Neutral Citation No: [2021] NIQB 122	*Ref:* SCO11720
	ICOS No: 21/058539/1
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 29/12/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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 and Simon Turbitt (instructed by Carson McDowell, solicitors) for the applicant
Paul McLaughlin QC and Denise Kiley (instructed by the Belfast City Council Legal Services Department) for the proposed respondent
Hugh Southey QC and Sarah Minford (instructed by Phoenix Law, solicitors) for the interested parties, Nora McCarthy and Noeleen McAleenon
Gordon Anthony (instructed by Arthur Cox, solicitors) for the interested party, Lisburn and Castlereagh City Council
Tony McGleenan QC and Maria Mulholland (instructed by the Departmental Solicitor's Office) for the interested parties, the Northern Ireland Environment Agency and the Department for Agriculture, the Environment and Rural Affairs

---

SCOFFIELD J

Introduction

[1] This is an application for leave to apply for judicial review in which the applicant, Alpha Resource Management Limited ("Alpha"), a limited company which is the owner and operator of Mullaghglass Landfill ("the Landfill Site") situated at 26 Mullaghglass Road, Lisburn, challenges a decision of Belfast City Council (BCC) ("the Council") to serve an abatement notice upon it in respect of a statutory nuisance at the Landfill Site.

[2] The applicant relies on a variety of grounds of challenge, including procedural unfairness (failure to properly engage with the applicant in advance of

the issue of the notice); failure to provide reasons; inadequate inquiry; failure to take material considerations into account; breach of statutory duty (in the form of failure to undertake an adequate investigation); breach of Convention rights (in particular, Article 1 of the First Protocol ECHR); failure to comply with the Council's own 'Regulation and Enforcement Policy'; lack of *vires* (including by imposing requirements in relation to a landfill site *not* within the applicant's control and by interfering with or usurping the role of the Northern Ireland Environment Agency (NIEA) as the regulator of the landfill); and irrationality.

[3] For present purposes, I assume that at least some of the grounds of challenge are arguable and would warrant the grant of leave on the merits. However, a short leave hearing was convened in this case to consider the question of alternative remedy. That is because the applicant has an extant appeal against the abatement notice which is the subject-matter of these proceedings. The impugned notice was issued pursuant to section 63(1) of the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011 ("the 2011 Act"). The applicant has appealed against the notice to the magistrates' court in accordance with its rights under section 65(8) of the 2011 Act and the Statutory Nuisance (Appeals) Regulations (Northern Ireland) 2012 ("the 2012 Regulations"). However, for a variety of reasons discussed below, it wishes to – and contends that it should be permitted to – challenge the notice by way of judicial review without first having to exhaust the statutory appeal available to it.

[4] Mr Beattie QC appeared with Mr Turbitt for Alpha, seeking leave to apply for judicial review. Mr McLaughlin QC appeared with Ms Kiley for the Council, inviting the court to refuse leave to apply for judicial review on the ground of alternative remedy. That position was supported by two interested parties who are residents who have complained about the Landfill Site and each of whom has issued proceedings in relation to this (described further below), who are represented by Mr Southey QC and Ms Minford. Another district council, Lisburn and Castlereagh City Council (LCCC) also has an interest in the Landfill Site and in these proceedings. It was represented by Mr Anthony. Finally, Mr McGleenan QC and Ms Mulholland appeared as interested parties for the NIEA and the Department of Agriculture, the Environment and Rural Affairs (DAERA), which are respondents to the proceedings brought by the interested parties represented by Mr Southey. I am grateful to all counsel for their written and oral submissions on the discrete but important issue considered at the leave hearing.

Factual Background

[5] It is unnecessary for the purpose of this leave ruling to set out in any great detail the factual background to the proceedings. A short summary will hopefully suffice.

[6] The background to the application has been comprehensively set out in the grounding affidavit of Mr Aidan Mullan, a Director of Alpha. He describes the Landfill Site, which is a non-hazardous landfill site which was formerly a quarry. It

sits within LCCC's district but close to the boundary with BCC's district. The gas generated by the landfill is taken by pipe to the Aughrim Landfill site approximately 1.25 km away, where it is used for electricity generation. The Aughrim Landfill site is owned and operated by a company which is unrelated to the applicant, with which Alpha simply has a contractual arrangement.

[7] Mr Mullan has also provided a range of information about the landfill activities which occur at the site and the history of the operations there. At the time of swearing of his affidavit, it was thought that the site had around 12-18 months of infilling remaining, with site being progressively capped as final levels are achieved. During the Covid-19 pandemic, the rate of infilling has increased with the increased household waste generated by people staying at home. The main customers of the Landfill Site are local councils disposing 'black bin' household waste there, generally deposited by the arc21 umbrella waste management group which represents a number of councils in the east of Northern Ireland. Mr Mullan was keen to emphasise that this is a vital public service.

