ENVIRONMENTAL HEALTH CASE NOTES

2017

As first published in EHN

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The important cases covered in 2017 affected many aspects of Environmental Health. Some were of very wide significance. The following cases were reported:

February - Hemming v Westminster CC: Round 5 in the long running issue of what licence fees can pay for. This covered the ECJ decision. (The longer article from the August EHN covering Round 6 - the second Supreme Court case - is also attached.)

March - Miller v S of S for Exiting the EU: This covered the Supreme Court decision on the need for a Parliamentary vote before triggering Article 50.

April - Waltham Forest LBC v Mitoo: This covered the High Court decision on the "reasonable excuse" defence for non-compliance with an Abatement Notice.

May - Nottingham CC v Parr: This covered the Court of Appeal decision which confirmed that HMO licence conditions can take into account the nature of the occupants.

June - Pieres v Bickerton's Aerodromes Ltd: This covered the Court of Appeal decision that the immunity under the Civil Aviation Act 1982 to nuisance actions is very wide.

July - Woods v Hull CC: This covered the Court of Appeal dismissal of the Council's appeal and is an object lesson in how not to serve Improvement Notices under the Housing Act 2004.

August - R v Food Standards Agency: This covered the Court of Appeal decision that a refusal by an official veterinarian to apply a health mark to a carcase, even if questionable, was not capable of being challenged legally.

September - Chancepixies Animal Welfare v North Kesteven DC: This covered the High Court review of the third attempt by the Council to issue a licence under the Breeding of Dogs Act 1973.

October - Powys County Council v Price and Hardwick: This covered the Court of Appeal decision to extend to Councils' immunity for past contamination of land, when they had been reorganised subsequently.

November - Jugheli v Georgia: This covered the decision of the European Court of Human Rights confirming environmental pollution can be an actionable infringement, both when caused by the state itself, and for its failure to have an effective regulatory framework.

December - Waltham Forest LBC v Reid: This covered the Upper Tribunal decision which agreed that the period for a licence, under a Housing Act 2004 selective scheme, should not be reduced for a landlord with convictions for relevant offences.

1. February

Hemming (t/a Simply Pleasure Ltd) and others v Westminster City Council

Decision of the European Court of Justice (Case C-316/15) 16 November 2016

Held

Article 13(2) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as precluding.....the requirement for the payment of a fee, at the time of submitting an application for the grant or renewal of authorisation, part of which corresponds to the costs relating to the management and enforcement of the authorisation scheme concerned, even if that part is refundable if that application is refused.

Comment

This is Round 5 in the long running saga about sex shop licence fees. The ECJ has, as expected, confirmed the opinion of the Advocate-General published in July 2016 (see September EHN). It means that only the costs of dealing with the licence application itself can be charged up front. Westminster CC had sought to argue that inclusive charges were permissible if the larger element relating to the management and enforcement of such licences was refunded to unsuccessful applicants.

The decision means that these management and enforcement costs can only be recovered separately after the licence etc. is granted, and whether that can be done depends on the particular piece of UK legislation involved. The judgment suggests that it can be included in subsequent renewals, but this may lead to more litigation. This will anyway require changes to the way Councils calculate such fees in future - to allow for what may be a "free" period.

The ECJ also highlighted a point raised by the Advocate-General - that licences etc. covered by the Directive should generally be open-ended rather than for a fixed period. This conflicts with the normal UK practice.

The matter now reverts to our Supreme Court, which had stayed their proceedings pending this ruling. It is likely that they will simply confirm this point. Those Councils which are still charging such elements up front should consider stopping now - as previously decided, licensees can go back up to 6 years in reclaiming unlawfully charged fees.

Those still arguing that Taxi and Private Hire licences are unaffected by this decision should see the article previously published in EHN (November 2016) - even on the most helpful interpretation of the transposing UK Regulations, all such licences are not clearly exempt.

2. March

R (on the application of Miller and another) v Secretary of State for Exiting the European Union

Reference by the Attorney General for Northern Ireland (Agnew and others)

Reference by the Court of Appeal (Northern Ireland) (Raymond McCord)

[2017] UKSC 5

In December the full Supreme Court heard the Government's appeal from the High Court decision (see Case Note EHN Vol 31/11) that it needed Parliamentary approval to start the process of leaving the EU. It also considered the related issues around the devolved administrations' role.

