

RICHARD BUXTON

ENVIRONMENTAL & PUBLIC LAW

R.M. Buxton
MA (Cantab) MES (Yale)

Susan Ring
LLM Env (London)

Paul Stookes
LLB MSc CEnv Solicitor - Advocate

Associate: **Andrew Kelton**
BA (Cantab) MA (UBC Canada)

19B Victoria Street
Cambridge CB1 1JP

Tel: (01223) 328933
Fax: (01223) 301308

www.richardbuxton.co.uk

law@richardbuxton.co.uk

Secretary to the Aarhus Convention
UNECE, Environment and Human Settlement Division
Room 332, Palais de Nations
CH-1211 Geneva 10
Switzerland

Attn: Mr Jeremy Wates

Our ref. PS/MRG-1

29th September 2008

Dear Sirs

Communication to Compliance Committee ACCC/C/2008/23

We write further to your letter 26th September 2008 to DEFRA in relation to the above and to answer the questions in your letters of 17th April 2008.

Before answering the specific questions it is important to clarify that there are two regulators of the site, the Environment Agency and the local authority, Bath & North East Somerset Council (BANES).

Environment Agency

The Environment Agency regulates waste management by, among other things, granting to an operator a waste management licence (since April 2008, called an environmental permit). Any enforcement action taken by the Agency is based upon breach of the conditions of the licence (permit).

The notices, cautions, and prosecutions relating to the waste operator close to the complainant's homes, Hinton Organics (Wessex) Ltd, relate to confirmed rather than alleged breaches by the operator. These identify some of occasions when the Agency has found offences and breaches occurring by the waste operator, even though it has failed to take effective action to resolve the continuing problems experienced by the local community. An example of this is the Environment Agency letter of 14th February 2008 to the operator explaining that offences had occurred on a number of days but concluding that it was not going to prosecute the operator. Many of the days recorded are those Mr Morgan and Mrs Baker sought to rely upon and initially obtained an injunction for (Appendix 1).

Appendix 2 is a list of the enforcement notices and purported action taken by the Agency. However, what is crucial is that the action recorded has not actually helped local residents in any way in protecting their environment and in preventing odours or other pollutants arising. And so, while there is evidence of numerous breaches of the licence (permit), the waste operator is able to continue operating and causing problems.



Bath & North East Somerset Council (BANES)

BANES is the local planning authority responsible for regulating land use planning under, among other legislation, the Town and Country Planning Acts. It is also responsible for environmental health matters including taking statutory nuisance proceedings against anyone causing a statutory nuisance under Part 3 of the Environmental Protection Act 1990.

As with the Agency, BANES has served regulatory notices against the waste operator. It did for instance serve a statutory nuisance abatement notice in July 2005 to prohibit odours, but after serving the notice did nothing more. In particular, it failed to prosecute the waste operator for breach of the notice, it being advised by its own legal department that the notice was defective. It issued a further notice on 2nd October 2007, which again was defective. In particular, it failed to provide the correct wording on the licence which would prevent suspension of the licence in the event of an appeal by the waste operator. Unsurprisingly, the waste operator appealed the 2nd October 2007 notice and BANES became unable to prosecute for further breaches, including the problems arising during October 2007 which led to the injunction proceedings. BANES has since withdrawn the abatement notice and has not issued a further notice, despite considerable problems arising throughout 2008.

In relation to your specific questions, we reply as follows:

Are there any means used by or available to the public to bring the company into compliance with the alleged breaches of its waste management licence other than the private nuisance proceedings and appropriate injunctive relief (such as initiating procedures against the relevant authority for failure to take action)?

There is, in theory, options to a private nuisance and injunction proceedings including:

a) Private prosecution

It is open for members of the public to initiate private prosecution proceedings against the waste operator for breach of licence/permit conditions. This would, however, involve obtaining details of the waste operations including attendance of the waste site. It also involves a member of the public becoming a prosecution body and taking the place of the Environment Agency or BANES. This is impractical and would involve initiating an entirely fresh set of legal proceedings in the magistrates' court. The burden of proof on a prosecution is greater than in private nuisance proceedings, there are also procedural requirements such as the Codes of Practice for Prosecutors to follow.

It also requires reliance on information by the Agency. Such information has been requested from both the Agency and BANES since the discharge of the injunction and while some information has been disclosed by the Agency, BANES has refused to disclose most of the information relating to the abatement notices served on 2nd October 2007.

b) Prosecution under s 82 of the Environmental Protection Act 1990

It is open for members of the public to instigate proceedings for statutory nuisance under s 82 of the EPA 1990. Again, this involves the instigation of a private prosecution and is an entirely fresh set of legal proceedings in a different court. It is intended to be an efficient, quick and simple form of environmental protection, but it rarely is. In our experience, the prosecution becomes entrenched and, even if the local court makes a finding of nuisance and makes an order, this is frequently appealed to the Crown Court and an entirely fresh set of proceedings ensue. In practice, it is impracticable, particularly when there is a refusal to disclose key information.

c) Judicial review of the regulators

The Agency and BANES defended their positions in their intervention in the injunction obtained against the waste operator of 9th November 2007 (the discharge of which then prompted the order for costs now argued to be contrary to the Aarhus Convention 1998) by stating that it was always open to challenge their decisions by way of judicial review.

