*321 R. (European Metal Recycling Ltd) v Environment Agency

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
31 August 2012

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[2012] EWHC 2361 (Admin)
[2013] Env. L.R. 14

Queen’s Bench Division (Administrative Court)

H.H. Judge Pelling QC :

31 August 2012

Noise; Pollution; Recycling; Suspension notices;

H1 *Pollution control—waste permitting—Environmental Permitting (England and Wales) Regulations 2010 reg.37—metal waste disposal and recycling—noise—suspension notice—whether noise created “serious risk of pollution”—whether notice failed to specify steps required to remove risk or was otherwise vague and imprecise*

H2. The claimant (“EMR”) operated a metal waste disposal and reclamation yard. The operations were controlled under an Environmental Permit issued by the defendant (“EA”) under the Environmental Permitting (England and Wales) Regulations 2010 (“the 2010 Regulations”). Following complaints from local residents living near to the yard, EA varied the permit to include a condition which required EMR to use appropriate measures to prevent or minimise noise and vibration from the activities carried out on site. Subsequently, the complaints continued and the EA concluded that EMR’s activities involved a risk of serious pollution from noise and issued a suspension notice (“SN”) under reg.37 of the 2010 Regulations. Under the notice, the EA required EMR to design and implement measures that eliminated the risk of serious pollution by noise by a certain date. EMR applied by way of judicial review to quash the SN.

H3. EMR argued that:

H4. (1) There was no basis for the EA to conclude that there was a risk of serious pollution by noise.

H5. (2) The wording of the SN did not comply with the requirements of reg.37(4)(a) of the 2010 Regulations because it failed to specify what steps EMR was required to take to remove risk, failed to provide defined threshold criteria for compliance with the notice and was otherwise vague and imprecise.

H6. **Held,** in granting the application and quashing the SN:

H7. (1) The question of whether there was a risk of serious pollution was manifestly one for the judgment of the EA and any decision could only be challenged on the ground of irrationality. On the immediate facts of the case, the EA's decision was clearly not irrational. All of the material available to the EA when making the decision was considered and entitled the EA to conclude that a risk of serious pollution was clearly made out. ***322**

H8. (2) Regulation 37(4)(a)(ii) of the 2010 Regulations imposed a mandatory requirement to specify what steps had to be taken in order to remove the risk that triggered the service of the SN. That requirement could have been satisfied by specifying an outcome or outcomes rather than by reference to steps in the sense of specifying works to be undertaken at the yard, if that was considered to be a more appropriate way in which to proceed. The EA was not entitled to require the elimination of a risk of serious pollution without identifying the steps by which that was to be achieved.

H9 Case referred to:

R. v Falmouth and Truro Port HA Ex p. South West Water Ltd [2001] Q.B. 445; [2000] Env. L.R. 658

H10 Legislation referred to:

Environmental Permitting (England and Wales) Regulations 2010 (SI 2010/675) reg.37(4)(a)(ii)

H11 Representation

Mr G.Wignall , instructed by Addleshaws Goddard , appeared on behalf of the claimant.
Mr G. Facenna , instructed by Environment Agency , appeared on behalf of the defendant.

JUDGMENT

H.H. Judge Pelling QC:

Introduction

1. The claimant ("EMR") is the operator of a metal waste disposal and reclamation yard at Parkhall Works, Parkhall Road, Longton, Stoke-On-Trent, Staffordshire ("the Site") pursuant to an Environmental Permit ("the Permit") issued pursuant to regulations that in their current form are the Environmental Permitting (England & Wales) Regulations 2010 ("EPR 10"). The regulator under that licence is and was at all material times the defendant ("EA").

2. The Permit was issued originally to EMR's predecessor in title at the Site but was transferred to EMR on 19 July 2010. Following the transfer EMR spent significant sums on modernising the Site and substantially increased commercial activity at the Site above the levels maintained by its predecessor. There were a substantial number of complaints from local residents concerning the noise generated as a result of EMR's activity at the Site. This led to a variation of the conditions contained in the Permit with effect from 31 August 2011 which required that:

> "Emissions from the activities shall be free from noise and vibration at levels likely to cause pollution outside the Site, as perceived by an authorised officer of the Environment Agency, unless the operator has used appropriate measures, including but not limited to those specified in any approved noise and vibration management plan to prevent or where that is not practical to minimise the noise and vibration." ***323**

3. The complaints continued. Following investigations by the EA and discussions between the EA and EMR's management which did not result in an agreed resolution, on 20 February 2012, the EA served EMR with a notice pursuant to EPR 10 reg.37 entitled " *Enforcement Notice of Suspension and Requirement to Take Steps* " ("SN"). By these proceedings, EMR seeks an Order quashing the SN.