[8] Alpha operates the Landfill Site pursuant to a permit issued under the Pollution Prevention and Council (Industrial Emissions) Regulations (Northern Ireland) 2013 ("the PPC Regulations"), which is issued by the NIEA, which includes, inter alia, conditions relating to gas and odour management. As a result of this, Alpha maintains and operates an Odour Management Plan (OMP), the most recent iteration of which is issue number 10, dated 1 April 2012, although agreed with the NIEA on 29 March 2021. The applicant contends that the NIEA has confirmed that it is operated 'best available techniques' (BAT) in its operation of the landfill, which is an important concept and statutory phrase in the context of environmental regulation of this kind, in meetings throughout 2021; and also that Alpha remains in compliance with its PPC permit. Mr Mullan also discusses the appointment of an expert environmental consultant, Mr Thompson, who has been asked to consider Alpha's compliance with its PPC permit and its OMP and who has confirmed that no odour issues were arising. Mr Thompson has also provided detailed evidence in support of Alpha's application for leave to apply for judicial review, which I do not need to summarise for the moment.

[9] Local residents who live in the proximity of the Landfill Site, in both the LCCC and BCC areas, have been complaining about unpleasant odours which they contend emanate from the site and about emissions which they further contend are having adverse health effects upon them for some time. This has led to a series of engagement between Alpha on the one hand and the local authorities concerned (although perhaps principally LCCC) and statutory agencies on the other. Residents have been complaining for some time that the regulatory bodies concerned have done little or nothing to properly investigate or alleviate their concerns. In BCC's case, this appears to have culminated in the issue of the notice which is impugned in these proceedings. In LCCC's case, no such notice has been issued; and that is the subject of the proceedings brought by Ms McAleenon who contends that the failure to act on the part of LCCC (and the NIEA and DAERA) is unlawful. For its part,

Alpha contends that it is compliant with all relevant obligations and denies that the issues the residents are facing are caused by its operations (or, at the very least, that this has been proven to be the case) or, if they are, that the issues give rise to a statutory nuisance or any other form of illegality.

[10] Notwithstanding a variety of engagement which various of the regulatory bodies, the applicant asserts that, with the exception of a site visit by one of the Council's officers (along with officers from the NIEA and LCCC) on 13 January 2021, it had received no communication, nor had it had any interaction with the proposed respondent, prior to the service of the abatement notice. A Council file note in relation to the visit of 13 January suggests that the relevant BCC officer was only there to observe; and the applicant states that he therefore did not engage with its staff during the visit. When the impugned notice arrived several months later, the applicant states that this was "out of the blue" and that it had been "kept entirely in the dark" by BCC as to what it was intending to do.

[11] In light of this, the applicant contends that it was deprived of the opportunity to inform the Council in relation to its consideration of any complaints received about the Landfill Site. The limited engagement between the applicant and the Council in advance of the service of the impugned notice is also relied upon by the applicant as evidence of lack of adequate enquiry. The applicant says that it was taken by "complete surprise" by the issue of the notice.

[12] Whatever the other legal obligations in relation to engagement between a district council and the recipient of such a notice, the applicant says that the Council's approach is a clear breach of the proposed respondent's own 'Regulation and Enforcement Policy', in compliance with which it has committed itself to act. This policy, amongst other things, specifies that the Council will be transparent and open in all its relevant activities, including by "explaining the reasons why the Council intend to, or have taken, enforcement action" and providing "clear information and guidance" on compliance issues and failures. The policy also indicates that the Council will liaise with other law enforcement bodies having overlapping regulatory powers to make sure that action taken is co-ordinated.

[13] The impugned notice is dated 27 April 2021 and was issued under section 63(1)(d) of the 2011 Act. It notes that the Council is "satisfied of the existence of a statutory nuisance within its district" caused by the Landfill Site "arising from the emission of smell or effluvia" and requires Alpha to abate same. The operative part of the notice prohibits the occurrence or recurrence of the nuisance and, for that purpose, requires the applicant to take such steps as may be necessary to ensure that emissions of smell or effluvia from the Landfill Site shall not be prejudicial to health or give rise to statutory nuisance at or within the curtilage of any residential property located with the Council area. In addition, a number of specific actions are recorded, including (in summary) reviewing the Odour Management Plan for the site and ensuring it is operational; and engaging an independent environmental consultant to conduct an odour assessment and implementing any recommendations

within 3 months, including by updating the OMP. The notice also requires the applicant to ensure that landfill gas management infrastructure installed on the Landfill Site and at the Aughrim Landfill is operated in accordance with Environment Agency guidance.

