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# Statutory nuisance - and the power of mediation...

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In this blog we suggest that for parties finding themselves embroiled in such a process there may, in fact, be an escape route that is both simple and (extremely) cost effective.

**Introduction**

To many the past two years may have seemed like a descent into Dante's Inferno as they experienced the worst of the pandemic, unrelieved by the usual salves of human relationships or interaction with nature. There remains a hope that this way of life is only temporary, and that normal service will be restored as the Covid virus and its many variants become less deadly.

In the background, however, the world continues to witness an ever-increasing fight for resources: for land, for clean water and for sustainable sources of food. More locally the perennial pressure for affordable housing has led year on year to greater proximity between residential homes and light commercial and industrial uses. In 2018 a revised National Planning Policy Framework (NPPF) was published with a new section of policy concerning "Making effective use of land", which is found in subsequent iterations of the NPPF. In this section, the NPPF encourages the greater use of brownfield or previously developed land to meet the need for new homes as well as other identified needs.

Paragraph 120(d) for example provides that planning policies and decisions should:

"...promote and support the development of under-utilised land and buildings, especially if this would help to meet identified needs for housing where land supply is constrained and available sites could be used more effectively (for example converting space above shops, and building on or above service yards, car parks, lock-ups and railway infrastructure)..."

As a consequence of this and similar policies historic commercial sites have all too often found themselves gradually encircled by new dense housing schemes on land that was previously considered unattractive to such uses, or not previously available. To mitigate that effect in July 2018 the government introduced the 'agent of change' principle [1] , requiring planning policies and decisions to ensure that new development can be integrated effectively with existing businesses and community facilities.

What this often means in practice is that planning committees, desperate to achieve their housing quotas, grant the necessary permission, either with aspirational conditions which seek to mitigate the impact of the existing business upon its new neighbours or, less reasonably, accept assurances from applicants and/or officers that existing statutory controls may be relied upon to guarantee the amenity of the (very welcome) new residents.

And so the problems begin...

**Statutory nuisance in the magistrates' courts**

As those practising in this area well know, magistrates' courts, by and large, do not welcome operators' statutory appeals against the service of abatement notices by local authorities [2] . Such appeals can be lengthy (blocking out courts for weeks at a time in some cases), evidentially and legally complex (meaning that it will often be more convenient for a DJ to be assigned), unfamiliar (civil procedure rules can apply) and inconclusive in the short-term (right of appeal to the Crown Court). Many upheld notices will only have effect when enforced by prosecution, when, again, relatively involved legal arguments are likely to arise.

It will be readily understood, therefore, that it is generally in neither party's advantage to proceed down the statutory route if a suitable alternative can be found. Fortunately, we suggest, such an alternative may readily be found in mediation.

**Advantages of mediation**

As all litigators should, by now, be aware, the benefits of alternative dispute resolution (ADR) are manifold. Following a survey by the Centre for Effective Dispute Resolution (CEDR) the leading accreditation body, it has been estimated that 93% of all mediated cases settled, of which 72% settled on the first day of mediation. According to CEDR, businesses and individuals saved £4.6bn annually by using mediation.

Unfortunately, space in this brief blog does not permit any kind of detailed exposition of the various other forms of ADR (conciliation, arbitration and adjudication). For the purpose of this article we will focus on that which we suggest is most suitable for statutory nuisance: mediation.

The benefits can be briefly summarised as these:

- **No commitment** - the process can operate on a 'without prejudice' basis, running in parallel with the statutory nuisance appeal. That is important since, once satisfied that a statutory nuisance exists, a local authority will be under an obligation to serve an abatement notice [3] . At the same time it will frequently face pressure from its local residents (and the councillors representing their interests) to be seen to take positive action in the courts.

