clearly provided by the notice, it is invalid.

[16] The third ground only arose if the court found the abatement notice to be valid. The notice and the pleadings left the appellant unaware of what the legal nuisance was that was to be abated. A finding against the appellant could give rise to enforcement of the notice and criminal sanctions. That would be unfair, oppressive, and unlawful. The respondent had failed to give fair notice of the case made against the appellant and the notice should be quashed.

[17] In response to the submissions of the respondent the appellant submitted that in *R* v *Falmouth and Truro Port Health Authority* 2001 QB 445 fell to be distinguished. There, in contradistinction to the instant case, the notice requiring the cessation of discharge of sewage from an outfall was clear and unambiguous and the recipient was in no doubt about what must be done.

Submissions for the respondent

[18] The respondent invited the court to refuse the appeal. Senior counsel submitted the appellant had been disingenuous as to the quality and terms of the notice. The appeal was

against the decision of the sheriff to repel the appellant's seventh plea-in-law to relevancy. That must inevitably have regard to the pleadings and the sheriff was properly satisfied that these were sufficient to require the case to proceed to proof.

[19] The respondent was satisfied that there was a nuisance caused by the noise emanating from the wind turbines and served a notice in terms of section 80 of the EPA. Section 79(1)(g) provides that noise, prejudicial to health or a nuisance, may be subject to an abatement. Inconveniently, "nuisance" itself is not defined. At common law a nuisance may be accepted as being "a state of affairs greater than is tolerable." This is an elastic and flexible concept to be understood by the reasonable man in the context in which it is said to arise. The case law establishes that an abatement notice does not require to identify what is wrong, or how it may be alleviated.

[20] The terms of the notice were comprehensible. There could be no doubt that the effect of the notice is that the noise must be reduced. There is no instruction as to how much it is to be turned down, but it should be turned down to see if that produces a reasonable outcome which alleviates the nuisance.

[21] In *R* v *Falmouth and Truro Port Health Authority* the Court of Appeal had to consider an abatement notice dealing with statutory nuisance in relation to a water course said to be so foul as to be prejudicial to health. The decision made clear that the local authority could leave the means of abatement to the perpetrator of the nuisance, and the notice was not invalid for failing to specify the works required to abate the nuisance. This is a case where it was entirely proper for the local authority to leave the decision as to how the nuisance should be abated to the appellant.

[22] Contrary to what appeared to be suggested on behalf of the appellant, the EPA does not impose a strict liability for a failure to implement an abatement notice. Section 80(4)

provides a statutory defence to prosecution of reasonable excuse. Given the availability of that defence the appellant's argument as to the impact of criminal offence on the requirement for specification in the abatement notice was misconceived. The Crown, in considering whether to bring proceedings, would require to take a qualitative decision on whether there was a contravention of the statute and a reasonable prospect of conviction. The appellant advanced arguments which may be relevant to a criminal prosecution but are not relevant to the question of the validity of the notice itself.

[23] The notice is to be construed objectively but context is relevant. Planning permission was initially refused, then allowed following consideration by the reporter and subject to conditions. The appellant is aware of those conditions and the planning consent which they operate under is subject to those conditions. The debate before the sheriff considered the respondent's averments, which the appellant challenged as being irrelevant and lacking in specification.

[24] The relevance of pleadings is to be assessed by the relevance and specification of the averments made by the party whose pleadings are impugned. Those averments are to be taken pro veritate. Incorporated documents may be referred to. The abatement note was incorporated into the respondent's pleadings brevitatis causa. Contrary to the submissions of the appellant, a debate can properly take account of the pleadings. *Jamieson* v *Jamieson* 1952 AC 525, which makes entirely clear that an action should not be dismissed unless the defence is bound to fail, applies equally in a case such as this. If the sheriff was correct to find the notice to be valid there was no error in allowing the matter to proceed to proof.

[25] Whether or not the noise emanating from the turbines exceeds the decibels specified in the planning consent is immaterial in answering the question of whether it constitutes a

nuisance. It could be below the planning consent decibel level and still create a nuisance or above that level and not be a nuisance. The test for nuisance is, as proposed by the appellant, that the noise exceeds what was reasonably tolerable. The abatement notice set out the respondent's view that the noise generated went beyond tolerable levels and required the appellant to reduce the noise.