[14] An obvious criticism the applicant makes of the notice is that it requires actions to be taken in relation to another landfill site – the Aughrim Landfill – which the applicant does not own, operate or control. This is an entirely separate site, albeit that landfill gas generated at the applicant's site is sent by underground pipe to the Aughrim Landfill where the gas is used to power electricity generation

[15] The applicant later learned that, on the same day that the impugned notice had been served, the Council had also sent a Judicial Review Pre-Action Protocol (PAP) letter to the NIEA. This was not copied to the applicant, the operator of the Landfill Site, for reasons which are not clear. However, it seems clear that the Council determined that action was required in relation to the Landfill Site and adopted a two-pronged approach: service of the abatement notice on Alpha and threatened proceedings against NIEA for failing to adequately regulate the site.

[16] Upon further enquiry by the applicant, it learned that the apparent genesis of the impugned notice lay in decisions taken by the Council at its meeting on 1 April 2021. The minute of this meeting is not particularly enlightening. There is no record of the discussion which occurred at the meeting; and, unusually, there is no report from officers to the elected members to brief them on the subject matter in advance of a decision being taken by vote. Initially, a number of councillors brought a motion to the Council requiring it to prepare legal action against the NIEA "for their dereliction of duty in protecting the rights of citizens around the Mullaghglass landfill site." At the meeting, prior to presenting his motion, Councillor Baker was granted approval to amend it to insert reference to "the site operator" as another person against whom the Council was required by the motion to "immediately prepare legal action." The motion was passed in amended form.

[17] The applicant is highly critical of the Council not having considered a range of information and documentation in advance of the issue of the notice, in particular the current OMP 10, or the immediate predecessor document, or its PPC permit. The applicant contends that it has consistently been told by the NIEA that it is operating in compliance with its PPC permit and that the Council was lacking relevant information in relation to this and failed to properly engage with it, or the NIEA, in relation to these matters. Alpha contends that LCCC's greater engagement with these issues has led it, properly, *not* to issue any such notice.

[18] To complete the factual picture, I should mention two other applications for judicial review, adverted to above, which have been issued in relation to the Landfill Site and possible enforcement action against it. The first, issued by Ms Noeleen McAleenon, a resident of the LCCC area is against LCCC, DAERA and the NIEA for failing to take any or adequate enforcement action against Alpha in

relation to the site. The second, issued by Ms Nora McCarthy, a resident of the BCC area is against the Council, DAERA and the NIEA for similar alleged failures, save that in the case of the Council, given that it has issued the abatement notice which is the subject of these proceedings, it is alleged essentially that the Council unlawfully delayed in issuing the notice. Leave has been granted in the *McAleenon* case and it is proceeding to full hearing in February (with a case management review listed in January to consider the question of what expert evidence is admissible and should be admitted and whether any oral evidence may be required). The *McCarthy* case has been stayed pending the outcome in the *McAleenon* case given that the challenge to actions of DAERA and the NIEA are essentially the same in each case and, in the court's view, the challenge to the Council's historic failure to act is presently academic.

The applicant's appeal to the magistrates' court

[19] The application for judicial review candidly disclosed that the applicant has instituted an appeal against the impugned notice in the magistrates' court. A copy of the notice of appeal was provided and it sets out that the applicant has appealed "pursuant to all grounds available under section 65(8) of the 2011 Act and Regulation 2 of the 2012 Regulations."

[20] In light of this, in the court's initial case management directions order in this case, it was noted to be likely that the applicant's challenge to the notice on appeal will overlap with many of the grounds advanced in these proceedings. The magistrates' court will be in a position to hear oral evidence and address the merits of the notice on appeal in a way which the judicial review court ordinarily would not. The court's provisional view, therefore, was that the statutory appeal represented an adequate alternative remedy.

[21] The notice of appeal is dated 14 May 2021. As noted above, it is widely pleaded for the moment and keeps all the statutory grounds of appeal open. Section 65(8) of the 2011 Act, under which an appeal against an abatement notice lies, simply provides as follows:

> "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."

[22] More detail about the available grounds of appeal are set out in regulation 2 of the 2012 Regulations, in the following terms (insofar as material):

> "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);

…

(c) that the district council has refused unreasonably to accept compliance with alternative requirements, or that the requirements of the abatement notice are otherwise unreasonable in character or extent, or are unnecessary;

(d) that the time, or where more than one time is specified, any of the times, within which the requirements of the abatement notice are to be complied with is not reasonably sufficient for the purpose;

(e) where the nuisance to which the notice relates—

(i) is a nuisance falling within section 63(1)(d) or (g) of the 2011 Act; …

that the best practicable means were used to prevent, or to counteract the effects of, the nuisance;

…

(g) that the abatement notice should have been served on some person instead of the appellant, being—

(i) the person responsible for the nuisance;
(ii) the person responsible for the vehicle, machinery or equipment;
(iii) in the case of a nuisance arising from any defect of a structural character, the owner of the premises; or
(iv) in the case where the person responsible for the nuisance cannot be found or the nuisance has not yet occurred, the owner or occupier of the premises;

(h) that the abatement notice might lawfully have been served on some person instead of the appellant being—

(i) in the case where the appellant is the owner of the premises, the occupier of the premises; or

(ii) in the case where the appellant is the occupier of the premises, the owner of the premises,

and that it would have been equitable for it to have been so served;

(i) that the abatement notice might lawfully have been served on some person in addition to the appellant, being—

(i) a person also responsible for the nuisance;

(ii) a person who is also the owner of the premises;

(iii) a person who is also an occupier of the premises; or

(iv) a person who is also the person responsible for the vehicle, machinery or equipment,

and that it would have been equitable for it to have been so served."

