Neutral Citation No: [2022] NICA 27	*Ref:* **KEE11820**
	ICOS No: **21/58539**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **19/05/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY ALPHA RESOURCE MANAGEMENT LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF BELFAST CITY COUNCIL

Stewart Beattie QC with Simon Turbitt (instructed by Carson McDowell, Solicitors) for the Applicant
Paul McLaughlin QC with Denise Kiley (instructed by the Belfast City Council Legal Services Department) for the Proposed Respondent

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Before: Keegan LCJ and Treacy LJ

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is a renewed application for leave following a decision of Scoffield J ("the trial judge") delivered on 29 December 2021 wherein he refused leave to apply for judicial review to the applicant. The applicant is a limited company and the owner of Mullaghglass Landfill Site. The applicant challenges a decision of Belfast City Council ("BCC") to serve an abatement notice upon it in respect of a statutory nuisance at the aforementioned site.

Background

[2] The background is set out comprehensively in the judgment of the trial judge and so we will not repeat it and gratefully adopt the narrative provided by him. Suffice to say that the following are the material background facts as we see them for the purposes of this application:

(i) The applicant operates the landfill site pursuant to a permit issued under the Pollution Prevention and Council (Industrial Emissions) Regulations

(Northern Ireland) 2013 which is issued by the Northern Ireland Environment Agency ("NIEA").

(ii) As a result of the provision of the permit the applicant operates an Odour Management Plan ("OMP") which the applicant states has been operated in a manner satisfactory to the NIEA.

(iii) Local residents in the BCC area along with residents in the Lisburn City Council ("LCC") area have complained about unpleasant odours which they say emanate from the site and about emissions which they state are having adverse health effects upon them for some time.

(iv) The BCC therefore decided at a council meeting to issue an abatement notice against the applicant in relation to the site and the alleged nuisance emanating from it.

(v) This notice is dated 27 April 2021 and is issued under section 63(1)(d) of the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011 (the Act").

(vi) The applicant has a statutory right of appeal from the notice mentioned at (v) above pursuant to section 65(8) of the Act. This appeal has been exercised to the Magistrates' Court but remains in abeyance pending the application for judicial review.

The Issues

[3] This case turns on a net point of whether or not the statutory right of appeal which is provided in the Act is an effective alternative remedy when issue is taken with an abatement notice as in this case. The applicant contends that it is not an effective remedy because it cannot correct the alleged illegality which is described in the Amended Order 53 Statement filed on behalf of the applicant dated 1 April 2022.

[4] In the extensive grounds of challenge the applicant posits the following:

(i) That there has been procedural unfairness as a result of a failure to engage with the applicant. The applicant says that with the exception of a site visit by one of the proposed respondent's officers on 13 January 2021, the applicant received no communication or had any interaction with the proposed respondent prior to the service of the abatement notice. As such the applicant contends that it was deprived of the opportunity to inform the proposed respondent's consideration of the complaints received by it and how those complaints may or may not relate to operations at Mullaghglass landfill or to address the operations of the site at the time of the relevant motion being 1 April 2021.

(ii) The applicant also maintains that there has been a failure to provide lawful reasons and submits that until 14 June 2021, the only information the applicant had received from the proposed respondent was the abatement notice itself and a copy of the proposed respondent's pre action-protocol letter to the NIEA dated and sent on the same day as the abatement notice which was 27 April 2021. In this regard the applicant points to the purported minutes of the council meeting of 1 April 2021 and submits that these are deficient in that:

(a) There is no record of the discussion referred to; no copies of the briefing/background papers sent to members on this issue in advance of the meeting;

(b) There is no officer report drawing the various material considerations together (including policy, guidance and survey results) outlining the recommended course of action and addressing other options;

(c) There is no explanation of why, despite the motion being originally drafted as a motion to take legal action against NIEA, the applicant (as the site operator) was included in the motion;

(d) There is no reasoning as to the evidential basis for the decision, or the reasons that underpin the decision; and

(e) There is no information to explain how, despite the confirmed motion being to take action in respect of Mullaghglass Landfill, Aughrim Landfill was also included in the abatement notice that ultimately issued.

