



## MOOT Problem 2011-2012

When John Steel was made redundant as a metal trader in 2008 he decided to deal from home. This was satisfactory for a period, but he realised that to make some serious money he needed somewhere where he could leave small deposits of different commodities.

John and his partner Sam decide to open a scrap yard in the centre of one of England's biggest cities. John realises that he can also use the yard to keep some of his deposits.

They hunt far and wide with the help of the City Council and the Environment Agency. They do not want the expense of a permit, and, having done some research, they know that they can obtain an exemption from the need to acquire a full permit under the Permitting Regulations 2007 so long as the yard is of a certain limited size.

Eventually they find the perfect site. It is in a very run down part of the City just to the west of a crossroads at which the high street runs north to south. The road on which the site is to be found runs further west into a residential area of houses built in between the 1950s and the 1970s. The site is on the southern side of the road a little way from the crossroads. There are small industrial units opposite. To the east of the crossroads is the unmanned train station and some large industrial sites of which some are unoccupied. Veolia and Sita have sites there.

This modest-sized yard is just small enough to justify the grant of an exemption. It used to be occupied by a waste collector who had skips and other bins into which various forms of waste were collected and stored at the yard for onward transmission and disposal. Lorries were in and out all the time. John had known the site as a teenager and it had always been very noisy, mainly because of the scraping of bins against the ground and lorries coming in and out. The planning department at the City Council decide that planning permission for use as a scrap yard is not necessary since there will be no change in the type of use at the yard: the previous and the intended uses are both waste uses.

John and Amy form a new company called "Scrap2U". They discuss matters with the Environment Agency which says that it will be an excellent site for their purposes.

In March 2009 Scrap2U takes a lease of the yard at £25,000 per year. They buy an old grabber and place 2 portacabins on the western edge of the site and adjacent to the nearest residential property. They let the local "tatters" know that they will pay good prices. These "tatters" are the modern form of rag and bone men and empty their vehicles on the southern perimeter of the site where it will be sorted into different categories around the yard and then collected by metal traders who buy material in bulk on-line or by phone. Some cleaning of the scrap will be required by the use of saws and special chisels.

Just before they start trading they hit a snag when the Environment Agency tells them that they need

to lay an impermeable layer round the site to prevent oil and other such contaminants entering the subsoil. They agree that concrete is suitable.

The EA issues an exemption to the Company, writing a letter saying that they grant the exemption to be registered as from 1st September 2009. The site "must comply with be provisions of the Waste Framework Directive and in particular it must comply with the requirements of the Directive by not causing a nuisance", referring to the relevant section of the Permitting Regulations.

Concreting the yard is done in stages since it costs a total £55,000, and the EA has said that the concreting can take place in stages whilst they trade - which must only take place on the concreted parts. Trading started on 1st November 2009.

In the first week of trading, the site's nearest neighbour behind the portacabins came to ask for work. He was sent away rather forcefully by the foreman. Ever since, there have been difficulties with him and he has been aggressive towards the staff.

After six months the yard has become a roaring success. It already has 16 members of staff and a projected turnover of £3.5m.

The two EA officers who oversee the site come in every week and they are delighted with progress. They congratulate John and Sam on the way in which they run the yard. "It is a really good site" they tell them. In about June 2010, however, they say that there have been complaints of noise nuisance. The officers have taken readings at the boundary between the site and their near neighbour and something needs to be done. It seems that they have no experience in using noise meters but they had a bit of training by their superior. Their superior is not an expert in interpreting noise nuisance meter readings either, but he says that the readings show there is a nuisance.

John and Sam get in touch with an environmental consultant who says that they need a Noise Management Plan. He drafts one for them which sets out a list of items then can implement immediately, some things they should implement in six months and some things they should implement in a year. The matters to implement include buying a quieter grabber and moving the saws and chisels off-site.

A meeting with the EA is organised. John and Sam can see the writing on the wall but in any event they have a new business plan. They recognise that they need a much bigger site than any which can fall with the permitting exemption criteria. Whether or not they can comply with the exemption requirements they need to find another site. On the other hand they would like to keep this site because it is a convenient source of local scrap. They decide that they want to keep the present site although they will wind down the extent of its activities. They will need six months to get a relocation organised as from the time when the legal formalities are completed which means that they can move into a new main yard.