4. Following the issue of these proceedings, EPR applied without notice for, and obtained, an interim injunction from H.H. Judge McKenna sitting as a Judge of the High Court in Birmingham restraining the EA from giving effect to the SN. On 17 April 2012, Judge McKenna ordered a rolled up hearing of these proceedings. This is that hearing. The hearing is taking place in Manchester because of the indisposition of the Judge in Birmingham before whom the application was to be heard. At the outset, I enquired whether the EA was contending that permission ought not to be granted. Following an indication that it was not being so contended, I directed that the proceedings should continue as a substantive hearing.

5. There is a statutory appeal against the SN due to be heard in the autumn. It is common ground that the appeal does not operate as a stay of the SN. Aside from denying that EMR has established any public law error concerning the SN, EA maintain that EMR had an alternative remedy available to it being the statutory right of appeal. However the EA has not sought to oppose the grant of permission on that basis, preferring that the substantive issues be dealt with in this Court. An application by EMR to stay these proceedings pending the outcome of the statutory appeal to be heard in October 2012 was refused by H.H. Judge Oliver-Jones QC sitting as a Judge of the High Court on 19 July. I return to the alternative remedy point at the end of this judgment to the extent that it is necessary to do so.

Statutory framework

6. EPR 10, Reg.37 provides as follows:

> "(1) The regulator may suspend an environmental permit by serving a notice ('a suspension notice') on the operator under this regulation.
> (2) If the regulator considers that the operation of a regulated facility under an environmental permit involves a risk of serious pollution it may serve a suspension notice on the operator.

(3) Paragraph (2) applies whether or not the manner of operating the regulated facility which involves the risk is subject to or contravenes an environmental permit condition.
(4) A suspension notice served for the purposes of Paragraph (2) must:

(a) specify:

(i) the risk of serious pollution mentioned in that paragraph;
(ii) the steps that must be taken to remove that risk, and
iii. (iii) the period within which the steps must be taken

b. (b) state that the environmental permit ceases to have effect to the extent specified in the notice until the notice is withdrawn; and
c. (c) If the environmental permit continues to authorise the operation of a regulated facility, state any steps (in addition to those already required to be taken by the environmental permit conditions) that are to be taken when operating the regulated facility. ***324**

…
(8) The regulator:

(a) may withdraw a suspension notice at any time by further notice served on the operator; and
(b) must withdraw a notice when satisfied that the steps specified in it have been taken."

It is not in dispute between the parties that the Permit is an environmental permit, that the Site is a "regulated facility", within the meaning of EPR 10, reg.37 , and that noise pollution is capable of being "serious pollution" for the purposes of EPR 10 . It is also common ground that it is a criminal offence to fail to comply with a suspension notice—see EPR 10, reg.38(3) —and that the penalties that can be imposed on proof of such an offence are severe—see EPR 10, reg.39 .

7. The EA has issued guidance as to how its powers are to be exercised, which is contained in a document published by the EA entitled " Environmental Permitting (England & Wales) Regulations 2010 —Regulatory Guidance Series No.11—Enforcement Powers" ("the Guidance"). As is apparent from paras 1.7–1.13 of the Guidance, EPR 10 was created to "… update and provide a flexible suite of enforcement powers with reduced prescription wherever possible …". Those paragraphs also explain the wide range of permits covered by the Regulations and thus the wide range of potentially polluting events that come within the scope of the scope of EPR 10 . Under the heading "Better Regulation" the following appears:

> "1.14 Better regulation puts the responsibility firmly on operators to manage their activities to prevent or minimise pollution to the environment. In our permits we now use outcome based conditions, as far as possible, rather than specifying detail. The operator is responsible for developing the mechanisms to achieve the outcome.
> 15. 1.15 It is our role to … have sufficient technical knowledge to challenge the operators proposals effectively … know a range of techniques to prevent and minimise environmental harm and use our skills and powers to get the operator to use the appropriate measures …
> 16. 1.16 The primary purpose of compliance monitoring and enforcement is to ensure that an unacceptable risk of harm or pollution does not occur … and that legitimate business is not undermined …
> …
> 15. 1.17 In general, better regulation means obtaining the outcome by proportionate means. … In some cases the breach might be so serious that the appropriate response is to serve a suspension notice … for suspension there must be a risk of serious pollution …
> …
> 2. 2.2 We aim to provide advice and guidance to assist the operator to come back into and remain in compliance at all stages in the regulatory cycle.
> …
> 2.12 Even where a more serious response is required, advice and guidance should be provided in addition …"

8. In relation to enforcement notices the Guidance says that "… a sensible approach might be to require measures that you are reasonably sure will solve the problem …". In relation to suspension notices the guidance provides that: ***325**

> "3.37 A suspension notice can be used where something has already happened to cause a risk of serious pollution or where we consider that something is likely to happen that will cause a risk of serious pollution. There will be cases where it is necessary only to suspend part of the operations or activities allowed under the permit to achieve the outcome. You should not simply automatically suspend the entire permit. You

> should consider how much of the permit needs to be suspended to deal with the risk of serious pollution."

In relation to the contents of a suspension notice, para.3.41 of the Guidance makes it clear that the Notice must … "say what the risk of serious pollution is … say what steps must be taken to remove the risk …". Interestingly, reference is made to a template which it is said "… will ensure the requirements above are addressed". Finally in para.3.44 of the Guidance, officials are warned that "… there should be clarity and certainty in each suspension notice served".

9. Under the heading "Points to Note" the Guidance makes the following points:

> "You must be satisfied that there is a risk of serious pollution. That means you will have to identify what the serious pollution is and why there is a risk of it occurring or continuing,"

see para.3.45; and in relation to the requirement to take steps, para.3.48 of the Guidance says:

> "The specified steps can only be steps which are necessary to remove the risk of serious pollution. You cannot go beyond this. The Core Guidance says that a suspension notice should allow activities that are not related to the risk of serious pollution to continue. This means that you should always ensure that you only suspend the permitted activity … to the extent necessary to avoid the risk of serious pollution."

The relevant facts

10. The parties have provided very extensive evidence relating to the events leading to the service of the SN. A significant amount of time was taken up at the hearing with an exploration of those issues. In my judgment however much of this material is irrelevant to the issues that I have to decide. That which I consider relevant is referred to below.

11. In so far as is material, the SN provides as follows:

> "Under regulation 37 … we may suspend an environmental permit if we consider that operation of the regulated facility involves a risk of serious pollution.
>
> Accordingly the Environment Agency has decided to suspend the environmental permit to the extent specified in Schedule 1 with effect from midnight on 26th February 2012.
>
> In addition you are required to take the steps specified in Schedule 2 to remove the risk.
>
> The reason for this decision is that we consider that the noise arising from operation of the regulated facility involves a risk of serious pollution.
>
> … ***326**
>
> **Schedule 1 Extent to which the Environmental Permit is suspended**
>
> All movement of waste onto, within and off the site.
>
> …
>
> **Schedule 2 Steps to Be Taken To Remove Risk of Serious Pollution**
>
> Design and implement measures that eliminate the risk of serious pollution from noise … [by] 31 August 2012."

12. Prior to the service of the SN, EA carried out a Noise Impact Assessment. The summary contained within that assessment is to the following effect:

> "Noise monitoring was performed between Monday 28th November 2011 and Monday 5th December 2011 … The weekday noise levels from the site during working hours were between 51 dB(A) and 58 dB(A). The worst hours were up to 62 dB(A).
>
> When the site was not operating, the average noise level was found to be 45 dB(A) and the background L90 noise level was found to be 42 dB(A).
>
> Using the BS4142:1997 methodology these noise levels would be considered likely to cause pollution, as the rated noise levels were between +13 dB and +21 dB greater than the background noise levels on all working weekdays and the worst single hours were between +14 dB and +25 dB greater than the background noise level.
>
> Noise levels such as these would normally constitute a Significant pollution, and together with lack of appropriate measures … would constitute a significant (CCS2) breach of their Environmental Permit.
>
> Unfortunately, the strict requirements of BS 4142:1997 were not followed as the response of the sound level meter was not checked with a calibrator after use. Therefore I do not consider this noise data to be sufficiently robust to be used as primary evidence for any enforcement action, but may be considered as very strong supporting evidence. I would therefore recommend reassessing the noise levels as soon as possible in order to substantiate the noise levels in keeping with BS4142:1997.

In practice the noise pollution from the site is so great that any potential drift in the noise meter response would be utterly eclipsed by the noise from the site. A likely drift of ± 0.2 dB would make no difference to a noise rating that was in excess of +18 dB greater than the background noise level.

…

Appropriate Measures

…

7.3 … It is unlikely that a noise barrier on its own will be able to reduce the current worst noise pollution below +10 dB over background, or the average noise pollution below +5 dB. This means that even with a noise barrier in place, a level of noise pollution may still remain which is likely to be at least a Minor (CCS3) pollution.

7.4 In addition to a noise barrier, full enclosures or temporary enclosures could also be used around activities such as angle grinding. Consideration should also be given to having buildings to fully enclose noisy activities. Other measures would include finding alternative methods, enhancing silencers, reducing drop heights etc (this is not an exhaustive list).

… ***327**

Compliance Classification Scoring

8.1 … CCS … scores breaches between CCS1 (Major) and CCS4 (No Effect) depending on their potential environmental effect.

…

The scoring guideline example for a Significant (CCS2) breach are:

- -excessive noise problems substantiated, followed by a significant number of complaints
- -Regular and sustained disturbance of local population from noise due to site activities
- -Significant reduction in amenity for more than 1 day which is disturbing enough due to volume/duration and tone

I would consider the noise impact from the site to fit the example of a CCS2 breach as:

- Excessive noise problems have been substantiated
- There have been a significant number of complaints
- There is regular and sustained disturbance

The reduction in amenity has lasted more than 1 day."

Notwithstanding the recommendations in this report the repeat testing using calibrated instruments or instruments in respect of which correct calibration could be demonstrated was not carried out.

13. Prior to the issue of the SN the EA prepared an internal document dated 17 February 2012 that purports to record the decision making process by which the decision to serve the SN was arrived at. The only form of suspension notice considered was a suspension notice that would require all movement of waste into, within and out of the Site to cease. No consideration would appear to have been given to whether a lesser form of restriction falling short of the suspension of all activity on the Site was appropriate. Given the long history of operations on the Site and the absence of serious complaint prior to the increase in the volume of operations by EMR following its takeover of the Site that is surprising. The explanation offered at the hearing was that structural changes at the Site and in particular the introduction of more hard standing areas, and the use of larger handling equipment made a comparison with the position as it was before EMR took over the Site inappropriate. There is nothing in the internal decision recording document that suggests something short of stopping all movement was considered but rejected on this ground.

14. In relation to evidence of a risk of serious pollution the document refers to the volume of complaints received, noting that only three complaints were recorded in the period in the period between 19 November 2001 and the 18 July 2010 when EMR took over the Site. It records 1,103 complaints as being received in the period between 19 July 2010 and 4 January 2012. Reference is also made to statements from EA officers to the effect that noise from the Site constituted serious pollution, and that a particular feature of the objectionable noise was unpredictable loud bangs and crashes. One of the contributing factors identified was an increase in the throughput of material following the takeover by EMR which was described as being "… an approximate tripling of the amount of waste through the site". The justification for the service of a SN was that it would prevent the risk of serious pollution from the site but that it could be withdrawn "… quickly provided that EMR implement the necessary measures". Notwithstanding the terms of the Noise **328* Impact Assessment noted above the "necessary measures" were not identified in the internal decision making record and indeed that document records the EA's position as being:

> "We are not in a position to specify what detailed measures EMR should take to eliminate the risk of serious pollution by noise, and the cost of these. It is EMR's responsibility to operate their site. They have not provided us with any costing information."