(iii) The applicant claims apparent bias by virtue of late disclosure which was provided during the course of the judicial review proceedings which the applicant says confirms that the members of the BCC were not briefed by any officials from the BCC, or indeed, other agencies such as NIEA before discussing the proposed motion on 1 April 2021 but rather, the proposed motion was presented at the night of the BCC Meeting by the proposing councillor who sought tactical facts from a council officer the night before the meeting to support his presentation.

(iv) The applicant also maintains predetermination on the part of the BCC. In support of this claim the applicant relies on the transcript provided by the council in its late disclosure which the applicant says demonstrates that the brief discussion by the members of the BCC was predicated on the assumption that there was a problem being caused by the Mullaghglass landfill and that the BCC should take action.

(v) The applicant alleges inadequate inquiry.

(vi) The applicant claims that the impugned decision is vitiated by the proposed respondent having failed to take into account material considerations.

(vii) The applicant claims breach of statutory duty flowing from section 64(b) of the Act which reads:

> "(b) where a complaint of a statutory nuisance is made to it by a person living within its district, it shall be (the duty of every district council) to take such steps as are reasonably practicable to investigate the complaint."

(viii) The applicant claims breach of EU law.

(ix) The applicant claims breach of policy.

(x) The applicant claims that the proposed respondent has acted *ultra vires* in relation to referring to another neighbouring landfill site known as the Aughrim site in the abatement notice. In addition the applicant claims there is an inconsistency between the BCC's motion and the abatement notice ultimately served and that the proposed respondent was interfering with NIEA's role as a regulator of the applicant's site.

(xi) Finally, the applicant maintains a claim of irrationality in the *Wednesbury* sense, particularly that the BCC's late disclosure confirms there was no written information at all provided in support of the proposed motion and, furthermore, that the only briefing the members received was by the proposing councillor who had sought tactical facts from a council officer the night before.

[5] Flowing from the above the applicant claims that the gravity of the public law unlawfulness means that judicial review is the correct legal route for redress in this case. In support of this position the applicant highlights the following. First, the applicant maintains that the scope of the statutory appeal is limited by virtue of Regulation 2(2)(a) of the Statutory Nuisances (Appeals Regulations) (Northern Ireland) 2012 in that it can only deal with a situation where the abatement notice is not justified in substance. The applicant submits that this interpretation of the appeal remit would not allow the statutory appeal tribunal to deal with issues of public law illegality. A further concern raised by the applicant is that the statutory appeal hearing would involve an *ex post facto* provision of materials by the BCC to seek to make good the action that was taken, when none of that information was actually before the members when the decision was made.

[6] In support of this argument the applicant relies on a case of *SFI Plc v Gosport Borough Council* [1999] LGR 610 which was not considered in the judgment of the

trial judge as it was provided after the hearing. In addition, the applicant relies on the case *R v Falmouth and Truro Port Health Authority ex parte South Wales Water Limited* [2001] QB 445 where judicial review was the preferred course notwithstanding the existence of a statutory appeal.

[7] In answer to the applicant's case the proposed respondent disputes the limited interpretation placed on the regulations governing appeal and argued that an appeal could deal with all of the issues and was the correct route to take in a case of this nature given that it was a statutory route provided by Parliament. The proposed respondent therefore asks the court to dismiss the application.

[8] We are also aware that there are related cases brought by individuals who challenge the failure of BCC and LCC to issue abatement notices in relation to landfill emissions in the area. These cases are currently being heard before the judicial review court. We have read the helpful argument filed by the intervenors however we did not permit formal participation on the net issue of whether or not the statutory appeal is an effective alternative remedy in this case.