- **Confidentiality** - second, the parties invariably agree at the outset that the process shall remain confidential (at least until any settlement, when it may be agreed that some matters may be placed in the public domain).
- **Expert support & assistance** - third, and crucially, in their discussions the parties will be assisted by an experienced mediator, whose role is to facilitate the discussions taking place and to help the parties [4] achieve their agreed outcome, whatever that may be. The value of involving the right mediator should not be underestimated. The converse is also true…
- **Agreed outcome** - outcomes remain in the control of the parties, rather than a court. This is particularly important where complex commercial and practical issues are involved. The outcome may include agreement on commercial and practical terms, devised after extensive negotiations between the parties, assisted by an experienced mediator. Any settlement may include items such as an apology or procedural guarantees falling well outside the purview of any court. Often, paradoxically, these can form the most important elements in any settlement.
- **Remote meetings** – whilst the current pandemic has shown that the more straightforward disputes readily lend themselves to virtual remote mediation, the decision on medium should, we suggest, remain with the mediator who will wish to consider a wide range of factors including, not least, the complexity of the issues to be resolved and the tangible benefits of bringing the parties together in a single (Covid-safe) environment.
- **Time & Cost** – each will be but a (small) fraction of that generated by the court process. Whilst the precise amount will vary from case to case, the fact that a 4-week appeal might be resolved after, say, 3-4 days of intensive discussions will readily reveal the levels of the savings that might be made. Generally, a fixed amount will be agreed with the mediator for preparation time and the mediation itself. Subject to agreement each side will also bear its own costs. The earlier the mediation is begun, the greater the savings will be.
- **Certainty** – the unavoidable uncertainty of litigation – both as to outcome and cost - so disliked by operators used to signing-off agreed projects against fixed estimates, is largely mitigated.
- **Control** – additionally, but probably most importantly, as the mantra goes: "Nothing is Agreed Until Everything is Agreed". No binding agreement arises until all parties agree, at which point the mediator will assist in drawing together all necessary threads.
- **Costs protection** – if running a mediation in parallel with appeal proceedings, any litigator and her/his client will naturally wish to consider their possible interaction. Fortunately, in this regard statements from the senior courts have invariably been positive. In Thakkar and Another v Patel and Another [2017] EWCA Civ 117, Jackson LJ recorded:

*"In PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288; [2014] 1 WLR 1386, the Court of Appeal held that silence in the face of an offer to mediate was as a general rule unreasonable conduct meriting a costs sanction. That was so even if an outright refusal to mediate might have been justified."*

On 27 April 2020, the British Institute of International and Comparative Law (BIICL) published a Concept Note highlighting the implications of the COVID-19 outbreak for commercial contracts and dispute resolution. In an accompanying press release Lord Phillips (a former President of the UK Supreme Court) stated that "parties should consider mediation, and conciliation should be encouraged at an early stage of legal proceedings".

More recently, in July 2021 Sir Geoffrey Vos, Master of the Rolls, has suggested that [5]:

"ADR should no longer be viewed as 'alternative' but as an integral part of the dispute resolution process. That process should focus on 'resolution' rather than 'dispute'"

Finally, on the approach of the civil courts, the pre-action protocols in the CPR suggest that the court will expect the parties to have 'exchanged sufficient information to consider a form of ADR to assist with

settlement'.

Given the multiple benefits that flow naturally from mediation – particularly in the case of most statutory nuisance cases - it is suggested that for mediation to be discounted in any post-judgment decision on costs a party would need to have a very good reason for declining to entertain a reasonable and genuine offer to mediate in any individual case. Generally, a decision to reject such an offer will be met by disapproval by the court in such circumstances.

10. **Continuing relationships** – in most litigation there is a winner and a loser, with the latter paying the costs of the former. Such outcomes will not be conducive to a good working relationship where circumstances dictate that the parties are obliged to continue to interact long after the initial case has been determined. Where a conclusion is reached following a mediation, rather than a judgment, the parties will have negotiated and agreed upon an outcome. That is (obviously) far more conducive to a positive and worthwhile continuing relationship than will be any court order.

