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Breakfast Briefing: Court of Appeal Judgment in R (Ball v Hinckley & Bosworth Council – local authority powers to vary an Abatement Notice issued against a statutory nuisance

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Meet the speakers

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Overview

1. Procedural context: JR of Council's decision to vary an abatement notice served in November 2014 to restrict the recurrence of a SN at a motor racing ground.
2. The issue: whether council has power to vary an abatement notice which it has issued against a statutory nuisance under s80 EPA 1990: [1].
3. Outcome: no express or implied power to vary an abatement notice once served

Detail (1)

- 2014 AN included a schedule that provided for possible variations to be applied for and made in writing
- It was a decision under this procedure that was challenged by local resident concerns that the variations would worsen the noise exposure.
- High court dismissed the challenge; CA allowed the appeal.
- Court set out statutory framework for surveying area, serving abatement notices, appeals and prosecutions.

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Detail (2)

- Held that there are two distinct stages in the legislation:
- Stage 1: is there a statutory nuisance? If so a notice must be served; "there is no relevant discretion": [33]
- Stage 2: if (but only if) there is an appeal or prosecution, then the court has to decide whether BPM exists. "…the use of BPM is not a matter for the local authority: it falls outside their jurisdiction. In law, it is solely a matter for the…Court….The abatement notice is not a gateway for the local authority's ongoing consideration of BPM.": also [33].

Detail (3)

- Is there a power to vary an abatement notice?
- No express power and no implied power:
- Fact that legislative scheme gives express power to the court on appeal to vary the notice "is a critical pointer away from the necessary implication of such a power on the part of the local authority": [45]; "a complete answer": [55].
- Express division of powers between Council and court are a feature of the legislation (and see e.g. the BPM point): [47]-[51]
- Implied power would lead to contradictions and inconsistencies within the legislative scheme (e.g. recipient could delay and lose right to ask court to vary notice but achieve same end by asking the Council): [52]-[54].

Detail (4)

- No power arises by necessary implication: a "relatively high hurdle" concerned not with what would be reasonable or sensible but what "the statute must have included": [58]-[60].
- Administrative convenience, purpose of environmental protection and arguments flexibility are insufficient: [63]-[78]
- No other factors (town planning: express power exists; certainty; time limits…).
- Authorities did not compel a different result NB Everett on withdrawal was materially different context, since withdrawal would be founded on error or absence of a nuisance whereas variation pre-supposes an existing nuisance; withdrawal promotes the purposes of the legislation whereas variation does not: [99], [100], [107]. Everett "plainly right, but also plainly distinguishable": [108].

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What's in store…

…the later paragraphs, which talk about the BPM defence, appear to fall into the same error as the judge, in suggesting that the BPM defence is a matter for the local authority and may even mean that no abatement notice will be issued. As a matter of principle, as the 1990 Act makes plain, BPM is not a matter for the local authority, who are obliged to issue an abatement notice if there is a statutory nuisance, whatever means are being deployed to address it. [113]

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DEFRA *Guidance on Sections 69 to 81 and Section 86 of the Clean Neighbourhoods and Environment Act 2005*

Paragraph 36 of the DEFRA *Guidance on Sections 69 to 81 and Section 86 of the Clean Neighbourhoods and Environment Act 2005* (section 86 of which introduces a power to defer the service of an abatement notice in respect of noise nuisance only: see further paras **2.53–2.55**) states that the provision was introduced because:

'There is no provision for the exercise of discretion as to whether or not to take this action, even if the local authority suspects that "best practicable means" may be in place (only the courts can rule on whether "best practicable means" are in place).'

Section 80(1) of the EPA 1990 provides that:

'[W]here 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 … an abatement notice.

This was interpreted as a duty (in other words 'shall' means 'must' in this context) by Carnwath J in R v Carrick District Council, ex p Shelley. [1996] Env LR 273. (but see *Nottingham Corpn v Newton*1

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Ex p Shelley and *Ball* are wrong in holding that 'shall' means 'must' for the purposes of section 80 of the EPA 1990

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The Secretary of State acted contrary to the intention of Parliament by allowing a ground of appeal based upon the 'best practicable means' (*ultra vires* argument)

Ex p Shelley **and** ***Ball are*** **correct, but where the local authority was satisfied that the recipient would be able to appeal successfully on the grounds that he had employed the best practicable means, the local authority should issue a notice restricting rather than abating the nuisance by requiring the employment of best practicable means (the power to restrict a statutory nuisance);**

Ex p Shelley **is correct but** ***Ball*** **is not but where the local authority was satisfied that the recipient would be able to appeal successfully on the grounds that he had employed the best practicable means, it is not under a duty to issue a notice.**

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