The meeting taken place on 1st December 2010. There is also a representative of the Council's Environmental Health Department at the meeting: Mr Laerm. He says that he has been to the neighbouring property and there is clearly a nuisance. He leaves the meeting. John and Sam reveal their Noise Management Plan and the EA is impressed. Its officers, including the Chief Regulatory Officer say that so long as the NMP is implemented and the Council is satisfied that best practicable means are being used then they will not deregister the exemption. There is a discussion about how long the Company would need to relocate.

The Company implements the NMP immediately. It spends £120,000 on a new grabber straight away and it takes a lease of premises over the road in which to house its saws and other noisy

equipment. The NMP specifies how the site should be run to make sure best available techniques are used (in accordance with published IPPC guidance for the assessment and control of noise) and it is implemented.

The City Council tries to help the Company to find a new site and eventually they locate premises which are satisfactory. By the end of April 2011 a head lease has been signed and agreement reached in principle. The EA then discover that its historical records show that this site was previously used as a scrap yard and it generated noise complaints. The deal is off.

Over the months the Environmental Health Department has written several letters to the Company which complain of a nuisance at the neighbouring premises. At the same time the EA officers continue to tell John and Sam that it is a "splendid site" and "very well run". They agree that the NMP has been implemented and best practicable means are being used to control any nuisance at the site. John and Sam do not accept that there is a nuisance, although their own consultant has carried out readings according to BS4142 (which they are told represents the relevant noise standard) and told them that "there is a difference between the background and rating level of 20dB which indicates that complaints are very likely". The EA officers have written to say that "ultimately we will rely on the position adopted by the Environmental Health Department. If they say that you are using best practicable means to counteract or reduce noise emissions, then we will adopt their advice". The local council has not served an abatement notice under the statutory nuisance regime and shows no inclination to do so.

On 1st July 2011 the Company receives a letter from the EA legal department saying that the exemption will be "deregistered as from 15th August 2011" because the site is causing a nuisance. After further inquiries from the Company the legal officers say that (a) at the meeting on 1st December 2010 John said that he would only need six weeks in which to find a new site and (b) the appropriate way forward if the Company wants to appeal on the merits is to make a complaint under the EA's complaint procedures which are set out at the Appeals and Challenges section of the appropriate Guidance to be found at:

<http://www.defra.gov.uk/publications/files/pb13631-ep2010exemptwaste.pdf>

John does not accept that he told the EA officers on 1st December that he would only need six weeks to relocate. He believes that he told them that he would need six months after the legal formalities were in place.

In further urgent correspondence the EA invites the Company to make a complaint under its procedures by 30th June 2011 in which case it would withdraw its decision letter and reconsider after the outcome of the complaint; at the same time it will not await the outcome of any complaint to the Parliamentary Ombudsman. The EA acknowledges that under the statutory nuisance regime, the permitting regime and the planning system there are rights of appeal on the merits.

The Company commences judicial review proceedings on the following grounds:

- (1) It had a legitimate expectation that no action would be taken to remove its exemption from the register of exemptions until service of an abatement notice by the local authority;
- (2) It is in any event procedurally unfair to "deregister" the exemption pending the service of an abatement notice. This is because the EA has failed to implement any system of appeal and it is a breach of its Article 6 right to a fair hearing not to have right of appeal on the merits - the statutory nuisance route is the only alternative and this avenue of appeal offers various important statutory grounds which the Company would wish to adopt;
- (3) The failure to set up an appropriate mechanism for an appeal represents a breach of its rights under Article 1 of the First Protocol to the Convention.

At the same time the EA has indicated in its response that:

- (1) The grounds of appeal available under the statutory nuisance regime, in particular the defence of "best practicable means" has no application where an exemption has been granted;
- (2) The complaint procedure set out in the Guidance published on the website offers an alternative to judicial review and this means that judicial review is an inappropriate form of challenge.

Somehow the parties have managed to persuade the List Office to list the matter for a "rolled-up" hearing (for both permission and the merits) urgently on 12th August. John and Sam have instructed specialist environmental solicitors and the hearing is a couple of weeks away. They had previously engaged a barrister they happened to find on the web under the Bar Direct scheme because he said that he had done some judicial review work. The solicitors are worried about the grounds of challenge which initially at least they consider something of a "mish-mash". They will be conducting the advocacy themselves and are determined to refine the existing grounds of challenge as they think appropriate to argue their best points. The EA has said that it will not object to an amendment, which it is quite content to cope with the forthcoming hearing, so long as the Company's position is clearly set out in its skeleton argument. For its part the EA will deal with both its present grounds in its skeleton since it believes that the claim is in any event unmeritorious.