**Case study**
A substantial light industrial unit had operated in a city-centre in Southern England for many years. As production increased hundreds of local residents (particularly those downwind of the prevailing SW airstream) complained of unpleasant odours.

Informal discussions with the operators of the plant failed to deliver significant improvements. An abatement notice was served and a notice of appeal filed in the local magistrates' court citing all available statutory grounds.

There had been a number of preliminary hearings before a DJ when the parties had been unable to agree any of the key issues in the case (or even whether the civil or criminal procedure rules applied!). Potential disclosure relating to the many hundreds of complaints received over a period of years, as well as the operational steps taken within the plant itself to mitigate odour escape, promised to be extensive and contentious. The matter had been listed for a 3-week trial, spread over a period of time to accommodate the DJ's existing commitments.

Mediation was proposed and the parties reluctantly came together with the assistance of an experienced mediator. Position statements and key documents were exchanged. At the conclusion of the 1½ day mediation it was announced that the operator would discontinue its appeal and the council would withdraw its abatement notice. It was agreed that the detailed terms of the Settlement Agreement entered into between the parties and which enabled such an outcome, would remain confidential.

By these means hundreds of pounds were saved and a lasting solution agreed between the parties.

**Statutory nuisance cases – issues arising**

The following are just some of the issues that are likely to arise when parties do decide to engage:

- **Choice of mediator** – a perennial issue. Factors to be taken into account will include: potential conflicts [6] , personality, success rate, cost, familiarity with the subject area and (in the case of the more popular mediators) availability. In our view it will invariably be a false economy to allow cost to dominate the final decision.
- **The issue(s)** – one might think that in the case of a statutory nuisance the 'issue' to be discussed will be readily defined by any abatement notice served. That, however, would be to artificially and unnecessarily restrict the scope of the mediation. It is likely that, having read the initial papers, the mediator will wish to send out informal 'directions' which will include a summary of the issues to be addressed.

- **Disclosure** – always an issue in complex mediations, it is likely that this will already have formed an important feature in any court proceedings. Certainly, any time expended on the process in either forum is unlikely to be wasted in the other.
- **Experts** – invariably a mediation will be assisted by the coming together of the parties' experts. Whilst this can represent a significant additional cost as far as the mediation itself is concerned it is likely, again, that much of the experts' time so involved can be applied to the court proceedings in the event that a settlement is not achieved.
- **Settlement** – unsurprisingly, the most difficult stage of the process. In particular, the question will arise as to how much of any agreed settlement should fall within the public domain. Solutions can be flexible.
- **Enforcement** – linked to the previous issue it will be necessary for the parties to agree upon 'next steps' if either is in breach of the settlement agreement. In some instances, this has been addressed in the consent order terminating the appeal proceedings, whilst in others it may be the subject of a separate contractual arrangement. Critically, issues which might have been in dispute within the court proceedings can be recorded as agreed within the concluding documentation.

**Conclusion**

As new housing developments increasingly crowd in upon existing industries and operators – and public expectations for a clean and healthy environment continue to rise - it is clear that the potential for claims of statutory nuisance can only follow a similar trajectory.

It is to be hoped that practitioners in this field will increasingly recognise the valuable role that mediation can play in achieving far better outcomes – at significantly reduced cost – in this developing area.

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**Notes**

[1] NPPF at 187
[2] We do not intend in this article to address the quite separate issues affecting s 82 EPA 1990 prosecutions brought directly by those affected by a statutory nuisance, which will be the subject of a separate future article.
[3] S 80(1) EPA 1990
[4] In one particularly complex mediation in which Jeremy was involved, raising issues affecting a national industry, there were more than 20 organisations represented.
[5] Civil Justice Report on compulsory ADR, published 12.07.21.
[6] Although a mediator will always be bound to investigate and disclose actual (as opposed to perceived) conflicts at an early stage