Core Statutory Provisions

[9] Part 7 of the 2011 Act defines statutory nuisances. Section 63(1)(d) refers to:

> "Statutory nuisances for the purposes of this Part, that is to say—
>
> (d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance."

Section 65 states:

> 65—(1) Subject to subsection (3) where a district council is satisfied that a statutory nuisance exists, or is likely to occur or recur, in the district of the council, the district council shall serve a notice ("an abatement notice") imposing all or any of the following requirements—
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> (a) requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence,
>
> (b) requiring the execution of such works, and the taking of such other steps, as may be necessary for any of those purposes,

and the notice shall specify the time or times within which the requirements of the notice are to be complied with.

…

(3) Where a district council is satisfied that a statutory nuisance falling within paragraph (i) of section 63(1) exists, or is likely to occur or recur, in the district of the council, the council shall—

(a) serve an abatement notice in respect of the nuisance in accordance with subsections (1) and (2); or

(b) take such other steps as it thinks appropriate for the purpose of persuading the appropriate person to abate the nuisance or prohibit or restrict its occurrence or recurrence.

(4) If a district council has taken steps under subsection (3)(b) and either of the conditions in subsection (5) is satisfied, the council shall serve an abatement notice in respect of the nuisance.

(5) The conditions are—

(a) that the district council is satisfied at any time before the end of the relevant period that the steps taken will not be successful in persuading the appropriate person to abate the nuisance or prohibit or restrict its occurrence or recurrence;

(b) that the council is satisfied at the end of the relevant period that the nuisance continues to exist, or continues to be likely to occur or recur, in the district of the council.

…

(8) A person served with an abatement notice may appeal against the notice to a court of summary jurisdiction within the period of 21 days beginning with the date on which the notice was served."

[10] The Statutory Nuisance (Appeals Regulations) (Northern Ireland) 2012 set out the procedure to be adopted on appeal. In particular, regulation 2 deals with appeals under section 65(8) of the 2011 Act as follows:

> "2.—(1) The provisions of this regulation apply in relation to an appeal brought by a person under section 65(8) of the 2011 Act (appeals to a court of summary jurisdiction) against an abatement notice served upon that person by a district council.
>
> (2) The grounds on which a person served with such a notice may appeal under section 65(8) of the 2011 Act are any one or more of the following grounds that are appropriate in the circumstances of the particular case—
>
> (a) that the abatement notice is not justified by section 65 of the 2011 Act (summary proceedings for statutory nuisances);
>
> (b) that there has been some informality, defect or error in, or in connection with, the abatement notice served under section 66(3) of the 2011 Act (certain notices in respect of vehicles, machinery or equipment). …"

Alternative Remedies in Judicial Review

[11] The general principle is that judicial review is a last resort and its pursuit is generally inappropriate where a suitable alternative remedy exists. Issues regarding the availability of an alternative remedy are appropriately dealt with at the leave stage in judicial review proceedings.

[12] The nuances in the application of this general principle are explained by Carswell LCJ in *In re Director of Public Prosecutions for Northern Ireland* [2000] NI 174. In this case, the applicant sought to have set aside an order granting leave to the Director of Public Prosecutions ("DPP") to apply for judicial review of a decision of a resident magistrate ordering the DPP to pay costs to the applicant following the dismissal of a summary prosecution brought against it. Appeal to the Court of Appeal by way of case stated was available to the DPP and it was argued that the application for leave should be set aside on the basis that the DPP had failed to avail himself of this procedure.

[13] Refusing the application on the basis that a case of the requisite strength for setting aside a grant of leave to apply for judicial review had not been made out, Carswell LCJ noted:

> "It tends to be assumed that an applicant's failure to resort to an alternative remedy open to him will almost inevitably result in the rejection of an application for judicial review. On examination, however, it may be found that the principles governing the exercise of the court's discretion

are less rigid and draconian and that a degree of flexibility exists which allows the court to take into account a number of factors in its decision.