No consideration appears to have been given to defining an outcome or objective that EMR could properly be required to achieve in order to eliminate the perceived risk. This is so notwithstanding the guidance contained in the Guidance set out above and further notwithstanding the contents of the Noise Impact Assessment.

15. In the result, Sch.1 of the SN provided for the suspension of all movement to from or on site but no specific steps were identified in Sch.2 of the SN as required to be taken, nor was any specific objectively identifiable outcome specified either. This was so notwithstanding the internal guidance referred to above and the contents of the Noise Impact Assessment.

The challenge

16. The Grounds [1/25-30] specify no less than 13 grounds of challenge to the SN. The main grounds of challenge were however three in number being a challenge to the conclusion by the EA that there was in the circumstances a risk of serious pollution, a challenge to the terms of

Sch.2 to the SN which it was contended failed to comply with the mandatory requirements of EPR 10, reg.37 and a challenge to the decision to suspend all movement to, from, and on the site.

Risk of serious pollution

17. The determination by the EA that EMR's operations on site posed a risk of serious pollution is challenged in Grounds 3-6. None of these are sustainable in my judgment.

18. The question whether there is such a risk is manifestly one for the judgment of the EA. Such a judgment is capable of challenge only on irrationality grounds. In my view such a challenge is clearly unarguable on the facts of this case. All the material available to the EA has to be viewed in the round when considering this issue. The material referred to in the internal decision making record so considered clearly entitled the EA to conclude that a risk of serious pollution was made out and clearly made out. The calibration issue acknowledged by the author of the Noise Impact Assessment (relied on in Ground 3) would only have been of potential significance if the Noise Impact Assessment had been the only material considered by the EA. However, it was not the only material that was available and considered. In any event as explained in the text of the Noise Impact Assessment, the noise demonstrated by the assessment was so serious that any calibration error could not have a material effect.

19. Although EMR rely on the time that elapsed between the commencement by EMR of operations at the Site and the service of the SN (and the number of reviews undertaken at the Site that did not identify the existence of a risk of serious pollution), in my view those factors are immaterial to the issue I am now considering. The internal guidance that I have quoted from above clearly shows ***329** that it is the approved practice and policy of the EA to attempt to resolve pollution issues in the first instance by negotiation. That is precisely what the EA has done here. Had the EA not adopted this practice then it would no doubt have been alleged that it was acting contrary to its published policy in not doing so. The failure to identify the existence of a serious risk in the course of earlier formal assessments does not lead to the conclusion that there was no proper basis on which such a conclusion could be reached. It does not give rise to any form of expectation that such a conclusion would not be reached nor does it lead to the conclusion that the material relied on by the EA as supporting its eventual conclusion that such a risk existed is incapable of supporting such a conclusion.

20. In the result the challenge to the judgment that there was a risk of serious pollution such as to justify in principle the service of a suspension notice is misconceived and I reject it.

The challenge to schedule 2 of the SN

21. This was the main focus of attention at the hearing before me. In essence EMR's case was that the wording adopted did not comply with the requirement of EPR 10 reg.37(4)(2)(a) because:

> "(i) it failed to specify what if any steps were required to be taken; and/or
> (ii) it failed to provide a defined threshold criterion objective, or defined threshold criteria or objectives, that had to be satisfied by EMR if it was to comply with the SN; and/or
> (iii) it was otherwise vague and imprecise."

It was submitted that these conclusions followed from the language of EPR 10, reg.37 , were consistent with the case law decided in relation to predecessor primary regulating legislation in this area and accorded with obvious common sense.

22. It was in the end common ground that the word "specify" meant to state explicitly. Although Mr Wignall focussed on this word in my judgment that word of itself does not assist in deciding the issues that arise. In my judgment the true focus needs to be on what is required to be stated explicitly. It is helpful to approach the question first without reference to authority because there is no authority which addresses directly the question that arises in this case in relation to EPR 10 .

23. Regulation 37(4)(a)(ii) requires that the notice specify (that is state explicitly) "… the steps that must be taken to remove that risk …". The risk referred to by the words "… that risk …" can only be the risk of serious pollution that is required to be specified (meaning explicitly identified) pursuant to reg.37(4)(a)(i) . The only specification of the risk relied on as the basis for serving the SN is the statement in the SN to the effect that "… we consider that the noise arising from operation of the regulated facility involves a risk of serious pollution". There is thus nothing within the definition which identifies the cause or causes of the risk other than the occurrence of noise.