Held - by a majority of 8:3 the Court dismissed the appeal and confirmed that an Act of Parliament was needed to authorise Ministers to serve notice under Article 50 of the amended Maastricht Treaty. The Court also held unanimously that the devolved administrations do not have a veto on the UK Parliament's decision to leave.

Comment - the majority followed the principles in respect of the first issue as reported last time on the High Court case. In essence it was accepted by all parties that the residual Royal Prerogative powers could not be used to change UK legislation or the Common Law. It was also accepted that these powers were still available to make International Treaties. The Court rejected the argument that the Government can withdraw from a Treaty using these powers where it had been enshrined in UK legislation, and conferring rights on individuals. All the relevant EU Treaties had been incorporated into the European Communities Act. It is settled law that the prerogative powers cannot now be widened. As stated in an earlier case "it is 350 years and a civil war too late".

On the second issue, foreign affairs and EU relationships were reserved matters for the UK Parliament, and not within the remit of the devolved administrations. Even where there are overlapping responsibilities the "Sewel Convention", which promotes consultation in such cases is essentially a political rather than a legal doctrine.

Since the decision was announced, the Government put a Bill to Parliament which is was passed in time to give notice to leave the EU by 31/3/2019 as already indicated. While 2 years is allowed in Article 50, negotiations will have to be completed by early Autumn 2018 due to the time needed to get approval by all the EU bodies. If this does not happen the risk is that the UK will leave without an agreed deal.

3. April

Waltham Forest London Borough Council v Mitoo [2017] Env.L.R.9

This was an appeal by case stated to the High Court from the magistrates' decision to acquit M of an offence of failing to comply with an Abatement Notice (served under Section 80 of the Environmental Protection Act 1990) without reasonable excuse. The notice required M to prevent a noise nuisance from the playing of loud music. He had not appealed against that notice. He claimed that he had turned the volume up on the occasion cited in the summons to drown out building works being carried out by his landlords, and that this was a reasonable excuse for not complying with the notice. The magistrates were advised that once this defence was raised, it was up to the prosecution to disprove it. Some of the prosecution evidence that there were no building works was inadmissible. The magistrates decided that M had a reasonable excuse.

Held - that the prosecution had the burden of disproving such a defence once raised (following Polychronakis v Richards and Jerrom Ltd [1998] Env. L.R. 346), but that it could never be reasonable to try and drown out one noise with another. The question of proportionality raised by the magistrates was therefore irrelevant, as was the issue as to when building works were taking place. The appeal was upheld and the case sent back to a new bench of magistrates.

Comment - this decision removes one line of argument, but what may count as a reasonable excuse is still potentially wide. It is sensible for Councils to consider how they will deal with such a defence if its use can be predicted. The Council witness was rightly criticised for trying to introduce hearsay evidence as to the building works when this could have been covered by a statement from the landlords. In the event this did not matter.

4. May

Nottingham City Council v Dominic Parr and Trevor Parr Associates [2017] EWCA Civ 188

This was a further appeal by the City Council from the decision of the Upper Tribunal. The UT had upheld the First Tier Tribunal's decision to allow the landlords' appeal against certain conditions attached to an HMO licence, and allowed a different condition proposed by the landlords. Initially NCC had prohibited the use of attic rooms in two HMOs unless the rooms were enlarged. While both rooms had over the 8m2 floor area used as a guide by NCC for bedrooms, the effect of sloping ceilings reduced the reckonable area to below this figure. The FTT had removed this prohibition and in the case of one HMO substituted a condition restricting the room's use to a full-time student occupying it for no more than 10 months a year. In refusing NCC's appeal, the UT had added this condition in respect of the other HMO. In both

properties it was considered that there was sufficient shared space, and the likely student living arrangements made this acceptable.

