IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:-

THE QUEEN on the application of SCRAP2U

Claimant

- and -

ENVIRONMENT AGENCY

Defendant

SKELETON ARGUMENT OF THE DEFENDANT

Introduction

1. The Claimant seeks to challenge the Defendant's decision of 1 July 2011 to deregister its exemption under reg. 5(1) of the Environmental Permitting Regulations ("EPR") 2007 (as amended) with effect from 15 August 2011. The factual background has been set out in an agreed statement of facts ("ASF").

2. The Defendant has consented to late amendment of grounds by the Claimant and will respond to any new submissions at the hearing, provided they are clearly stated in the skeleton argument.

3. It is submitted that the Claimant's current grounds are without merit for the following reasons:

    a) Ground 1: The Defendant did not create or breach any legitimate expectation that the exemption would not be deregistered;

    b) Alternative Remedy: The Defendant has offered to withdraw its decision as long as the Claimant accepts reconsideration via its complaints process;

c) Ground 2**:** The Defendant has not clearly identified how its Article 6(1) ECHR rights are engaged. If the rights are engaged, it is denied that there has been a breach of Article 6(1);

d) Ground 3: The Defendant has also failed to identify how its Article 1 Protocol 1 rights are engaged. If the rights are engaged, then the Defendant's actions would be justified and proportionate.

Ground 1: Legitimate Expectations

Content of Representations

4. The Claimant's current case is that there was a legitimate expectation that the exemption would not be deregistered until the City Council's Environmental Health Department served an abatement notice. It is denied that any representation was ever made to that effect.

5. The only clear representations were that to avoid deregistration: (i) a Noise Management Plan should be implemented (it is conceded that this took place) *and* (ii) the Council had to state positively that they considered that best practicable means ("BPM") were being used. As the Defendant's letter expressed: "if they say that you are using [BPM]...then we will adopt their advice" [emphasis added]. No positive statement was ever made by the Council, so there has been no compliance with that condition and no legitimate expectation could have arisen.

Representations Ultra Vires

6. The representations by the Defendant's officers that they would rely on the Council's views for the purpose of determining compliance with the exemption conditions were *ultra vires*.

7. The Defendant had instituted a condition for the exemption to comply with Articles 13(b) and 25(1) of the Waste Framework Directive ("WFD")(Directive 2008/98/EC), to ensure that the activities at the site did not cause a noise nuisance.

In effect, the Defendant's representations would have caused them to abdicate their duties to uphold the provisions of the WFD [ASF, §9] (*R v Secretary of State for Environment Transport and the Regions ex p Watson* [1998] EWCA Civ 1250).

8. Equally, the Defendants could not as a matter of law delegate their statutory duties to the Council's Environmental Health Department (*Lavender (H) & Son Ltd v Minister of Housing and Local Government* [1970] 1 WLR 1231)

Extinguishment

9. If there was a legitimate expectation, this had been extinguished by 1 July 2011 as seven months had passed since the Claimant had promised to relocate to a new site.

Justification

10. Finally, any purported breach would have been lawful as a proportionate response to a legitimate public end: the prevention and removal of noise nuisance.

Alternative Remedy

11. It is well-established that judicial review is a remedy of last resort. The Defendant has offered to withdraw its decision of 1 July 2011 provided that the Claimant allows its case to be reconsidered via the complaints process. The practical impact of this decision is that the Claimant's activities will be able to continue under the exemption.

12. The Claimant has therefore failed to pay heed to the "paramount importance of avoiding litigation wherever this is possible" (*R(Cowl) v Plymouth City Council* [2001] EWCA Civ 1935, per Lord Woolf CJ at §1).

Ground 2: Article 6(1) ECHR

13. The Claimant has not yet demonstrated exactly how Article 6(1) ECHR is engaged in the instant case. The Claimant is put to proof to show that all the requirements are met, particularly the identification of the relevant civil right or obligation that is to be determined. The Defendant makes no concession at the present time.

Deferral to a Statutory Nuisance Appeal

14. In the first part of the submissions, as currently formulated, the Claimant suggests that the Defendant should ignore breaches of conditions provided in an exemption notice and permit deferral of consideration to a statutory nuisance appeal. As explored above under Ground 1, that approach is wrong as a matter of domestic law. It is also a misinterpretation of ECHR law.

15. Article 6 cannot control the content of a state's substantive law. In particular, it cannot require that a particular enforcement route be taken or that a particular substantive defence be offered within civil proceedings, such as "best practicable means". Such matters clearly lie within a state's margin of discretion.

The Role of the Court

16. The requirements of Article 6 ECHR vary according to the nature of the dispute in question. The requirement is for the right of access to a tribunal with full jurisdiction to determine the relevant dispute.

17. The instant dispute concerns a question of law: whether the Defendant lawfully held that the site had breached a condition of its licence, namely compliance with Articles 13(b) and 25(1) of the Waste Framework Directive. There is no dispute of fact. The facts here are agreed and limited. There has been a long-term, substantial and incurable noise caused by the Claimant's activities on the site. This clearly constitutes a nuisance at law. The dispute concerns what the Defendant should do with regard to the exemption in the light of that nuisance.

18. Consequently, if the claim was not premature because of the Defendant's submission to reconsideration and alternative dispute resolution, it would be open to the Claimant to challenge the decision by way of judicial review. The Claimant cannot dispute that such a route would provide the requisite "fair and public hearing before an independent and impartial tribunal".

19. If the court was to find that there had been error of law in the approach of the Defendant, the decision could be properly quashed (*R(Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, per Lord Slynn at §§50 and 52).

Substantive Merits Appeal

20. As to the Claimant's allegation that "it is a breach of its Article 6 right to a fair hearing not to have a right of appeal on the merits", it is denied that Article 6 requires such a merits appeal.

21. Comparison with the rest of the environmental permitting regime, or the planning and statutory nuisance regimes is not of assistance. The exemption procedure is *sui generis*, being intended to remove regulatory burden.

22. Accordingly, a simplified dispute resolution procedure is appropriate, prioritising a negotiated solution, as the Defendant has demonstrated in the instant case through its request that the Claimant seek reconsideration.

Ground 3: Article 1, Protocol 1

23. The above submissions with respect to Article 6 are repeated. The Claimant has failed to show how Article 1 Protocol 1 is engaged.

24. With regard to the first limb of Article 1 Protocol 1 "deprivation", the deregistration has not deprived the Claimant of its property or possessions. In the alternative, the deregistration was in the public interest and lawful under the EPR.

As to the second limb, "control of use", the deregistration is in compliance with the need to control the use of the property in the general interest.

25. If such justification is required, any action taken has been wholly proportionate – taking into account the long-running nature of nuisance at the site and the public interest in removing it.

26. It is submitted that the Claimant's interpretation of Article 1 Protocol 1, though novel, misunderstands the significant extent of the margin of discretion afforded to Member States under this provision.

Conclusion

27. It is respectfully submitted that permission should be refused as none of the grounds are arguable. In the alternative, all the grounds should be dismissed.