[23] The powers of the court on an appeal are set out in regulation 2(5), as follows:

"On the hearing of an appeal the court may—

(a) quash the abatement notice to which the appeal relates;

(b) vary the abatement notice in favour of the appellant in such manner as it thinks fit; or

(c) dismiss the appeal,

and an abatement notice that is varied under sub-paragraph (b) shall be final and shall otherwise have effect, as so varied, as if it had been so made by the relevant district council."

[24] The impugned notice contained the following endorsement:

> "In the event of an appeal, this Notice shall NOT be suspended until the appeal has been abandoned or decided by the Court as, in the opinion of the Council, the expenditure which would be incurred by any person in the carrying out of works in compliance with the abatement notice before any appeal has been decided would not be disproportionate to the public benefit to be expected in that period from such compliance."

[25] This endorsement was included as a result of the provision made in regulation 3 of the 2012 Regulations. Generally speaking, where an appeal is brought against an abatement notice served under section 65 of the 2011 Act compliance with which would involve any person in expenditure on the carrying out of works before the hearing of the appeal, the abatement notice is suspended until the appeal has been concluded. However, one exception to this is where the expenditure which would be incurred in compliance with the notice before the appeal has been decided would be proportionate to the public benefit to be expected in that period from such compliance and this ground is stated within the notice itself. Accordingly, an issuing authority such as the Council can ensure that an appeal does not result in the notice being suspended in an appropriate case.

[26] It is also clear that the applicant's appeal has been progressed to some degree. That is because several of the points made in the present judicial review proceedings arose out of documents obtained from the Council in the course of a disclosure process which had occurred during the appeal proceedings. Mr Mullan's affidavit discloses that the first review of the appeal was held on 15 June 2021, at which full disclosure was directed by the magistrates' court in light of the provision only of partial disclosure by the Council at that point. The applicant's solicitors have since asked the magistrates' court to 'pause' the appeal, pending the outcome of these proceedings.

Summary of the parties' submissions

[27] The focus of the submissions on behalf of each of the parties was on whether the statutory appeal to the magistrates' court represented an effective remedy for the applicant in the circumstances. For Alpha, Mr Beattie emphasised the complete lack of engagement between the Council and the applicant in advance of the Council's decision of 1 April and the consequent issue of the impugned notice on 27 April. The manner in which the Council's decision was taken gave rise to obvious illegality, he submitted, which could readily be addressed by this court and ought in principle to be so addressed; whereas the statutory appeal would focus on whether issue of the notice was justified under section 65 of the 2011 which, he submitted, would principally address the scientific evidence about the nature and origin of the emissions complained of. Mr Beattie emphasised that that issue – whether or not there actually was a nuisance or not, involving detailed and technical expert evidence – was *not* an issue in the judicial review application but that it would be in

the statutory appeal. These proceedings were addressed only to the *legality* of the Council's decision-making, not the merits. There could be no guarantee that the magistrates' court would deal with that issue or, if it did, that it would do so in an efficient and cost-saving way. In short, he contended that the statutory appeal was "not an equivalent remedy to the judicial review" in terms of the grounds which were advanced in these proceedings.

[28] Mr McLaughlin for the proposed respondent pointed to the case-law setting a high bar for cases where, despite the availability of an alternative remedy (especially in the form of a statutory appeal), the High Court would entertain an application for judicial review. He emphasised that the appeal in the present circumstances can be brought on a wide variety of grounds (see regulation 2 of the 2012 Regulations), including that the notice is not justified, that there is some error or defect in it, that it is unreasonable in character or extent, and/or that the best practical means were used by the applicant to prevent or counteract the effects of the nuisance. In his submission, this was a perfectly proper alternative remedy in the circumstances of this case and there was nothing exceptional, or sufficiently exceptional having regard to the approach set out in the authorities, which justified (much less required) the court to grant leave when a clear alternative remedy for the applicant existed.

Guidance from the authorities

[29] A key authority in this area in our jurisdiction remains that of *Re Ballyedmond Castle Farm Ltd's Application; and Re DPP's Application* [2000] NI 174. In that case, a judicial review of a costs order made in the magistrates' court had been brought, and leave had been granted, which was then sought to be set aside on the basis that the applicant (the Director of Public Prosecutions) should have appealed the order by way of case stated. In the course of his judgment, Carswell LCJ emphasised that a failure to resort to an alternative remedy would not inevitably result in the rejection of an application for judicial review and that a degree of flexibility existed in relation to this, involving an assessment of the balance of cost and convenience between each option. The Divisional Court then endorsed the following general principles (which had been set out by the Beloff and Mountfield in an article in the *Judicial Review* journal):

> "(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."