24. Schedule 2 to the SN specifies the steps that have to be taken as being to, "… design and implement measures that eliminate the risk of serious pollution from noise". As a matter of language a requirement to state explicitly the steps required to be taken to eliminate an identified risk cannot sensibly be said to be satisfied by a requirement to design and implement measures to eliminate that risk. There is no material difference between a measure and a step, or between "eliminate" and ***330** "remove", or between "taken" and "design and implement" in this context. In my judgment it is obvious as a matter of language that a requirement to state explicitly the steps that must be taken to remove an identified risk is not satisfied by a statement requiring the recipient to take steps to remove the identified risk. If this is correct as a matter of language I do not see how a requirement to design and implement measures to eliminate the risk is any more compliant. Had the EA's position been that any noise emanating from the Site as a result of regulated activity pursuant to the Permit had to be eliminated then it might have been possible to say that a provision to this effect was satisfactory because it required the elimination

of all noise. However, it is not the EA's case that this is what is required. Thus it seems to me that as a matter of language, what is required for Sch.2 to be compliant with reg.37(4)(a)(ii) is the identification of either outcomes or criteria that have to be achieved by whatever means EMR choose to adopt and/or the identification of specific steps that are required to be taken.

25. The EA's position is that it does not seek to eliminate the emanation of all noise caused by the regulated activity at the Site nor does it seek to bring to an end all of the regulated activity at the Site. In those circumstances, the approach adopted in the SN does not comply with the Regulatory Guidance, the material parts of which are set out in paras 7-9 above. No attempt has been made to adopt an outcome-based specification. No attempt has been made to identify what steps must be taken to remove the risk of serious pollution as is required by para.3.41 of the Guidance. The SN fails to achieve the outcome identified in para.3.44 of the Guidance that "… there should be clarity and certainty in each suspension notice served …".

26. At this stage it is necessary to turn to the authorities because EMR maintain that the authorities support its submissions as to the true meaning and effect of the relevant regulation albeit by analogy. The EA does not accept this proposition and submits that once they have been considered it becomes clear that the approach identified above is misconceived as matter of law.

27. *R. v Falmouth and Truro Port HA Ex p. South West Water Ltd [2001] Q.B. 445; [2000] Env. L.R. 658* provides some implicit support for EMR's case. It does not support the EA's submissions. That case was concerned with an abatement notice served pursuant to s.80 of the Environmental Protection Act 1990 . The issue that arose in that case was whether the abatement notice was invalid for failing to specify the works required to abate the nuisance. Section 80 of the 1990 act permitted a local authority to serve either (a) a notice requiring the abatement of the nuisance concerned or (b) a notice requiring the execution of such works and/or the taking of steps for that purpose. There was no obligation to serve both. The decision of the Court of Appeal was that an abatement notice did not need to specify the steps that had to be taken to abate the nuisance—see Brown L.J. as he then was at 469B-E. However, critically, Brown L.J. added this:

> "If however the means of abatement are required by the local authority, then they must be specified; the *Network case, 93 LGR 280* and the *Sterling case [1996] Env LR 121* remain good law."

Pill L.J. agreed with this part of Brown L.J.'s judgment as did Hale L.J. This is the key point to be derived from this authority. EPR 10 does not provide for the service of an abatement notice. It provides for the revocation of permits (reg.23), and for the service of enforcement and suspension notices. The regulation governing ***331** suspension notices (reg.37) does not offer an alternative provision to reg.37(4)(a) that enables the EA simply to require abatement without specifying the steps required to be taken. Regulation 37(4)(a) imposes a mandatory

requirement to specify the steps that are required to be taken. Thus it is the qualification to the general principle identified by Brown L.J. that matters.

