Neutral Citation Number: [2023] EWHC 1922 (Admin)

Case No: CO/1792/2022

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 01/08/2023

Before :

MR JUSTICE EYRE

- -

Between :

THE KING **on the application of** **GARRY BALL**	**Claimant**
- and -	
HINCKLEY & BOSWORTH BOROUGH COUNCIL	**Defendant**
- and -	
REAL MOTORSPORT LTD	**Interested Party**

- -
- -

Piers Riley-Smith (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Gordon Wignall (instructed by **Defendant Legal Department**) for the **Defendant**

Hearing date: 19th July 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 1st August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

Mr Justice Eyre:

1. The issue I am to address turns on a shortly stated point of law. The question is whether a local authority which has issued an abatement notice under section 80 of the Environmental Protection Act 1990 ("the 1990 Act") in respect of a statutory nuisance in the form of noise emitted from premises has the power subsequently to vary that abatement notice. The Claimant says that a local authority has no such power. He says that as a consequence the Defendant's variation on 31st March 2022 ("the Variation") of an abatement notice issued on 21st November 2014 ("the Abatement Notice") relating to premises operated by the Interested Party was unlawful and falls to be quashed.

2. Permission was given by Steyn J who noted that there is no direct authority on this issue. The Interested Party has taken no part in the proceedings.

3. The Claimant's case is simply that the Variation was unlawful because the Defendant had no power to vary the Abatement Notice. He does not make any other public law challenge to the decision to vary. It follows that I am to approach the case on the footing that if the Defendant has a power to vary an abatement notice that power was validly exercised in this case.

4. As I will explain below the parties disagree as to whether the Variation had the effect of watering down the restrictions imposed by the Abatement Notice. I will address the issue in the first instance on the basis that the Variation had the effect of at least arguably reducing the restrictions imposed by the Abatement Notice on the Interested Party and will consider whether such a variation was lawful. If a local authority has power to make such a variation then it is not suggested that it does not also have power to make a variation which maintains the same overall level of restriction (as the Defendant says was the position here). If I conclude that there was no power to make a variation reducing the restrictions it will then be necessary to consider whether a variation which does not reduce the overall level of restriction can nonetheless be made lawfully. It will only be if I conclude that the latter is lawfully permissible but the former is not that it will be necessary to consider the actual effect of the Variation.

The Factual Background.

5. The Interested Party operates the Mallory Park Circuit ("the Circuit"). This is a car and motor cycle racing circuit in the village of Kirkby Mallory. Most of the properties in the village are within 500 metres of the Circuit and some are even closer.

6. The Circuit has been used regularly for motor sports since the mid 1950s with the frequency of events varying over the years depending on the popularity of that sport. In December 1985 the Defendant served a noise abatement notice on the company which was then operating the Circuit. In March 2014 the Local Government Ombudsman reported on a complaint made by some of the residents in the village that the Defendant had delayed in taking enforcement action for breaches of that notice. As that report noted "many residents of the village can hear motorsport noise whenever the track is used" and "motor racing on a hard surface is clearly audible throughout a large part of the village."

7. The Ombudsman's report was followed by the issuing of the Abatement Notice. This gave notice that the noise from racing activities at the Circuit had given rise to a statutory nuisance which the Defendant was satisfied was likely to recur. The Abatement Notice required the Interested Party to restrict the recurrence of that nuisance and "from 1st January 2015 to cease or cause to cease the operation of the Mallory Park Racing Circuit by motor vehicles other than in accordance with the Schedule … attached."

8. The Schedule laid down a regime for the operation of the Circuit. It defined noisy days, non-noise event days, and quiet days with noisy days being sub-divided into race days, high noise days, and medium noise days. The Schedule set an annual limit on the number of high noise and medium noise days; limited the number of noisy days which there could be in any seven day period; provided for intervals between noisy days; and regulated the hours when motor vehicle activities could be undertaken. In addition it laid down limits on the noise level for vehicles using the Circuit and provided for the publication of a calendar of activities. At clause 21 the Schedule provided for variation thus:

> "The operator may request any variation of this Schedule in writing and if a variation is agreed by the Council it shall take effect only on receipt by the Operator of written confirmation of the variation. In applying for any variation the Operator must remind the Council that the variation only takes effect on receipt by the Operator of the Council's written confirmation."