[30] However, I was also referred by the parties to a number of further authorities which represent an elucidation or application of the basic principles set out in *Re DPP's Application*. In particular, the Court of Appeal in this jurisdiction set out guidance in this field in *Re McDaid's Application* [2016] NICA 5, in which Gillen LJ said the following at paragraphs [35]-[37]:

> "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.
>
> An existing alternative remedy raises a question for the courts "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).
>
> 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)."

[31] The *McDaid* case involved a proposed challenge to a decision of the Bankruptcy Master in circumstances where the Insolvency rules specifically provided for an appeal to the relevant judge. At paragraph [38] of his decision, Gillen LJ noted that the applicant "had another means of redress conveniently and effectively available to him which he should ordinarily have used before resorting to judicial review." The appeal route would have been "no less effective, convenient and suitable to determine the issues he wished to raise." The Court of Appeal in this case perhaps emphasised more strongly than did the Divisional Court in *Re DPP's Application* that judicial review is a remedy of last resort so that, where a satisfactory alternative remedy is available, the grant of leave will be rare.

[32] More recently, but in the same vein, the English Court of Appeal has addressed this issue in *R (Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] 4 WLR 213, in the context of an HMRC decision which could be challenged by way of a requirement for review, followed by a possible appeal to the First-tier Tribunal. Sales LJ addressed the principle which applies in this field, whereby the court must exercise its discretion as to the proper forum in the circumstances of the case, and gave the following guidance at paragraphs [55]-[56] of his judgment:

> "In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and

> remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure. But of course it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor.
>
> Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required.

[33] Sales LJ went on (in paragraph [58]) to quote Lord Scarman in *In re Preston* [1985] AC 835, at 852D, where he said that:

> "Where Parliament has provided by statutory appeal procedures… it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."

[34] In the same case, Lord Templeman also indicated that the judicial review process should not be allowed to supplant the normal statutory procedure unless the circumstances were exceptional and involved an abuse of power of a serious character (see, again, Lord Sales in *Glencore* at paragraph [58], summarising Lord Templeman in *Preston* at 864F-H and 866G-867C).

[35] To similar effect is the judgment of Lord Dyson MR in *R (Watch Tower Bible and Tract Society v The Charity Commissioners* [2016] 1 WLR 2625, a case involving a

challenge to an investigation by the Charity Commissioners in which it was considered that a potential appeal to the First-tier Tribunal was an effective remedy in relation to a decision on the part of the Commissioners to initiate an investigation but *not* an effective remedy in relation to a decision to issue a production order. In the course of his judgment, Lord Dyson said this (at paragraph [19]):

> "If other means of redress are "conveniently and effectively" available to a party, they ought ordinarily to be used before resort to judicial review: *per* Lord Bingham of Cornhill in *Kay v Lambeth London Borough Council* [2006] 2 AC 465, para 30. It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available. This principle applies with particular force where Parliament has enacted a statutory scheme that enables persons against whom decisions are made and actions taken to refer the matter to a specialist tribunal (such as the First-tier Tribunal (General Regulatory Chamber) (Charity)). To allow a claim for judicial review to proceed in circumstances where there is a statutory procedure for contesting the decision risks undermining the will of Parliament; see *per* Mummery LJ in *R (Davies) v Financial Services Authority* [2004] 1 WLR 185, paras 30–31; *per* Lord Phillips of Worth Matravers MR in *R (G) v Immigration Appeal Tribunal* [2005] 1 WLR 1445 at para 20; and *per* Moore-Bick LJ in *R (Willford) v Financial Services Authority* [2013] EWCA Civ 677 at [20], [23] and [36]. I would also refer to the helpful and comprehensive summary of the relevant principles by Hickinbottom J in *R (Great Yarmouth Port Co Ltd) v Marine Management Organisation* [2014] LLR 361, paras 35–72."

[36] There is also authority to suggest that the issue of alternative remedy ought to be grasped and dealt with at the leave stage, rather than in the course of the substantive hearing after leave has been granted (see *McDaid* at paragraph [36]). That is plainly sensible. There would be no benefit in putting the parties to the time and expense of preparing for a full hearing only to dismiss the application at that stage on the basis that the applicant ought to be pursuing their case in another forum. Alternatively, a temptation may arise, if leave has been granted with the alternative remedy issue having been parked, to simply determine the case and grant relief, if the challenge was otherwise meritorious, when, as a matter of principle, the correct approach would be to refuse to entertain the application. An initial suggestion on the part of the applicant that this issue could be left over for consideration in the course of the substantive hearing in this case, leave having been granted, was not pursued in the course of the oral leave hearing.

