# Mediating a high-profile environmental dispute

**Lord Carnwath CVO**

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- This mediation arose from a complex and highly contentious dispute about emanations from a landfill site in the Midlands. It had attracted widespread complaints from the public, and representations from MPs and the Press.
- The background was described by the Court of Appeal in a judgment in early 2022 (*R (Richards) v The Environment Agency*[2022] EWCA Civ 26 (17.1.22)):
  - "From a time in late 2020 onwards, complaints were received about foul-smelling odours coming from the landfill site. The principal cause of the odours was hydrogen sulphide gas. The emissions give rise to a strong, foul-smelling odour like the stench of rotten eggs. It can cause irritation to the eyes, sickness, headaches, vomiting and other symptoms… The level of complaints was high. We were told that there had been about 45,000 complaints in a period of some months in 2021, more than the number of complaints made about all other such facilities in the country combined."
- Those proceedings had been brought by Mathew Richards, a five-year-old boy with severe health problems living in the area, alleging breach by the Agency of his rights under articles 2 and 8 of the European Convention of Human Rights. The action failed. Although the court found that Matthew's health had been directly affected, it accepted that at the date of the hearing (August 2021) the Agency was taking reasonable steps to monitor the problem and deal with it.

# Legal Background

- The legal framework was complicated by the overlapping jurisdictions of -
  - Staffordshire County Council, as waste planning authority, responsible for enforcement of conditions in the planning permission;
  - Environment Agency, as regulator with responsibility for granting permits and with powers of enforcement under Environment Act 1995, and
  - Borough Council, with duties to take action in respect of “statutory nuisances” under Part III of the Environmental Protection Act 1990.
- The statutes are unhelpfully reticent about how these respective functions are expected to interact. But it was clear that the Borough Council, having identified a statutory nuisance, had an independent duty to act, regardless of any action or lack of action by the Agency.

# Statutory nuisance proceedings

- The Council had served an abatement notice on the operator under s.80 of the 1990 Act on 13 August 2021, which was subject to appeal.
- This seems to have provided the stimulus for further action by the operator, including the engagement of new experts. By the summer of 2022, there was a reasonable degree of consensus about the action that needed to be taken to deal with the problem.
- Meanwhile a date had been set for a hearing of the statutory nuisance appeal in Autumn 2022 before a District Judge. Leading and junior counsel had been instructed.
  - "The hearing was listed for a four week trial, with directions providing for disclosure and the exchange of factual and expert evidence. In addition to factual experts, the parties each intended to call expert witnesses on hydrology, odour and landfilling."
  - See https://www.ftbchambers.co.uk/news/news-view/landfill-odour-case-settled

# Mediation

- It was at this point (in July 2022) that I was approached to act as mediator, with a view to arriving at an agreed resolution of all the outstanding issues.
- As I understood it, there were three main factors which led the parties to agree to mediation, in preference to the court procedure:
  - The unattractive prospect of a long and expensive hearing with highly technical evidence before a non-specialist judge;
  - In court the issues would be confined by the statutory framework - whether there was a statutory nuisance at the time of the notice (August 2021), and what was needed to “abate” it; rather than looking broadly for practical solutions to the outstanding problems at the time of the hearing, and providing an effective and transparent regime for the future;
  - The major and complex issue of costs could be left unresolved.

# The outcome*

- The mediation was conducted over two days in the offices of the solicitors (Browne Jacobson) in Nottingham
- The result was an agreement whereby the operator agreed to withdraw its appeal against the statutory nuisance abatement notice, subject to an agreed programme of remedial measures and monitoring procedures. This was subject to approval by the District Judge which was duly given.
- The agreement also provided for payment by the operator of a substantial contribution towards the Council's costs already incurred and the costs of future monitoring, and arrangements for improved information to the local community.

- * Reported in Local Government Lawyer 24.10.22; see also https://www.ftbchambers.co.uk/news/news-view/landfill-odour-case-settled

- The agreement provided for a formal statement by me confirming the agreement, and stating:
- “Walleys Quarry Limited acknowledge that the site has been the source of community complaint, and the council acknowledge that Walleys Quarry Limited have improved their operational practices such that odour emissions have recently reduced significantly and best practicable means are currently in place.
- The terms of the agreement reached by the parties ensure that an abatement notice will remain in place and require best practical means to prevent any repetition so far as is reasonably possible of any statutory nuisance and provide for ongoing reporting to give continuing assurance to the community.”

# Points to consider

- Mediation versus the relief which can be claimed in court proceedings. Mediation offered a potentially much cheaper alternative, and the opportunity to cut through the legal and factual complexities, to a more flexible and practical approach.
- Choice of mediator – horses for courses. In this case, I believe, the parties saw me as a senior legal figure with direct experience over many years of dealing with environmental cases, as practitioner and judge; while it may have been thought that the involvement of a former Supreme Court justice would help to promote public acceptance of any resulting agreement.
- Good working relationship between mediator and lawyers. In this case the process was much assisted by two preliminary zoom sessions with counsel on both sides.
- Detailed preparation. It is essential that the mediator is fully briefed on the legal, factual and technical background of the case, so that he/she can command confidence of the parties in the discussions

- A good working environment – adequate rooms for the parties and their advisers to meet separately, and for joint sessions, with a separate room for the mediator. I was very grateful to the solicitors (Browne Jacobson, Nottingham) for organising this in advance without any need for input from me.
- A firm but realistic timetable. In this case, the parties had allowed four days for the process, but I decided at an early stage to set a much tighter timetable of two days, which was achieved.
- All key parties present – including not only the lawyers and the main experts, but crucially the decision-makers (with the necessary authority to conclude the agreement).
- Costs can be a major stumbling-block. It is essential that they are on the table from the start.

# Thank you

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