…

The trend of modern authority is to be more ready to look at the balance of cost and convenience between an application by judicial review and resort to an alternative remedy…"

[14] Carswell LCJ then went on to endorse the general principles set out by *Beloff and Mountfield* in an article in *Judicial Review* [1999] JR 143, namely:

"(a) The existence of an alternative statutory machinery will mean that courts will look for 'special circumstances' before granting an alternative remedy.

(b) There are, however, a number of factors which may amount to 'special circumstances', and the court should be astute not to abdicate its supervisory role.

(c) What is the most efficient and convenient method of resolving a dispute should be determined having regard not only to the interests of the applicant and respondent before the court, but also the wider public interest.

(d) Whether the allegedly alternative remedy can, in reality, be equally efficacious to solve the problem before the court, having regard both to the interests of the parties before the court, the public interest and the overall working of the legal system.

(e) In determining the most efficacious procedure, the scope of enquiry should be considered. It may be that fact-finding is better carried out by an alternative tribunal. However, if an individual case challenges a general policy, the relevant evidence may be more readily admissible if the challenge is brought as a judicial review: an allegation that a prosecution is unlawful because brought in pursuit of an over-rigid policy can scarcely be made out on the facts of one case.

(f) Expense of the alternative remedy or delay may constitute special circumstances."

[15] The Northern Ireland Court of Appeal dealt with alternative remedies more recently in *Re McDaid* [2016] NICA 5. In that case, the applicant, a personal litigant, was refused leave to apply for judicial review of the decision of a Master of the High Court on the basis that the decision was not amenable to judicial review. Refusing the appeal on the ground that the decision was correct, Gillen LJ went on to find that judicial review was an "inappropriate avenue" for the applicant to pursue, stating:

> "[35] Judicial review is not the sole or immediate means of protection against legal wrongs by public authorities. The existence of other avenues of protection, and the question of whether these have been or can be pursued, stand to affect whether judicial review will be available and, if so, how it will operate.
>
> [36] An existing alternative remedy raises a question for the court's "discretion", whose judicial exercise is in truth a matter of "judgment." Judicial review is regarded as a last resort and it can properly be declined if the court concludes that the claimant has and should pursue a suitable alternative remedy. The question whether the pursuit of judicial review is inapt is usually best addressed at the leave stage when the pursuit is commencing, rather than at the alternative hearing after it has occurred (see Judicial Review Handbook 6th Edition Michael Fordham QC, at paragraph 36.3).
>
> [37] In short, judicial review was and is always a remedy of last resort (see Baroness Hale in R(Cart) v Upper Tribunal [2011] UKSC 28). It is thus not the practice of the court to use the power of judicial review where a satisfactory alternative remedy has been provided by Parliament (see Lord Phillips at [71] in R (Cart) v Upper Tribunal [2011] UKSC 28).
>
> [38] This applicant had another means of redress conveniently and effectively available to him which he should ordinarily have used before resorting to judicial review. It would have been no less effective, convenient and suitable to determine the issues he wished to raise."

[16] Established legal texts reiterate the principle in play. *Lewis on Judicial Remedies in Public Law* (6th Edition, 2021) at [12-055] states:

> "The position is not as straightforward as the dicta suggest. The exhaustion of remedies "rule" is only a general principle governing the exercise of judicial discretion. There are qualifications on that principle, and different formulations and understandings of the rule can be seen in the case law. Judges have also exhibited "… varying emphasis on the reluctance to grant judicial review." One recurrent theme is the extent to which errors which could be corrected by way of judicial review should be left to the appellate system. Another important issue is the adequacy of the alternative remedy as a means of resolving the complaint. These issues can be seen as defining the scope of the "exhaustion of remedies" principle, or as exceptions to the general rule. In addition, an alternative remedy which may normally be adequate may not on the particular facts of a case be appropriate, and that may justify allowing recourse to judicial review. In exceptional circumstances, which, "… by definition … defy definition", judicial review may be used notwithstanding the availability of alternative remedies."