In the Court of Appeal, Andrew Arden QC argued on NCC's behalf that the Housing Act 2004 only allowed licence conditions relating to the physical characteristics of the property, not the personal characteristics of the potential occupiers. It was also argued that such conditions were irrational and unenforceable. The Court unanimously disagreed with these arguments and held that such conditions could be validly imposed. The Court allowed the use of the attic rooms but with the imposition in both houses of licence conditions requiring the provision of communal sitting rooms and kitchen/diners, and prohibiting the letting of any rooms to other than full-time students.

Comment. While the result will be disappointing to the City Council, nevertheless it opens the way to a wider range of HMO licence conditions being imposed which take into account the potential occupiers as well as just the building. This ability should therefore be taken into account in setting relevant policies, and updated guidance could be helpful. Limits on occupancy periods feature in both other types of licence and planning permissions.

5. June

Peires v Bickerton's Aerodromes Ltd [2017] EWCA Civ 273

This was an appeal by the owners of an aerodrome from the High Court decision to grant an injunction restricting the noise nuisance caused by its usage for helicopter training. There was a substantial history of disturbance affecting both the current and previous owners of a nearby property, who had regularly complained. Despite various promises over the years, the family company which owned the aerodrome had done nothing of substance to reduce this disturbance. On the evidence the aerodrome had been licensed and in use for more than 20 years. The use of some sloping land close to the affected premises for practising take-offs and landing was a particular source of complaint.

The trial judge found that there was such a nuisance affecting both the use of the garden and rooms within the claimant's house. He dismissed the defendants' claim of statutory immunity under the Civil Aviation Act 1982, as while helicopters were aircraft, the manoeuvres carried out could not be reasonably regarded as "flight" for the purposes of Section 76. He also dismissed their claim that they had acquired an easement to commit such a nuisance by prescription as there was ample evidence that the neighbours had objected over the years. He outlined several difficulties with ever establishing such an easement.

The Court of Appeal overturned this decision. They held that the definition of flight did cover such manoeuvres, giving the aerodrome owners immunity against actions in nuisance and trespass, and that the trial judge had misapplied the use of the word

"reasonable" in Section 76. They made no finding as to whether Section 77 also applied (noise from aerodromes rather than aircraft in flight), and the question of the easement was not pursued.

Comment - as statutory noise nuisances under S79(1)(g) of the Environmental Protection Act 1990 specifically exclude noise from aircraft (except model aircraft), there is no remedy available under that subsection. This exclusion does not apply to the separate category of noise nuisance under S79(1)(ga), but in practice that appears to be of little help. The Supreme Court judgement in Coventry v Lawrence suggests that an easement to commit a noise nuisance can be acquired. However the trial judge's analysis of why this may rarely be capable of proof by a defendant, appears sound.

6. July

David Woods v Kingston upon Hull City Council [2017] EWCA Civ 400

Two Victorian houses were converted into freehold flats in the ‘50s, and were an HMO by virtue of Section 257 of the Housing Act 2004. In 2011 the Council identified a Category 2 hazard in a first floor flat owned by DW caused by deficient fire protection to the ceiling of the ground floor flat owned by SP. In 2012 the Council served an Improvement Notice on DW under the Housing Act 2004 including works to replace the deficient ground floor ceiling. DW successfully appealed to the Tribunal, which held that the IN had been incorrectly served on him.

In 2013 the Council served INs on both DW and SP, requiring them to either replace the ceiling on the ground floor, or to install fire protection in the floor structure between the two flats. The former was estimated to cost £1000 and the latter £7000, and would require DW’s flat to be vacated. DW again appealed to the Tribunal which upheld these notices, but ruled that if SP did not allow the cheaper works to be done, she should pay the difference. It accepted that alternate schemes could be specified, and that notices could be served on both parties.

DW appealed to the Upper Tribunal. It held that Sections 11(3)(b) and (4) of the 2004 Act applied, and it was necessary to require works outside the dwelling with the hazard. DW could not be asked to do the works to the ground floor (see Schedule 1 Paragraph 3(2) of the Act), and it was irrational to require the more expensive scheme. The UT quashed the IN on DW, and varied the IN on SP to only require the works to her flat. While it accepted that alternate schemes could be cited, it thought that this would be rarely sensible, and in INs served on two persons only where they were joint owners of the same interest.

