# Avoiding a stink

**Lyn Dario** explores some of the legal implications for those accused of creating bad smells and offers some tips on how to keep things sweet

Those who seek to promote waste management schemes could be forgiven for being wary of the current legal framework. Although evolved to protect individuals, it is arguable whether this is achieved, particularly in group litigation.

There are genuine cases where the claimants have every right to seek damages or an injunction. But from a defendant's point of view – particularly for those operating businesses with the potential to generate noise or odour – the business of getting a controversial, but necessary, facility up and running and then ensuring that there are no complaints, is an arduous one.

First, operators have to negotiate the planning process and even if they are granted planning permission, they can face a judicial review. It is the same for environmental permits.

The law has developed so that individuals do not suffer detriment because of activities that interfere with their daily lives. Nuisance is a property-based tort, which requires the court to assess whether a person has suffered interference with the use and enjoyment of their property.

Some of these cases might involve actual damage – subsidence, for example, or rogue balls from a nearby cricket ground. Others involve more intangible issues – odour and noise being classic examples, where it can be much harder to quantify the impact on the claimant.

The courts have always taken the view that just because a site benefits from a planning permission or an environmental permit, and may even perform a public service, it does not mean that an individual should have to suffer as a result. If a site's operations have an adverse impact on that individual, the courts have been quick to ensure that they are compensated accordingly, even to the extent of the site being injuncted (and in some cases effectively shut down).

So where do those with existing or proposed developments that may have amenity impacts stand legally under the principles of nuisance?

## Criminal law

It is always open to potential claimants to approach their local authority to request an investigation of statutory nuisance pursuant to section 79 of the Environmental Protection Act (EPA) 1990. If the local authority concludes that a statutory nuisance exists, it must serve an abatement notice requiring the defendant to take steps to abate it or prevent its recurrence.

Defendants can, of course, appeal such a notice. This protects their legal position and allows time for negotiation with the local authority.

The golden rule, if you do receive an abatement notice, is to take immediate legal advice – because if you do not appeal and subsequently contravene its terms, you could be committing a criminal offence.

A carefully drafted abatement notice could have devastating commercial effects – making it impossible to continue in business.

If the local authority decides that there is no evidence of a statutory nuisance, complainants can still bring proceedings as individuals under the EPA. However, this puts them at risk on costs, in a way that local authority proceedings do not.

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## Statutory nuisance

Where a site has an environmental permit, a local authority cannot instigate statutory nuisance proceedings unless certain criteria are met and the Secretary of State has given consent. The presumption is generally that environmental and amenity issues are better dealt with through the permitting system. The Secretary of State would be concerned principally with whether:

- the local authority and the Environment Agency have been in regular communication and/or sharing information
- the facility is a regulated one, subject to a permit, rather than being an exempt operation; this is because the regulatory controls are likely to be tighter if the Environment Agency is contemplating or already taking enforcement action.

## Civil proceedings

Perhaps the greater practical concern, especially for those operating in the waste sector, is a civil claim, which can lead to the award of damages, or, in some cases, an injunction.

These types of actions have often taken the form of group litigation, with a small core of complainants gradually snowballing into tens or hundreds. There may be a mix of meritorious and rather less meritorious complaints, which can muddy the water.

One such case was Barr & Others v Biffa Waste Services Ltd, which was heard by the Court of Appeal in 2012. The case concerned Biffa's Westmill landfill site and of the 150 or so claimants, 30 were selected to lead.

To give a general flavour of the High Court judgment, it seemed to be generally accepted by the judge that the site had often been operating in compliance with its environmental permit, but that nonetheless the residents had found the odour nuisance to be unbearable.

Having extensively reviewed the common law, he sought to move it into the 21st century, recognising that the regulatory controls (particularly on the

environment) are now considerably more advanced. He wanted the law of nuisance to 'march in step' with legislative controls such as the Environmental Permitting (England and Wales) Regulations 2010, concluding that:

- there was no evidence that Biffa had been negligent
- the site was strategically important
- the common law should be 'flexible'/ there should be thresholds that the complainants had to prove had been exceeded, with regard to the frequency of the nuisance
- only two claimants would have succeeded in proving their case.

The Court of Appeal reversed the decision, ruling that: *"The fundamental principles of law were settled by the end of the 19th century and have remained resilient and effective since then."*

However, earlier this year, the Supreme Court delivered its judgment in Coventry & Others v Lawrence & Others [2014] UKSC13. Although the case concerned alleged noise nuisance from a motor cross track, the principles are equally applicable to odour. The case went against the defendant, but the court did offer some crumbs of comfort that could add balance in such cases. The judges agreed, for example, that:

- it would be possible in principle to acquire a right to commit a nuisance by prescription (by establishing 20 years' use). It would not necessarily defeat the claim to the right to commit a nuisance. This puts the onus on the claimants to act relatively promptly if they wish to object to how a site is being operated
- although it is no defence to say that the claimant came to the nuisance, if the claimant develops land or changes its use after the facility alleged to be committing the nuisance has become operational, they face some additional hurdles to prove their case. This is because courts should treat the existing facility as something that is already part of the character of the area so there can hardly be a complaint if the character is already industrial. The Supreme Court seemed more willing to apply this principle in cases of offence to the senses than where physical harm is being caused to the property
- the fact that planning permission has been granted for a facility may carry some weight in certain circumstances. For example, where the permission specifies parameters such as the starting and ending time for particular operations
- with regard to whether damages or an injunction is a more appropriate remedy, the court will look at a range of public interest factors for example the risk of job losses if the facility is closed down.

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## Top tips

For sites that are permitted, there will already be detailed reporting requirements, but there are general principles that apply to all sites. For example, it is vitally important that proper records are kept, particularly of complaints. This means having an effective liaison system with the Environment Agency or the local authority.

There should also be evidence that complaints are being taken seriously and followed up. However, you should ensure that you are fully aware of how the concept of privilege might apply to your investigations – always seek advice from your lawyer before putting pen to paper.

Finally, although compliance with your environmental permit/planning permission is not in itself a defence to a nuisance claim, a failure to comply and/or a history of such non-compliance will always be used by claimants as evidence that site is not being well run. Always follow up and close out any advice or warnings given by the Environment Agency, and keep a careful record of what you have done in response.

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