[17] In this vein *Supperstone Goudie and Walker on Judicial Review* (6th Edition, 2019) at paragraph 18.69 states that there is not yet a generally accepted statement of principle regarding the factors that determine whether a judicial review claim may proceed where a statutory right of appeal exists. The authors suggest that factors which may influence the courts include:

> "(1) *Nature of the issues* — where the claimant contends that there has been an error in applying the particular statutory regime that an appellate tribunal is specifically set up to deal with, then in general the claimant should proceed by way of appeal, not judicial review. On the other hand, where the claim raises general issues of public law, the courts may well consider that it is appropriate to permit a judicial review claim.
>
> (2) *Adequacy of remedies* — if the court considers that the alternative remedy is inadequate then it is unlikely to require that the claimant pursue it, save in the rarest of cases. A statutory appeal may offer an inadequate remedy because, for instance, there is no power to quash the disputed decision (but merely to alleviate its consequences).

(3) *Interim remedies* — the case may be one in which urgent interim relief is required. It is unlikely that a statutory appeal will meet this need."

[18] *Fordham – Judicial Review Handbook* (7th Edition, 2020) also comments on alternative remedies as follows:

"36.1 Judicial review alongside other safeguards. Judicial review is not the sole protection against legal wrongs by public authorities. The existence of other avenues of protection, and the question whether these have been or can be pursued, affect whether judicial review will be available and, if so, how it will operate. Judicial review is, however, an ever-present safeguard and safety net against public authority action, by reference to public law standards. The means that, even where there are bespoke statutory remedial schemes, judicial review can fill any judicially perceived gaps.

36.2 Exclusive alternative remedy. In certain contexts, usually under bespoke legislative provisions, special alternative mechanisms are regarded as the exclusive means of challenge, so that judicial review does not arise or is effectively replaced.

36.3 Alternative remedy as a discretionary bar. Judicial review is regarded as being a recourse of last resort. It can be declined when the Court assesses that there is a suitable alternative remedy. The question whether the pursuit of judicial review is inappropriate on this basis is generally a permission-stage issue when that pursuit has just begun, rather than an issue for the substantive hearing when the pursuit has happened. The vast body of case law (old and new), providing working illustrations on this topic, demonstrates a judicial robustness with room for a bespoke approach tailored to the interests of justice and the public interest in the specific context and circumstances.

36.4 Whether action/avenue curative of public wrong. The claimant's past or present pursuit, or future ability to pursue, another means of protection may be able to 'cure' or remedy a public law wrong, whether by virtue of a substantive decision or otherwise curative approach."

[19] Finally, to complete this brief survey of the texts, *De Smith's Judicial Review* (8th Edition, 2018) deals with alternative remedies at paragraphs 16-013 – 16-024 and summarises the position as follows:

> "Claimants are refused permission to proceed with judicial review where the court forms the view that some other form of legal proceedings or avenue of challenge is available and should be used. Judicial review is a true remedy of last resort. Questions as to whether a claimant should have used another type of redress process should arise on the application for permission and not at or after the substantive hearing of the judicial review claim. Once the court has heard arguments on the grounds of review, there is little purpose in requiring the parties to resort to some other remedy, indeed, to do so may be contrary to the overriding objective of the CPR. But a failure to pursue other remedies may influence how the court exercises its discretion to award costs."

[20] Drawing together the authorities and texts we have referred to above, we summarise the principles as follows:

(i) Judicial review is a remedy of last resort and may not be the only available avenue of challenging a particular decision. That is because statute may have provided an appellate machinery to deal with appeals against decisions of public bodies.

(ii) A court may, in its discretion, refuse to grant permission to apply for judicial review or refuse a remedy at the substantive hearing if an adequate alternative remedy exists, or if such a remedy existed but the claimant had failed to use it.