The Council appealed to the Court of Appeal. In dismissing this appeal the Court discounted the relevance of a public law irrationality test, but held that the “necessary” test in Section 11(4) included considerations of cost and disruption, and limited any works to the minimum required to eliminate the hazard. The UT had

therefore reached the right conclusion, so that only the varied IN on SP would stand. It also approved the comments in respect of including alternate schemes in such a notice.

7. August

R (on the application of the Association of Independent Meat Suppliers and another) v Food Standards Agency [2017] EWCA Civ 431

At the ante-mortem inspection an FSA "Official Veterinarian" (OV) passed a bull as fit for slaughter. Three abscesses were found in the offal on slaughter, and the OV refused to apply the health mark on the grounds of pyaemia, making the carcase worthless. The slaughterhouse manager was aggrieved at this decision, as in his experience animals with such a generalised condition would show more symptoms.

The challenge argued that (1) the OV was obliged to seize the food to formally condemn it under S9 of the Food Safety Act 1990; (2) a right of appeal was indicated by Regulation (EC) 882/2004; and (3) the decision was a breach of the European Convention on Human Rights and the EU Charter. The High Court dismissed all three arguments. The case went to the Court of Appeal, which also dismissed these claims.

Article 5 of Regulation (EC) 853/2004 prohibits operators placing animal products on the market without the relevant health mark. Article 5 and Annex 1 to Regulation 854/2004 require that a health mark cannot be applied unless *there are no grounds for declaring the meat to be unfit for human consumption*. The effect of this double negative prevented the health mark being applied. There is no reference to any form of appeal or challenge in this Regulation.

The Court accepted that Regulation (EC) 882/2004 included operators' right of appeal against actions in respect of official controls, and to be informed of this. However Article 1 of that Regulation made it clear that this provision did not derogate from the particular controls in 854/2004. While the Regulation set out the enforcement processes for non-compliance by the operator, the Court did not accept that the refusal to apply a health mark was covered. While the amended S9 of the 1990 Act also covered the FSA, the Court held that this domestic procedure did not oust the specific EU legislation about health marks.

On the human rights argument, the ECtHR has not interpreted these as creating a right of appeal against such administrative measures as applying a health mark. While such action would impose financial loss, there was the important need to consider public safety.

Comment - this means such a refusal cannot legally be challenged even if wrong, which it may have been here. As with similar issues, it may be affected by Brexit.

8. September

Chancepixies Animal Welfare v North Kesteven District Council [2017] EWHC 1927 (Admin)

This was a Judicial Review of a decision to issue a licence under the Breeding of Dogs Act 1973 made by an officer using delegated powers.

In 2016 CAW had challenged a similar licence, which NKDC withdrew and then issued a new one. That was also challenged on the basis there was no power to revoke such a licence once granted. Those proceedings were resolved by consent, with both purported licences being set aside, and a new process followed. Following a detailed inspection by a council officer and a vet, NKDC decided to grant a licence in October. That decision was also challenged by CAW.

The decision-maker considered the lengthy inspection report including plans of the premises and the vet's report. He was satisfied that the application met the requirements of the 1973 Act. It was acknowledged in the detailed decision record that there had been procedural errors previously.

Before a licence can be granted a Council must consider a report from one of its officers and/or a vet following an inspection of the premises, and must consider the nine criteria set out in S1(4). They have the power to withhold a licence on other grounds.

In addition CAW argued that the Council must consider the requirements of the Animal Welfare Act 2006, and the Code of Practice for the Welfare of Dogs issued under S14. By not having specific regard to the details in this Code, they claimed the Council's decision was unreasonable and could not be allowed to stand.

The Court rejected this argument as there was no obligation to consider all the fifty detailed points in the Code, simply because 2006 Act issues could be taken into account under the wider discretionary power to have regard to other matters. It was immaterial that the reports did not positively state that the Code was being complied in all respects.

