IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Case No. HC06X02114

Court 24
Royal Courts of Justice
The Strand
London WC2A 2LL

Friday 21st December 2007

Before

HIS HONOUR JUDGE SEYMOUR QC

FRANCIS MORGAN and CATHERINE BAKER

- v -

HINTON ORGANICS (WESSEX) LTD

Transcribed by Ubiqus
(Official Court Reporter)
Clifford's Inn, Fetter Lane, London EC4A 1LD
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MR ANGUS MCCULLOUGH appeared on behalf of the Environment Agency and Bath & North East Somerset Council
MR JEREMY HYAM appeared on behalf of the CLAIMANTS
MR RICHARD WARD, instructed by Osborne Clarke, appeared on behalf of the RESPONDENT

JUDGMENT
(Approved)

HIS HONOUR JUDGE SEYMOUR QC:

1. The defendant, Hinton Organics (Wessex) Limited, is the operator of a recycling and composting facility at Queen Charlton Quarry, Charlton Field Lane, near Keynsham in Bristol. The first claimant is the joint owner and occupier of a property known as Rosewood Lodge, Woollard Lane, Publow, Bristol. The second claimant is the owner and occupier of the Cleracres Cattery, Woollard Lane, Publow. The nature of the claim made in this action is for damages and an injunction in respect of odours alleged to have been generated by the defendant at its recycling and composing facility of such a nature as to amount to a nuisance suffered by each of the first claimant and the second claimant.

2. On 9th November of this year, an application came before me on behalf of the claimant, seeking interim injunctions. The form of the orders which I was invited to make at the commencement of the hearing was to this effect: that

> "the defendant (1) be prohibited from causing odours to emanate beyond the site boundary of its waste site at Charlton Field Lane and to implement and prevent releases that are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality; (2) be prohibited from causing emissions to air that are odorous and are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality outside the site boundary; (3) be prohibited from holding any more than 800 tonnes of waste at the waste site at any time, whether in a pre, part or post processed state and, for the avoidance of doubt, such waste is to include any final composted material".

3. The operations of the defendant at the site which I have mentioned are subject, amongst other things, to the need for a licence issued by the Environment Agency. One of the requirements of the licence which has been issued, set out

at paragraph 5.2.2 of the licence, is to this effect: "All emissions to air from the specified waste management operations on the site shall be free from odours at levels as are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality outside the site boundary as perceived by an authorised officer of the Agency". The Environment Agency has statutory obligations arising under the Environment Act (1995).

4. Bath and North East Somerset Council is the local authority for the area of the facility operated by the defendant. It is convenient in this judgment to refer to Bath and North East Somerset Council simply as "the Council". The Council has statutory obligations – in particular, under Section 79 and 80 of the Environmental Protection Act (1990) – to investigate odour complaints and, where it is considered that an odour amounts to a statutory nuisance, to serve an abatement notice.

5. When the matter was before me on 9th November, it was immediately apparent that a difficulty which arose on the face of the form of the orders which I was invited to make was that there were no objective criteria by reference to which any assessment could be made of whether there had been any infringement of any injunction which I might make. As the hearing proceeded, I was persuaded that it was appropriate to have regard to the provisions of paragraph 5.2.2 of the licence issued by the Environment Agency, and also to have regard to the statutory obligations of the Council and, therefore, to make an order in these terms: "Until trial or a further order, the defendant be prohibited from causing odours at or in the immediate vicinity of the claimants' respective properties situated at..." – and the addresses were then given – "at levels that are likely to cause pollution of the environment or harm to human health or serious detriment

to the amenity of those properties, as perceived by either (a) an authorised officer of the Environment Agency or (b) an authorised officer of Bath & North East Somerset Council".

6. It seemed, at that stage, that what was involved in granting an injunction in those terms was, effectively, providing another means of enforcement of the existing obligation imposed by paragraph 5.2.2 of the licence issued by the Environment Agency and extending the possible assessors of whether there had been a breach of the injunction to an authorised officer of the Council. After I was persuaded that it was appropriate to make that order, I commented, in my judgment at paragraph 12, as it has been transcribed and approved, this:

> "While Mr Hyam, counsel on behalf of the claimants, accepted that it was appropriate that there should be some independent assessment of whether there had been any breach, if there is said to be a breach, following the making of the order, Mr Hyam recognised that the court has no power and the claimants have no power to require either the Environment Agency or Bath & North East Somerset Council to make available authorised officers for the purpose of making the assessments that the injunction that Mr Hyam seeks postulates".

7. Notwithstanding that observation by me in the course of my judgment, what happened after I made the order of 9th November was that Messrs Richard Buxton, solicitors acting on behalf of the claimants, wrote a letter dated 16th November 2007, I think, to each of the Environment Agency and the Council, *mutatis mutandis* in similar terms, and including this paragraph:

> "You will see that any breach of the order will involve an assessment by an authorised officer of the Agency or the Council attending one of our clients' homes. We trust you will approach any complaint by our clients

about odours or other problems in a professional and responsible manner and ensure that the court's intentions are not undermined in any way. We also ask that you advise your relevant officers of the terms of the order".