(iii) The general principle is that an individual should normally use alternative remedies where these are available rather than judicial review. The courts take the view that save in the most exceptional circumstances, the judicial review jurisdiction will not be exercised where other remedies were available and have not been used.

(iv) The rationale for the exhaustion of alternative remedies principle is that it is not for the courts to usurp the functions of the appellate body which has the expertise and ability to determine disputes.

(v) The courts will not insist that claimants pursue an alternative remedy which is inadequate. The principle can be defined as one that requires the use of adequate alternative remedies, or the fact that an alternative remedy is

inadequate may be seen as an exceptional reason why judicial review may be used.

(vi) There may be other exceptional reasons why judicial review is the preferred course as each case is fact sensitive and the court must consider in exercising its discretion to hear a judicial review where an alternative remedy is available the overall circumstances including in some cases the urgency of the case, delay, cost, or public interest concerns.

Consideration

[21] This case arises in the field of statutory nuisance and engages a number of interests. There is a duty upon statutory agencies in this case BCC to take action if a nuisance arises. In this case there was no argument against the fact that the potential exists for a statutory nuisance by virtue of the emission of smells. The second interest is the operator of public facilities in this case the landfill site. The operator has obligations not to create a nuisance and to ameliorate any nuisance caused. In this respect there is an interplay with the licensing and management responsibilities of NIEA in relation to landfill sites. The third interest in a case of this nature is, of course, the public interest in securing safe, clean and environmentally friendly conditions. The statutory scheme reflects all of the above. That is the context of this case.

[22] The proposed respondent accepts that there is an arguable case for judicial review. One way or another the question of whether an abatement notice should have been issued or should be quashed needs to be determined. The availability of a statutory appeal is not disputed and in fact that avenue has been taken by the applicant but the proceedings are stayed pending this case. Hence, there is an alternative remedy. Therefore, the legal question is limited as to whether it is an adequate remedy to answer the applicants' complaints as to how the abatement notice was issued and whether the applicant is right that the decision making process is so flawed that the abatement notice should be quashed by the administrative court.

[23] In support of this argument Mr Beattie focussed on two core authorities and one text in this area which bear some comment as follows. The first case relied upon is that of *SFI Plc (formerly Surrey Free Inns Plc) v Gosport Borough Council*). This is a decision of the Court of Appeal reported at [1999] LGR 610. It involves the provisions of the Environmental Protection Act 1990 in relation to a noise nuisance relating to two premises. The facts are not akin to this case. It is however worth noting that in both cases the statutory route was followed. The cases came to the Divisional Court by way of case stated to deal with a number of legal issues relating to service and in particular whether the nuisance had to exist at the date of hearing or service of the notice. The Divisional Court found that it was the latter.

[24] At paragraph [29] of the judgment of Stuart-Smith LJ the following comments are also found:

> "The notice is not justified if no statutory nuisance existed or was not likely to occur or recur at the date of its service; that is a question of fact to be determined by the Magistrates' Court if it is in dispute. The court is not bound to accept the subjective view of the inspector in the absence of bad faith or *Wednesbury* grounds."

This passage is not determinative of the issue whether a statutory appeal hearing can deal with procedural points.

[25] The other case relied upon which is of greater relevance is *Regina v Falmouth and Truro Port Health Authority ex parte South West Water Limited* reported at [2001] QB 445. This was a case where the applicant was a water undertaker charged with the duty pursuant to section 94 of the Water Industry Act 1991 of effectually dealing with the contents of sewers in its area, provided at sewer outfall at Falmouth on the Fal Estuary as an interim phase of a large scheme to comply with the United Kingdom's obligations under European law. There was a difficulty in relation to the management of this issue as a result of which a statutory notice was issued. This notice alleged a nuisance under the Public Health Act 1936 ("the 1936 Act"), namely that a part of the estuary described as a watercourse was so foul or in such a state as to be prejudicial to health or a nuisance as the result of the discharge of sewage from the outfall. The notice required the cessation within three months of the discharge of sewage from the outfall of the watercourse.