Comment - this case usefully highlights three relevant issues. Decisions on things like individual licences under delegated authority can be challenged in the same way as decisions taken by Committees etc. Written records of the decision taken, the reasons for the decision and the matters considered are always important. It also confirms that the Courts will allow charities and similar groups to challenge public authority decisions in this way, despite not having any directly affected legal interest.

9. October

Powys County Council v Price and Hardwick [2017] EWCA Civ 1133

Powys was created in 1996 by the merger of three Councils. One of the predecessors (and one of its predecessors) had tipped domestic and commercial waste for over 30 years in a valley on a farm by agreement with the owners. The valley had a water course that flowed into SSSIs. The tipping had stopped by 1994. Powys carried out various monitoring and mitigation measures after 1996, as there were continuing issues caused by leachate from the tip. The contaminated land regime under Part IIA of the Environmental Protection Act 1990 came into force in Wales in 2001. Initially Powys assumed it was responsible under this regime as the original polluter, and constructed a treatment and filtration plant as well as a pumping station.

In 2015 Powys reviewed the position in the light of the "*Transco**" case, where the House of Lords had decided that National Grid was not responsible for remediating contamination caused by its corporate predecessors. Powys ended the agreement with the owners of the farm, who then challenged that decision.

At first instance the judge held that Powys was liable as the responsibility was transferred under the Local Government (Wales) Act 1994 and the relevant 1996 Order. He distinguished this case from *Transco.* He gave a wide interpretation of "liability" and accepted that the responsibility under Part IIA had arisen some 5 years after the transfer, and even longer after tipping had stopped. Powys appealed.

The Court of Appeal unanimously rejected the judge's decision and the alternative arguments put forward by the respondents' Counsel. The Court held that the transfer of liabilities did not include responsibility for legal requirements that did not exist at the time of the transfer, and that the principles set out in *Transco* were to be followed. Part IIA was not retrospective in that respect, and Powys was therefore not an "appropriate person" under those provisions.

Comment – this will be potentially good news for Councils which were re-organised before 2000 in England as their potential liability for remediating contamination by predecessors may disappear. In circumstances where the operations complained of continued after their formation, or where the Council owns or had owned the land, liability may continue. It is bad news for the landowners in similar circumstances.

*R (on the application of National Gas Grid – formerly Transco PLC) v Environment Agency [2007] 1 WLR 318

10. November

Jugheli and Others v Georgia

Application 38342/05 European Court of Human Rights 13 July 2017

This case was brought by residents of flats in central Tbilisi, located a few metres away from a thermal power plant built in 1911. It ended up at ECtHR as a claim that the pollution and associated health effects were a breach of Article 8 (respect for private and family life, home etc.) of the European Convention on Human Rights. This was adopted by Georgia in May 1999. In November 1999 the plant was privatised, and in February 2001 it ceased operating. At that time Georgia had no effective regulatory framework for dealing with environmental pollution from existing plants, nor was there a buffer zone between the industrial operations and the residential area.

During the domestic court proceedings, the claims about air pollution and electromagnetic radiation were held to be unsubstantiated, despite evidence about pollutants including SO2, NO2 and dust. Structural damage of the flats due to water escapes was accepted, as was interference by noise.

Key issues were whether the period from May 1999 was sufficient to trigger a breach of the Convention; whether the state was liable following privatisation; the reasonableness of legislation that prevented claims by residents who chose to live near to industrial plants; and the right balance between individual effects and community benefits.

The Court reiterated that Article 8 is not breached every time pollution occurs. While previous cases had established there had to be a breach of a relevant minimum threshold, a breach could occur without the need to prove serious health effects. The Court held that the exposure to potentially toxic pollution for 21 months after the Convention was adopted was sufficient. The Court held that the state had failed to protect the residents from the known effects before and after privatisation. Awards were made for both non-pecuniary damage and costs.

Comment - this case is helpful in several ways. It is precedence that can be cited in the UK courts, and the need for the state to ensure there is an effective regulatory framework is welcome when there are fears that environmental protection legislation may be watered down by Brexit. It also reminds everyone that this Court is <u>not</u> part of the EU arrangements and its judgments will continue to apply unless we abandon the Convention.