[37] In addition to some authorities dealing generally with the courts' approach to alternative remedy in judicial review, I was referred to a number of authorities which were more closely related to the subject area of the present dispute. The most relevant is that in *R v Falmouth and Truro Port Health Authority, ex parte South West Water Ltd* [2001] QB 445. That case concerned the respondent authority serving an abatement notice on the applicant, a water undertaker, in respect of a sewage outfall which had been granted a discharge consent by the Environment Agency. As in the present case, the applicant asserted that the authority had not properly investigated the matter. Permission to apply for judicial review was granted (since the statutory appeal to the magistrates' court could not be heard within the three months within which the notice required to be complied) and the High Court went on to quash the notice on a variety of grounds, including lack of consultation. On the authority's appeal to the Court of Appeal in England and Wales, the appeal was dismissed on one ground, namely that the first instance judge had been correct to hold that the location of the outfall was not a "watercourse" within the meaning of the relevant legislation, so that the abatement notice was invalid. The Court of Appeal held that no general duty of consultation arose in such circumstances; but that it could arise on the basis of legitimate expectation. However, the Court of Appeal also went on to give some guidance in relation to whether or not permission to apply for judicial review should be granted in such cases.

[38] In particular, the Court considered that 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; rare still will permission be appropriate in a case concerning public safety. The judge considering the matter 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 (perhaps) the apparent strength of the applicant's challenge.

[39] Simon Brown LJ recognised that where an authoritative resolution of a legal issue was required, judicial review may be regarded as the more convenient avenue of redress; but noted that different considerations may apply where the alternative remedy was a statutory appeal process or where the need to safeguard the public is involved. Much would depend on the point at issue and how quickly it could be dealt with on judicial review. Pill LJ agreed and also observed, as regards the statutory appeal, that "the emphasis should… be upon making the statutory procedures effective rather than assuming ineffectiveness and treating judicial review as a default procedure." He also emphasised that there was "a very high burden on a party claiming, in the context of public health, that the statutory remedy will be ineffective before he can expect permission to apply to be granted." The thrust of the comments in the *Falmouth* case on this issue, albeit that they were obiter, is that in this particular field, a very high hurdle has to be surmounted before leave to apply for judicial review will be granted in preference to requiring an aggrieved recipient of an abatement notice to pursue their statutory appeal.

Application in this case

[40] Turning to the application of these principles in the present case, I take as my starting point that, since the legislature has expressly provided for an abatement notice to be challenged by way of a statutory appeal procedure, that is the method of challenge which the applicant should pursue. It is for the applicant to persuade the court that, notwithstanding that presumptively effective alternative remedy, there is some reason why it should be permitted to pursue its complaints by way of judicial review instead. The statutory appeal is the method by which the legislature generally intended that such notices should be challenged. I should therefore be slow to conclude in my discretion that the public interest is so pressing that I ought to intervene alongside, or instead of, the appeal to the magistrates' court. The reticence with which I should exercise the court's discretion to allow a judicial review to proceed in these circumstances is expressed in different ways in the cases: but, at the very least, the case should be exceptional for me to do so.

[41] An important factor is, of course, whether the applicant's right to appeal the impugned notice in the magistrates' court represents a satisfactory remedy in the circumstances or, in the words of some of the authorities, a convenient and effective remedy. Consideration of this issue will generally involve reflection upon the grounds on which the alternative remedy is available; the remedies or relief available if it is pursued; and the suitability of the procedure offered in the circumstances of the particular case. I address each of these in turn.

[42] First, I accept the proposed respondent's submission that the grounds of appeal available to the applicant in its appeal to the magistrates' court are wide. A core element of the applicant's argument is that a number of grounds upon which it wishes to rely in these proceedings are not, or may not be, available to it to rely upon in its statutory appeal. The Council submits firstly that this is irrelevant – a submission which I find hard to accept in quite such stark terms – but also that, in any event, the statutory appeal grounds are sufficiently broad to encompass the applicant's complaints. I consider that highly likely to be correct for the following reasons:

(a) There is a wide variety of grounds of appeal available under the 2012 Regulations (see paragraph [22] above). These encompass claims that the notice was unreasonable or unnecessary; that Alpha has been using best practical means to prevent or counteract the effects of the nuisance; and that the notice ought properly to have served on someone else (for instance, the owner or operator of the Aughrim Landfill site).

(b) In particular, the first ground is where the appellant contends that the issue of the impugned notice is not "justified" by reference to section 65 of the 2011 Act. This is clearly a broad term in my view, and intended to be so. The issue of the notice will not have been justified if in the court's view there is not a

statutory nuisance. This allows the magistrates' court to enquire into the merits of the determination. However, the phrase "justified" must mean more than that; and cannot simply mean that the requirements of the notice are unreasonable or unnecessary (which is addressed by the ground of appeal set out in regulation 2(2)(c)). I accept the submission that the issue of a notice could not be justified if, in public law terms, it was unlawful (including, by way of example, through an unlawful absence of inquiry). Although a district council is obliged to serve an abatement notice under section 65(1) of the 2011 Act where satisfied that a statutory nuisance exists, if it unlawfully became so satisfied, the service of the notice would not be justified within the terms of section 65.