[26] The applicant appealed against the notice to the Magistrates' Court but because the appeal could not be heard within three months the applicant also sought permission to apply for judicial review. The court granted permission to apply for judicial review and stayed both the abatement notice and the statutory appeal. On the hearing of the substantive application the judge held that the applicant had been given a legitimate expectation of consultation which was unfairly denied, that the abatement notice was invalid for failing to specify the works required to abate the nuisance and that the Carrick Rose was not a watercourse within the meaning of section 259(1)(a) of the 1936 Act. Therefore, the judge quashed the abatement notice.

[26] On the Health Authority's appeal it was held by the Court of Appeal that the law did not impose a general duty on an enforcing authority to consult the alleged perpetrator of a nuisance before serving an abatement notice and only a very clear assurance could give rise to a legitimate expectation. Therefore, the decision was affirmed. In per curiam comments the court also said that it was inappropriate for permission to seek judicial review and a stay to have been granted on so wide ranging a basis, expressed in the following way:

> "The critical decision in an alternative remedy case is that taken at the grant of permission stage. If the applicant has a statutory right of appeal, permission should only exceptionally be given: rarer still will permission be appropriate in a case concerning public safety. The judge should have regard to all relevant circumstances which will include, besides any public health consideration, the comparative speed, expense and finality of the alternative processes, the need and scope for fact finding, the desirability of an authoritative ruling on any point of law arising, and the apparent strength of the applicant's substantive challenge."

[27] The court assessed the issue of alternative remedy by reference to a case of *Ex parte Ferrero* [1993] 1 All ER 530. In that case the need to safeguard the public was stressed. The court therefore said:

> "If, for example, in this case, as ultimately in *Ex parte Ferrero*, the enforcing authority had defeated all grounds of challenge, then the decision to allow judicial review would have delayed abatement, quite possibly with damaging public health consequences this should be recognised."

The court then referred to the fact that a stay should not have been granted in the case given the public health concerns.

[28] There were two other issues, however, namely the specification of abatement works and the meaning of watercourse. The court decided that the resolution of those issues needed no evidence whatever, merely the notice itself and a map. The court also found that these issues, moreover, if decided in the water undertaker's favour, would inevitably have been decisive of the case. The court therefore saw no reason why an expedited judicial review hearing could not have resolved them within a very short time.

[29] We can see why this case was utilized by Mr Beattie to argue in favour of the judicial review remedy. However, the facts are very different in the *Falmouth* case given that there was an urgent public safety issue and a fear of delay. Therefore, it is plain why the court in that instance exercised its discretion. The same stark circumstances do not apply in this case and so we do not consider that this case provides authority for Mr Beattie's proposition that this court should take a similar approach.

[30] During the course of argument Mr Beattie also referred to the text of *Statutory Nuisance (4th Edition)* and two particular sections. Section 4.144 refers to the following:

> "The circumstances where it may be appropriate for a recipient of an abatement notice to proceed by way of judicial review rather than or, in addition, to an appeal under the regulations were considered by Simon Brown and Pill LJ in *R v Falmouth*. The argument made is that the statutory appeal deals only with the existence of a statutory nuisance and not with the preceding irregularity which it is said is live in this case."

[31] Section 4.36 under the heading Regulation 2(2)(a) considers the English regulations and the requirement that an abatement notice must be justified and states that:

> "This ground of appeal goes to whether a statutory nuisance existed or is likely to occur or recur. The issue most likely to arise under this ground is whether the matters complained of be a statutory nuisance."

[32] Mr Beattie utilises these extracts to bolster his argument that the District Judge cannot in fact deal with procedural issues as these are public law grounds. We understand the point but we do not consider it is as absolute as Mr Beattie suggests. Rather, we think that the adequacy of a statutory appeal will depend on the facts and subject matter of a particular case and the terms of the statutory scheme.