11. December

LB of Waltham Forest v David Reid [2017] UKUT 396 (LC)

From 1/4/2015, a selective licensing scheme under Part 3 of the Housing Act 2004 applied to the whole of LBWF's area. This meant that private rented accommodation had to be licensed. DR owned 9 flats, but had failed to apply for licences despite letters from the Council in August and November 2015. It was later claimed that he had not received the August letter. In December 2015 he applied for Temporary Extension Notices in respect of 3 of these flats. This was refused and the appeal to the First Tier Tribunal was withdrawn. In March 2016 he was prosecuted for failing to licence 5 of the flats and was fined £10k with costs. In September 2016 he was granted licences for 8 of the flats for a period of one year, rather than the full period to 31/03/2020. An existing licence was reduced to the same period.

He appealed on the basis that he was a "fit and proper person", that apart from the failure to apply for licences the properties were in reasonable repair and the only grounds for reducing the licence periods was the fact of the convictions. In effect the requirement to seek further licences when the year expired, was to impose a further financial penalty on him for the same offences.

The FTT allowed the appeal as the convictions were not relevant to the length of the licence, but only as to whether he was a fit and proper person to hold such a licence. The Council's decision to reduce the period simply to allow the conviction to become spent was inappropriate and not justified by the facts presented to the FTT. LBWF appealed to the Upper Tribunal.

The UT dismissed this appeal. While it held that it was reasonable to take the fact of the convictions into account, the FTT was right to conclude on the evidence it had considered that they were not relevant in this case. It distinguished the previous case of LBWF v Khan [2017] UKUT 153 (LC) where there had been an ongoing issue in respect of a lack of planning permission. The shorter licence period allows for remedial action to be taken where there are problems with the properties, as was stated in the Council's policy. The reference in this policy for a shorter period to allow the convictions to become spent was unreasonable.

12. "Hemming" article from EHN September 2017

Hemming and Westminster City Council- Round 6 and counting!

EHN readers will know I have reported on previous rounds of this long-running case involving sex shop licences, a flawed process for setting fees over several years, and the impact of the Services Directive. Most recently the February 2017 Edition set out the decision of the ECJ on the issue referred by the Supreme Court.

The case came back to the Supreme Court in May, and the new judgment was issued in July*. As expected it confirmed that only the costs of processing the

application for grant or renewal can be charged for upfront. The costs of running and enforcing a licensing scheme cannot be included at that stage and refunded to unsuccessful applicants, as WCC had been doing. The Court confirmed that the costs of dealing with unlicensed operators could be included. Because the sex shop statutory provisions do not set any limitation on when fees can be sought, the Court ruled that the second part of the bill could be demanded as soon as the licence was granted. It seems that a Council would have to deal with non-payment through ordinary debt procedures.

WCC may now be able to claw back some of the costs of dealing with unlicensed premises - removed following the Court of Appeal decision, now reversed. However this element plus others have now been sent back to the High Court for determination - including the claim that WCC had generated substantial surpluses on this account. It has been reconfirmed by all the courts involved that Councils cannot make a profit on such activities and must carry forward surpluses when setting the following year's fees. This has been the law for some time, but has been widely ignored. There is now no excuse for continuing to do this, and other Councils may face claims on a range of licensing functions where surpluses have been swallowed by their General Fund.

So on to Round 7!

There appear to be two important issues left open. Some of the licensing statutes make it clear that fees can only be charged at a particular time. Where this is only on application, this case makes it impossible to cover the costs of running the licensing scheme in question, as they cannot be included at that stage. Where there is a wide discretion as to what conditions can be imposed, one possibility is to add a condition requiring such an additional payment towards the scheme costs after grant.

A wider question is the point made in the ECJ that generally licences should be for an indeterminate term. This was not a binding part of the judgement and was not referred to in the Supreme Court. For sex shops the domestic legislation prevents licences being granted for more than a year. In such cases, Regulation 6 of the Provision of Services Regulations 2009 helps in respect of pre 2009 legislation where there is a conflict. However the possibility of a new challenge can be anticipated!

* R (on the application of Hemming t/a Simply Pleasure Ltd and others) v Westminster City Council [2017] UKSC 50