Again, in theory, this could be available to local residents, but has its own difficulties. It is again, an entirely fresh set of legal proceedings in the High Court. Further, it is not really dealing with the underlying problem which is to stop the nuisance odours and other pollutants arising from the site. Any proceedings would divert resources and effort away from the real concern. If judicial review proceedings were successful against either BANES or the Environment Agency relating to a failure to act, the regulators could equally continue to fail to act, requiring fresh judicial review proceedings. Further, once either the Agency or BANES have taken initial steps to investigate complaints any formal action is discretionary and it has to be shown that either the Agency or BANES acted irrationally or perverse in not taking action. This is discussed below.

It is important to note also that local residents are taking judicial review proceedings against both BANES and the Environment Agency in relation to this site. For BANES there are proceedings relating to land use planning. A local resident is challenging a decision to grant retrospective planning permission to the waste operator without complying with the EIA Directive 85/337/EEC and the requirement to properly screen the proposal as to whether it constituted 'EIA Development'. There is a hearing listed for 8th December 2008. Land use planning and EIA should be preventative in nature. It is likely that, had an effective EIA been carried on for the site, it would have identified the past and future problems at the site, and refused planning permission to develop. This would not be unrealistic; the site is in protected green belt land and is adjacent to a protected Site of Nature Conservation Interest (SNCI). Other waste operators have considered the site inappropriate for waste composting operations (see Appendix 3)

Judicial review proceedings have also been issued against the Environment Agency for a failure to (a) investigate the emissions of bio-aerosols from the site and (b) by issuing a waste exemption licence to the waste operator allowing it to dump partly decomposed waste on land adjacent to its waste site (the SNCI) and close to local residents. This is subject of an appeal to the Court of Appeal.

In summary, while there were, in theory, other legal options open to local residents, the private nuisance proceedings that gave rise to the cause of action for the injunction were underway against the waste operator, having been issued in July 2006 and progressing through the courts. It was entirely appropriate to apply for an interim injunction in those proceedings. It was also entirely appropriate to seek an injunction in the terms sought. The terms of the order merely required either the Environment Agency or BANES to carry on tasks they were required to do as part of their regulatory functions in any event. For everyone concerned maintaining an injunction against the waste operator would have been the most efficient mechanism of protection against pollution and nuisance.

In reply to the specific questions to DEFRA:

1. To which procedures and remedies in this kind of case do the provisions of article 9, paragraphs 3 and 4 of the Convention apply?

Article 9(3) and (4) of the Convention apply to injunction and nuisance proceedings. In particular, Art. 9(3) requires that members of the public have access to judicial procedures to challenge acts and omissions by *private persons* which contravene national law relating to the environment. Nuisance is a common law remedy recognised in UK law. It derives from case law. It can reasonably be regarded as a national law relating to the environment. Moreover, the waste operator has a separate legal personality in UK law and may be regarded as a private person. An injunction is the primary remedy sought from nuisance proceedings to protect the environment and the use and enjoyment of a person's home and property.

2. Which effective means of injunctive relief are available in cases such as the one referred to in the communication in accordance with the national legislation or case law?

Injunctive relief available would be either prohibitory injunction which would prevent certain action being taken, or a mandatory injunction requiring action by the Court, the terms of any injunction can be wide-ranging and at the discretion of the Court. In the present case the Court awarded a prohibitory injunction, preventing the waste operator from causing odours at the property of either Mrs Baker or Mr Morgan. The assessment of whether there was or was not an odour was to be 'as perceived by either an officer of BANES or the Agency'. Both BANES and the Agency were under a duty to investigate complaints of odours. There was nothing over and above their normal regulatory functions they would have been asked to do.

3. What means are available in order to challenge a failure of a public authority to act in order to enforce environmental decisions?

An application for judicial review can be made to challenge a failure of a public body to act. However, it is important to note the distinction between the limited obligations (duties) of the both regulators to act in the first instance and the discretionary powers to act after initial action has been taken. As mentioned above, the Agency and BANES have served a number of notices stating that problems have arisen, but there has been no effective enforcement of those environmental decisions. The power to enforce the breaches of notices is discretionary which leaves those suffering from pollution and nuisance in the unsatisfactory position of having to take legal proceedings themselves or with the regulators frequently confirming that pollution and offences have arisen but that no action is being taken (see the Agency letter (Appendix 1)).

To succeed in a judicial review claim against a failure to enforce requires any claimant to show that it was unlawful for the regulator to use its discretionary power not to enforce. Even if successful and this was found to be irrational, the regulator could in future argue that in its discretion it was not going to enforce. In the meantime, residents are distracted from resolving the real problem which is the continuing pollution and nuisance from the waste operations.

4. Why did the relevant authorities take no action?

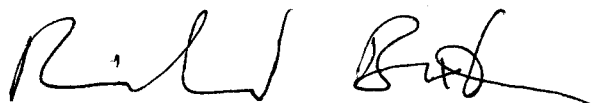
It is very difficult to know the answer to this. Since the decisions to intervene in the injunction were taken, the Complainants we have sought disclosure of the relevant documentation relating to the decisions taken. This has been persistently refused by both the Agency and BANES. We are continuing to pursue disclosure, but in its absence, there is no way of telling why, when there has been repeated offences by the waste operator confirmed by the Agency, (a) they chose to act the way they did (by intervening in the private nuisance proceedings, such that the injunction was discharged) and then (b) failing to take action themselves.

5. Does a repeated violation of an environmental decision constitute a criminal act?

Yes. For the Environment Agency, a breach of licence conditions is an offence (see letter of 20th February 2008). For BANES a breach of an abatement notice is an offence under s 80 of the Environmental Protection Act 1990.

We trust the above assists and look forward to hearing from you.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Richard Buxton', with a long horizontal flourish extending to the right.

Richard Buxton

cc Dr Asa Sjoström, Head of EUIC Core Team, DEFRA