(c) In the absence of clear language excluding the normal application of the requirements of procedural fairness, courts will also readily imply into the statutory scheme whatever is required by way of additional procedural safeguards as will ensure that the procedure is fair (see Lord Bridge in *Lloyd v McMahon* [1987] 2 WLR 821, at 879.

(d) The above analysis is supported by the line of authority exemplified in *Boddington v British Transport Police* [1999] 2 AC 143. Albeit that case related to criminal proceedings, it draws attention to the fact that, in appropriate cases, public law arguments can be deployed in magistrates' courts by way of collateral or defensive challenge as an important means of avoiding duplicity of proceedings. There is no reason in principle why a magistrates' court may not consider such issues.

(e) In any event, in the present case, since the Council has clearly committed itself to the position that the statutory appeal can encompass both the applicant's complaints on the merits and in relation to the procedures it adopted, I do not consider that it would be open to it to seek to contend otherwise in the proceedings before the magistrates' court.

[43] Second, it is clear that the powers available to the District Judge (Magistrates' Court) are also wide. They are set out in regulation 2(5) of the 2012 Regulations (set out at para [23] above). The District Judge can quash the abatement notice in its entirety – which is what the applicant seeks in this case – or can vary it in the applicant's favour if and insofar as they consider that the appeal should succeed in part. In short, the magistrates' court can do precisely what the applicant asks this court to do on its application for judicial review, namely to quash the notice.

[44] Third, turning to the nature of the procedure available, I do not accept that there is anything inherently preferable in the matter being considered by way of judicial review rather than by the statutory appeal mechanism. Indeed, there is much to be said in favour of the statutory appeal for the reasons given below. In the first instance, it is generally to be expected that proceedings in a court of summary jurisdiction will be quicker and less expensive than those conducted in the High

Court. This may not invariably be so but, as a general rule, the court proceeds on that assumption. Perhaps more importantly, the appeal procedure will involve oral evidence and cross-examination in a way which is highly unusual in judicial review proceedings. It is a much better forum for the resolution of disputed factual issues. Indeed, the applicant has acknowledged the likelihood of substantial oral evidence being required in the appeal, including from expert witnesses, if it is required to proceed on the merits.

[45] This leads on to a further concern on the part of the applicant, namely that it has a number of clean, knock-out procedural points which (it contends) ought to result in the quashing of the notice without having to spend time and resources debating the scientific merits of the Council's approach at this stage (if at all). However, I accept the respondent's submission that, in truth, this amounts to a concern that the District Judge (Magistrates' Court) who will deal with the appeal will not case manage it in a manner with which the applicant is content. In my view, there would be nothing to stop the judge dealing with the appeal in a phased manner, addressing the procedural points which do not (or may not) require expert evidence but which may be dispositive of the appeal first, and only moving on to consider the remainder of the appeal grounds later, as necessary. The procedure to be adopted is, of course, a matter for the judge seised of the appeal; but there is no proper basis to assume that the judge would not hear submissions on the proposed case management and deal with it in an efficient and effective manner.

[46] It is also significant that the statutory scheme provides, generally, for the suspension of the effect of a notice which is under appeal to the magistrates' court; but also for the automatic suspension not to operate in certain cases. This represents a considered and calibrated approach on the part of the legislature to what might be addressed by way of an application for interim relief in judicial review proceedings. In this case, there is presently no application for interim relief. Indeed, that is probably not surprising given that the time for compliance with the notice has now expired; and the applicant contends that, in any event, it has complied in substance (including by introducing the recent OMP 10). The applicant's residual concern is that the Council might proceed against it for an alleged failure to comply; but that has not yet occurred and it might well be that the Council has taken the pragmatic view that it would not be in the public interest to seek to prosecute when the validity of the notice is under challenge either in these proceedings, in the appeal, or in both. If any prosecution were to be brought, it would again be open to the applicant to raise public law defences to the proceedings (see *Boddington* above) and also to rely on the 'best practicable means' defence in section 65(12) of the 2011 Act. That concept is defined in section 63(13) of the Act and is clearly closely related to the concept of BAT under the PPC legislation.

[47] I also take into account that the statutory appeal has been invoked in this case. I make no criticism of the applicant for that since, first, that was an entirely understandable step for it to take in order to protect its position; and, second, as noted above, that is the usual approach one would expect where a recipient

complains about an abatement notice which has been issued. However, the commencement of these judicial review proceedings and the leave hearing which necessarily followed illustrates one of the reasons why the doctrine of judicial review being a measure of last resort operates: it is to avoid expensive duplication of effort where (as here) two sets of procedures have been followed in relation to the same notice. As I understand it, the appeal has essentially been parked until this court has ruled on the applicant's application for leave to apply for judicial review. Thus, the magistrates' court's process has been interrupted. Both this court and the magistrates' court have had to devote resources to considering the same subject matter. These factors weigh against the grant of leave to apply for judicial review. (That is not to say, however, that a judicial review applicant who did not invoke an alternative remedy and then issued judicial review proceedings when they were too late to do so would necessarily be in a better position: see the cases cited in Fordham, *Judicial Review Handbook* (7th edition, 2020, Hart) at sections 36.3.17 and 36.3.18 in relation to unused alternative remedies still acting as a discretionary bar to judicial review).