28. In my judgment similar considerations apply to the judgment of Sullivan J. as he then was in *R v SSE Ex p. Premiere Environment Ltd [2000] Env. L.R. 724* . That case was concerned with the effect of s.38(12) of the Environmental Protection Act 1990 which required a suspension notice served under s.38 of that Act to state the events on the occurrence of which the suspension was to cease to have effect. That is statutory language that is different from that which is used in the EPR 10 . As the Inspector had observed in that case (judgment at 728), "… section 38 … places no requirement on the Agency to specify the steps to be taken by the appellant …". That is not the position under EPR 10, reg.37 which imposes a mandatory obligation on the EA to specify the steps that are required to be taken to remove the identified risk.

29. *Sterling Homes v Birmingham City Council [1996] Env. L.R. 121* concerned a notice under s.80 of the 1990 Act that required steps to be taken which were described as being "… such works as may be necessary to ensure that the noise and vibration does not cause prejudice to health or a nuisance, take any other steps as may be necessary for that purpose". The distinction between an abatement notice and a notice that required steps to be taken was clearly drawn by McCullough J. at 133 whose conclusion was that where a s.80 notice required works or other steps to be taken, the notice was required to specify the works or other steps required to be taken —see in particular pp.131–132 and 133–134.

30. I return to the terms of the Regulation. It imposed on the EA a mandatory requirement to specify what steps had to be taken in order to remove the risk that triggered the service of the notice. In my judgment that requirement could have been satisfied by specifying an outcome or outcomes rather than by reference to steps in the sense of specifying works to be undertaken at the Site if that was considered to be a more appropriate way in which to proceed. In my judgment however, what it was not entitled to do was to require the elimination of a risk of serious pollution without identifying the steps by which that was to be achieved. Subject to the alternative remedy point considered below, in my judgment EMR is entitled to a quashing order on this ground alone.

Remaining grounds

31. Given my conclusions on the main issue in controversy, it is not necessary that I consider any of the other grounds not so far considered in detail. It is right however that I should set out summarily my conclusions on one issue that would have arisen had I not decided the main issue as I have. Given that the EA's professed view is that it did not consider that all operations under the Permit would need to cease, and did not consider that all noise from such operations had to be eliminated, in my judgment consideration had to be given to whether a suspension of regulated activity under the Permit falling short of the comprehensive suspension in fact imposed by the SN would have been appropriate.

32. I accept that there may have been reasons for rejecting such an approach if only on a temporary basis pending the taking of the steps that should have been but ***332** were not specified in the SN. It is clear from the internal record of the decision making process referred to above however that such an approach was not adopted. The only solution considered was a suspension in the terms in the end imposed. This approach ignores the guidance in para.3.37 that "… you should not simply automatically suspend the entire permit. You should consider how much of the permit needs to be suspended to deal with the risk of serious pollution …" and that in para.3.48 of the Guidance that the permitted activity should be suspended only to the extent necessary to avoid the risk of serious pollution.

Alternative remedy

33. The final issue that I need to address is the suggestion by the EA that this claim is potentially an abuse of process because there is a suitable alternative remedy available. Since the grant of permission was not opposed on this basis nor was the substantive claim, I need not address this issue in detail. I should make clear however that I do not accept the suggestion. In the circumstances, I state my reasons shortly. The hallmark of an alternative remedy that will normally lead to a refusal to grant relief by way of judicial review is that it is a remedy that is equally effective and convenient—see R. v Hillingdon BC (1974) Q.B. 720 at 728.

34. Where the effect of a statutory appeal is that the SN is not suspended pending determination of the appeal, and where, as here, the effect of such a notice is to require all regulated activity governed by the relevant permit to be discontinued and where, as here, it is likely that an appeal will take months rather than weeks to be determined, in my judgment it is difficult to conclude that the existence of a statutory appeal is either equally effective or convenient. The losses caused to EMR by a suspension in the terms adopted by the EA in this case would inevitably be substantial and the potential effect on employees at the Site even more serious. In addition there is a fundamental issue of law that requires resolution—that is the degree to which if at all EPR 10 requires the specification of the steps required to be taken. It was clearly desirable that a ruling on this issue be obtained in early course. A statutory appeal is not the most appropriate method for deciding such issues—see *R v. Falmouth and Truro PHA v South West Water Ltd* (ante) at 473D-F.

Conclusion

35. For the reasons outlined above, the SN must be quashed. ***333**