Decision

[26] The key question to be resolved in this appeal is whether the abatement notice is valid. The thrust of the appellant's complaint is that the notice does not inform them as to the boundary or boundaries between noise which is not a legal nuisance and noise which is said to be a legal nuisance.

[27] We accept that the validity of the statutory notice is a question of statutory interpretation. The abatement notice is to be interpreted having regard to the EPA. The appellant expressed concern that the sheriff may have fallen into error in having regard to the test in *Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd* [1997] AC 749 which was not relevant to the interpretation of the statutory abatement notice in this case. We accept the appellant's submission that to be valid the abatement notice must set out with sufficient clarity what is complained about. We do not accept however that the sheriff erred in the manner suggested.

[28] The notice identified that there is noise coming from the turbines and required the appellant to take steps to reduce the noise. It is also apparent that the notice was issued as the respondent had formed the view that the noise emitted by the turbines constituted a nuisance.

[29] The appellant invited the court to consider whether the notice informed the reader of what the legal nuisance that exists around Redstones, Torphins, is. On that formulation we have no difficulty in identifying, on a plain reading, that the nuisance alleged by the respondent is the volume and character of the noise generated by the wind turbines. A plain reading also informs the reader that the appellant is required to abate the noise to avoid the continuation of the nuisance. The question as framed by the court in *Community Windpower Limited* in the context of a prohibition notice was "did the notice set out the prohibited activity with sufficient clarity?" We are satisfied that the sheriff was entitled to find that the abatement notice was valid. The notice, which in this case is an abatement notice rather than a prohibition notice, gives sufficient clarity of the alleged nuisance.

[30] We do not accept there to be a sound basis for the appellant's complaint that the notice does not specify the nature of the abatement required. If the respondent establishes to the satisfaction of the court that noise is beyond what is reasonably tolerable then it is open to the appellant to reduce the noise by taking such steps as have the effect of reducing the noise to avoid the creation of a nuisance. The authorities establish that the method of achieving abatement may, in appropriate circumstances, particularly where the cause of the nuisance is outside the knowledge of the affected party, be left to the perpetrator to identify and execute. There can be compelling reasons to leave the choice of the means of abatement to the perpetrator (*R* v *Falmouth and Truro Health Authority*, above), not least that some methods may be considerably cheaper and less inconvenient than others. It may be that the perpetrator is in a better position to know what works are required to comply with the notice (*Cummings* v *Singh,* above, at para [9]). We accept the submission of the respondent that whether the noise exceeds or falls below the level of the planning consent is of limited

value in establishing whether or not the noise generated by the two turbines is or is not more than is reasonably tolerable.

[31] The appellant further complains that it is not clear to them from the terms of the notice the extent to which the noise must be abated, the need for greater specification being heightened by the prospect of their facing a criminal prosecution if they fail to comply with the notice. As a result of the lack of specification the appellant maintains that it cannot know if the steps it must take to satisfy the respondent. Indeed it was suggested that they may have to cease operation of the turbines to ensure compliance.

[32] Section 80(4) of the EPA provides for a statutory defence to any criminal prosecution arising from a failure to comply with an abatement notice. If the appellant was indeed suggesting the notice in some way imposed a strict liability, that is manifestly incorrect. The submissions of the appellant failed to take account of the defence available in a criminal prosecution and that the Crown would require to be satisfied that there is a reasonable prospect of a conviction before proceedings were commenced. Any prosecution could only follow in the event that the court was satisfied after proof that the noise created a statutory nuisance; and that the appellant had failed to take steps, within a reasonable time, to abate nuisance.

[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.

[35] We also reject the subsidiary argument that the respondent's averments were lacking in specification and should not be allowed to go to proof. The assessment of whether the noise constitutes a nuisance is, a matter of fact and degree. We do not accept the contention of the appellant that further specification they suggest is required. The averments of the respondent are sufficient, to allow the case to proceed to proof. The appellant has fair notice of the case being made against it. We shall therefore refuse the appeal.

[36] Parties agreed that expenses should follow success and the employment of senior counsel should be sanctioned. We shall therefore sanction the appeal as suitable for the employment of senior counsel and award the expenses of the appeal in favour of the respondent.