[48] Mr Beattie had three points on which he understandably focused in his oral submissions. The first was the concern about the course which the appeal proceedings in the magistrates' court might adopt, discussed at para [45] above. The second was the unusual procedure followed by the Council in this case before the issue of the impugned notice, which he contended clearly gave rise to illegality. The third was the fact that there are already two judicial review applications before this court dealing, in broad terms, with the Landfill Site and which are therefore related to this challenge.

[49] As to the second of these points, this really goes to the arguability of the applicant's grounds of challenge, which I have assumed for the purposes of the leave hearing. Indeed, the Council (sensibly) did not seek to oppose the grant of leave on the merits. A number of the grounds clearly appear arguable, perhaps even strongly so. However, a good point in this court will be just as good a point in the statutory appeal. I cannot accept the applicant's submission that it would be "patently unfair" for it "to have to contest a notice that was unlawful in the first place." A statutory right of appeal is provided precisely in order to permit aggrieved recipients to challenge notice which have been issued to them unlawfully. The applicant's complaints about process are also likely to involve factual evidence and, possibly, contested fact-finding. They relate to the Council's process in this case and none of them, in my view, amount to complex issues of legal principle on which authoritative guidance is required and which therefore ought to be addressed in the High Court. Nor do they amount to the type of abuse of power mentioned in the *Preston* case (or in para [62] of Sales LJ's judgment in the *Glencore* case) where this court would feel bound to intervene.

[50] In relation to the other judicial review applications, it is right that these are related to this case to some degree; but they are of a different character. Both of them concern an alleged unlawful *failure* to enforce environmental provisions.

Crucially, in those cases, the applicants did not have an appeal right constituting an alternative remedy such as exists in the present case. The applicant in this case, Alpha, will continue to be able to participate as a notice party in those cases and its interests will therefore be protected. Ultimately, though, I consider that the proposed respondent is right to say that seeking to join this case with those other (already complicated) proceedings is simply likely to make them more difficult to manage, and unnecessarily so.

[51] Finally, the applicant prayed in aid my own recent judgment in *Re Hartlands' Application*, a case in which I permitted a disappointed planning applicant to judicially review a decision of a district council to refuse it planning permission, notwithstanding that it had a statutory right of appeal to the Planning Appeals Commission (PAC). I do not consider that this assists the applicant, since there are two important points of distinction. First, in the present case the magistrates' court can consider the applicant's procedural objections (see para [42] above), whereas in the *Hartlands* case, the PAC could consider the planning merits of the applicant's application but could not rule on the legality of the council's voting procedures, much less quash its decision and remit the matter to the council for further decision-making (see *Re UK Waste Management Ltd* [2002] NI 130, at 140f). Second, in the *Hartlands* case, I considered the applicant to have lost the opportunity to persuade the elected members to depart from planning policy on the basis of their assessment of local residents' needs. That can be contrasted with the present case where, in essence, the applicant here contends that residents' concerns or demands have been improperly prioritised over objective scientific investigation or analysis. A case of that nature can just as adequately be dealt with in the magistrates' court, indeed can be better dealt with there insofar as it requires consideration of detailed evidential issues, than in this court.

Conclusion

[52] For the reasons given above, I consider that the application for leave to apply for judicial review should be dismissed. There is clearly an alternative remedy available to the applicant, which it has invoked, and which the legislature obviously intended to be the primary means of challenging an abatement notice issued under section 65 of the 2011 Act.

[53] The applicant's attempt to persuade me that this was an appropriate case for the exercise of the court's discretion to allow the judicial review application to proceed was far from hopeless. The position is complicated by the fact that there are other judicial review proceedings which are related to the operation of the Landfill Site currently before the High Court; and, it must be said, on first impressions it appears that the procedure adopted by the Council in determining that the applicant should be issued with a notice was (at best) fairly unorthodox. In the final analysis, however, I do not consider this case to fall within the category of sufficiently exceptional cases to warrant a departure from the basic principles that judicial review is a remedy of last, rather than first, resort; and that an appeal right conferred

by statute ought to be exercised before recourse is had to this court's supervisory jurisdiction.

[54] I accordingly refuse leave to apply for judicial review.

[55] I will make no order in relation to costs between the parties; save for an order for taxation of the costs of those notice parties who are in receipt of legal aid funding, pursuant to Schedule 2 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.