[33] We adopt the analysis of the trial judge that in the context of this case the statutory appeal remit is wide and the test whether an abatement notice is justified can encompass procedural errors. The cases of *Boddington v BTP* [1999] 2 AC 143, *Wandsworth v Winder* [1985] AC 461 and *R v Adaway* [2004] EWCA Crim 2831 albeit in different factual areas support the view that a Magistrates' Court can deal with the determination of procedural issues as part of a statutory appeal.

[34] In addition, we agree with Mr McLaughlin's submission that appeal rights are comprehensively provided for in the statutory framework and specifically that Regulation 2 is framed in broad terms. We agree with the trial judge that the test whether a notice is justified should not be given a restrictive meaning. In our view consideration of justification can encompass how an abatement notice has come about in the first place. It is apt to confuse to segregate issues of substance and so-called public law issues because, ultimately, they are all part of an overall consideration of whether an abatement notice is justified.

[35] In our view Mr McLaughlin also makes a compelling point at paragraph 24 of his skeleton argument where he states that several other provisions of the legislative scheme point towards an intention that the notice and appeal procedures are intended to operate in an integrated manner rather than in a more restricted way

that segregates procedural issues. He highlights regulation 3 which refers to circumstances where the effect of a notice is formally suspended pending determination or abandonment of an appeal. Mr McLaughlin also refers to regulation 2(5) which refers to the fact that a notice which is varied on appeal shall be final and shall otherwise have effect so varied. Finally, he refers to the explanatory notes for section 65 of the Act which describes the appeal procedure as a streamlined one. We agree that these references provide further support for the view that the appeal procedure was designed to encompass all issues and to provide prompt and effective relief.

[36] The trial judge also referred to the benefit of having examination and cross-examination of witnesses under the statutory procedure. We agree with that analysis. There is also a disclosure process which ensures fairness. In addition, as the trial judge has explained, the District Judge can decide how exactly the case should proceed. Mr McLaughlin on behalf of the proposed respondent has expressly accepted that all matters may be heard on appeal including the procedural issues. Therefore, the applicant may challenge all of the evidence and have evidence called to determine whether or not the abatement notice was justified. This leads us to a conclusion in line with that of the trial judge that the statutory appeal provided for is an effective alternative remedy.

[37] We understand the point raised that cases of this nature are rare and may involve complicated evidence. However, we consider that the District Judge is well equipped to deal with an appeal and can case manage as he or she sees fit. Whilst cases of this nature may be difficult that is not a reason to bypass the statutory appeal route which Parliament has provided for. The appeal route also chimes with the overriding objective and the need to deal with cases of this nature in a cost effective, efficient way.

[38] We accept that notwithstanding the existence of an alternative remedy the court has a residual discretion to hear judicial review on the same subject matter. However, this will depend on the facts of a case. We do not rule out the fact that in some cases there may be an insurmountable impediment in the scope of the appeal. That may emanate from the statutory provisions themselves which limit scope or the type of error alleged. However, here we consider that the issues are intertwined and that the statutory remit is wide. In this case the facts firmly point towards the statutory appeal. There is no exceptional reason by virtue of emergency or cost or delay that would make us exercise our discretion otherwise.

[39] We were not told that the statutory appeal route would cause undue delay. In fact as the case is already before the District Judge we consider the opposite to be true. In addition, we are not attracted to a hybrid approach whereby there would be two simultaneous challenges by virtue of stay of judicial review pending the appeal. There is a remedy left open should the applicant be dissatisfied with the District Judge on a point of law by way of case stated. That is the ultimate safety valve should issues arise which are legally controversial.

Conclusion

[40] Accordingly, we consider that the trial judge was correct to refuse leave to apply for judicial review on the basis of an effective alternative remedy. In our view the statutory appeal should now be utilised as soon as possible. This application is therefore dismissed.