8. It is unclear why it seemed appropriate to the claimants' solicitors to write to the Environment Agency and the Council in those terms. The inclusion of that paragraph in the letters that were written created the impression, contrary to what I said specifically in my judgment, that I was anticipating a proactive response on the part of the Environment Agency or the Council. Needless to say, the suggestion in the letter that a proactive response was required created concern both with the Environment Agency and the Council.

9. That concern was exacerbated when each of the Environment Agency and the Council received a letter dated 13 November from Messrs Osborne Clarke, solicitors acting on behalf of the defendant, which included this paragraph: 'In the event that an authorised and appropriately qualified officer, of either B&NES or the EA, were to investigate any future complaint by the claimants and conclude that Hinton Organics were in breach of clause 1 of the order and then to inform the claimants or their solicitors of the same, it is highly likely that the claimants would make an application to the court for an order that the defendant was in contempt of court. Any such application would be strongly resisted and would almost certainly require the relevant officer to attend court in order to give evidence.' In those circumstances, both the Environment Agency and the Council invited the claimants and the defendant to reconsider the position and, in particular, to address whether it was appropriate for the order which I made on 9 November to have included express reference to the officers of either of them.

10. There was correspondence between the Agency and Council and the Queen's Bench Listing Office concerning the intentions which I had when I made my order of 9 November. It was made plain on my behalf that I had not envisaged either the Environment Agency or the Council doing anything other than performing their normal duties in the normal fashion, and that I had not contemplated that there would be any onerous requirement on either the Environment Agency or the Council. Notwithstanding that clarification of the position, it appears, from the witness statement of Mr Nicholas Hayden, on behalf of the Environment Agency – and as I understand it the position of the Council, set out in a witness statement of Margaret Horrill, seems to be similar – that the effect of the order that I made is that the officers of the Environment Agency and/or the Council will be placed in the position of determining whether the terms of the order have been breached. That, I am bound to say on reconsideration of the terms of the order made, is undoubtedly the case.

11. The effect of the order that I made is to constitute, in effect, an authorised officer of the Environment Agency or an authorised officer of the Council the adjudicator of the issue whether or not there has been an infringement of the injunction. I have had the benefit of submissions from Mr Angus McCullough on behalf of the Environment Agency and the Council, and I am persuaded, in the light of those submissions, that it is inappropriate in principle to constitute an individual, who has other statutory functions to perform, the person to determine whether or not an order of the court has been infringed.

12. Mr McCullough has emphasised – and I think this is an aspect which I took insufficiently into account when making my order of 9 November – that officers involved in making any assessment of whether there has been an emission of odours infringing the order which I made on 9 November, are likely to be drawn

into court proceedings in a wholly unsatisfactory fashion. Plainly, if it were to be suggested that there had been an infringement, it is likely that whatever officer had come to the relevant conclusion would be involved in court proceedings focusing on challenging the accuracy of the assessment that the officer had made. If it were determined that there had been an infringement, the position of the defendant is plain and set out in the letter of 13 November from which I have quoted. Equally, if the officer came to the conclusion that there had not been an infringement, it is obvious that the possibility exists that the claimants might wish to seek to challenge that assessment.

13. I am satisfied, in the light of the witness statement of Mr Hayden and of Miss Horrill that it would be a diversion from the due performance of the officers of the Environment Agency and the Council respectively of their statutory functions to contemplate that they might become involved in a wholly unsatisfactory fashion in court proceedings. I am therefore satisfied that it was not appropriate, having reconsidered the matter, for me to make an order in the terms that I did constituting an authorised officer of the Environment Agency or an authorised officer of the Council the adjudicator of whether there had been an infringement of the order. It nonetheless remains the position, as it seems to me, that an injunction is unworkable without there being some objective means of assessing whether there has been an infringement. Without there being some objective means of an assessment of whether there has been an infringement, either the injunction achieves nothing of value or it will be productive of satellite litigation as to whether there has in fact been an infringement of the injunction or not.

14. It thus seems to me to be appropriate to reconsider, on a balance-of-convenience basis, whether it was appropriate to make any order at all on 9 November. I

have to say that, if I had had then the benefit of the submissions which I have had now, on behalf of the Environment Agency and the Council, I would not have been persuaded to make an order in the terms that I did. The question then arises: what should follow?

15. It has been suggested that it might be possible to substitute, for the references to 'an authorised officer of the Environment Agency or an authorised officer of the Council', some independent expert. That in my judgment would be appropriate if, but only if, there was an agreement between the claimants and the defendant as to the identity of such a person. That is not the position. There is no purpose me making an order varying the order of 9 November so as to substitute an agreed independent third party unless there actually is such a person. As I have said, there is no suggestion that there is.

16. The reality is that, being persuaded, as I am, that it was inappropriate to make reference to an authorised officer of the Environment Agency or an authorised officer of the Council in the order of 9 November, the question arises whether it is appropriate to continue the injunction at all. I have to say, on practical grounds, it seems to me there is no alternative but to discharge the order of 9 November, and that is what I do.