***Frank Smart and Son Ltd v Aberdeenshire Council* 2022 SAC Civ 005**

Background and decision

The appellant Frank Smart and Son Ltd ('FS') operated two wind turbines at a farm, namely, Easter Tolmauds, Torphins. Planning permission had been originally refused, but had been granted on appeal, following the appointment of a reporter. The reporter concluded that the development would not cause significant disturbance to the properties which were situated immediately nearby. The reporter also held *inter alia* that whereas noise from the turbines could be heard at nearby houses, the noise was unlikely to make living conditions unacceptable.

Aberdeenshire Council ('A') served an abatement notice on FS, firstly under s79(1)(a)(nuisance from premises) of the Environmental Protection Act 1990 (EPA) and then under s79(1)(g)(noise from premises) on the grounds that the noise amounted to a statutory nuisance. FS appealed against the notice to the sheriff, under s80(3) of the EPA. On appeal, the sheriff was required to consider two issues. Firstly, whether the abatement notice was valid. Secondly, whether A's averments were sufficiently relevant to allow the matter to proceed to proof. The sheriff allowed the matter to proceed to proof. FS appealed against that decision.

FS appealed on three grounds. The first was that the sheriff had erred in finding the abatement notice to be valid. The second was that the sheriff had erred in holding the abatement notice to be sufficiently specific, since it did not identify the nature, extent or circumstance which gave rise to the alleged nuisance, as a result of which it lacked necessary information to enable FS to understand what was required, in order to abate the alleged nuisance. The third was that the sheriff had erred in holding the A had made sufficient averments, which, if proved, would discharge the burden of proof.

Sheriff Principal Murray (who delivered the judgement of the court) stated that the key question, which fell to be resolved in the appeal, was whether the abatement notice was valid. FS complained that the notice did not distinguish between noise which was not a nuisance, and noise which was a nuisance. Sheriff Murray stated that whereas the notice required to set out with sufficient clarity, what was complained of, at first instance, the sheriff had not erred in the manner FS suggested. The notice identified that there was noise coming from the turbines, and that FS required to take steps to reduce the noise. It was also apparent that A had formed the view that the noise in question had constituted a nuisance. The sheriff added that on plain reading of the notice, the alleged nuisance consisted of the volume and character of the noise, which was generated by the wind turbines. The notice also clearly stated that FS was required to abate the noise in order to avoid continuation of the nuisance. The notice, therefore, was valid in that it set out with sufficient clarity, the alleged nuisance.

The sheriff went on to state that the notice was not required to state the nature of the abatement required. Case law had established that it could be left up to the author of the nuisance to take the necessary steps to reduce the noise and avoid the creation of a nuisance. The notice was not required to specify the means by which compliance with the notice could be achieved. The absence of such specification, therefore, did not render the notice invalid.

Comment

The EPA does prescribe the content of an abatement notice. In effect, the courts have been required to fill the legislative gap. The content of an abatement notice served under the EPA, and its predecessors, has been a fertile source of litigation over the years. A large number of such cases in recent years have related to abatement notices concerning noise. In *Strathclyde Regional Council v*

Tudhope 1983 SLT 22 it was held that the terms of an abatement notice must be precise, practical, reasonable and certain (see also *Network Housing Association Ltd v Westminister City Council* [1995] Env LR 176). The abatement notice also must make it clear to the person, on whom the notice is served, what is wrong; *Myatt v Teignbridge DC* [1995] Env LR 78. Furthermore, the local authority can simply require the recipient of the notice to abate the nuisance. In other words, the former need not specify the steps which are required to abate the nuisance: *Budd v Colchester BC* [1999] Env LR 739; *R v Crown Court at Canterbury* [2001] Env LR 36. The local authority can simply leave it up to perpetrator of the nuisance to choose how the nuisance should be abated.

Frank Smart and Son Ltd, therefore, does not take the law further forward.

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