9. The procedure laid down in clause 21 led to variations of the Schedule in 2015, 2017, 2018, and in 2021.

10. The Variation of 31st March 2022 followed a request made by the Interested Party on 1st December 2021 and was made after consultation with those living in the village and others. Five variations were requested although the fifth of those was withdrawn by the Interested Party following the consultation exercise. The Defendant agreed to three of the variations but refused to make the fourth requested.

11. The Schedule had provided that there should be a minimum one hour continuous lunch break on race days. The Variation in this regard was to permit the lunch break to be reduced to 30 minutes on 26th December when the Interested Party held its Boxing Day Plum Pudding event. The Interested Party had sought this variation because at that event the operating hours were only from 10.00am to 3.30pm rather than the normal operating hours for race days of 9.30am to 6.00pm. The Defendant's decision said that the reason for this variation was that "there was no evidence of increased noise nuisance from previous variations and the level of control provided by the original notice would continue". The other two permitted variations did not change the total annual number of noisy days but did alter the days when these could occur. The effect of the second variation was to allow there to be three consecutive noisy days once a year. The effect of the third was allow there to be once a month a noisy day on a Friday followed immediately by another noisy day. In each of those instances the reason was the same as had been given for the first variation.

12. The variations which had been made in earlier years had expressly been temporary but those made in March 2022 were expressed to be permanent albeit subject to annual review.

13. The Claimant lives in the village and he contends that the effect of the Variation is to increase the impact which noise from motor racing at the Circuit will have on him and on other residents. He says that the increased impact will come from the reduction in the required lunch interval on Boxing Day and the provision for noisy days to be permitted in close proximity to each other. In his skeleton argument Mr Riley-Smith put it thus:

> "The impact of these changes self-evidently worsened the noise landscape in the locality by together reducing the period of quiet during Boxing Day; allowing 3 days of consecutive noise on occasions and by reducing the respite between noisy weekends. Cumulatively, the noise effects from the operations are, on their face, worse than they were when the Notice was issued."

14. The Defendant does not accept that the Variation amounts to any watering down of the protection which the Abatement Notice provides to local residents nor that there will be an increased effect on them. It says that the limit on the total number of noisy days will remain unchanged and that the rationale for allowing the variation was that the previous variations showed that there would be no increased noise nuisance from the variation allowed.

15. As explained above the question of whether the Variation does or does or not have the effect of permitting an increased impact will only be material if I conclude that the Defendant could not lawfully vary the Abatement Notice to reduce the restrictions imposed but could make a variation which did not have that effect.

16. It is not suggested that the Variation operated to increase the restrictions imposed on the Interested Party by the Abatement Notice and the Schedule. Mr Riley-Smith submitted that because the Variation provided for an annual review of the changes which had been made it envisaged the prospect of the restrictions being tightened. I do not accept that analysis. The Variation says that on the annual review the Defendant "will consider the impact of the change and if it should remain or revert back to the original". The effect is that the annual review will be with a view to a removal of the March 2022 variations or of one or more of them with the consequence that the Schedule would revert in respect of such variation to its original unvaried terms. If there is such reversion the restrictions after the reversion would be tighter than those before the reversion but the restrictions would not go beyond those originally imposed by the Abatement Notice. For the purpose of considering whether a variation operates to increase the restrictions imposed by an abatement notice the assessment is to be made by reference to the original terms and not to any subsequent variation. In any event no such upwards or tightening variation has been made. The lawfulness of such a variation would have to be considered as and when it was made in the light of any challenge at that time. It follows that I am not concerned with the question of whether a local authority has power to vary an abatement notice so as to restrict activities formerly permitted under such a notice. Different considerations may well apply in such a case from those which apply to a variation which either waters down the restrictions or modifies them while leaving the overall level of restriction unaltered and which is in accordance with the wishes of the party subject to the abatement notice.

The Legislative Framework.

17. The starting point is section 79(1)(g) of the 1990 Act. This provides that "statutory nuisances" for the purposes of the relevant part of the Act include those consisting of "noise emitted from premises so as to be prejudicial to health or a nuisance".

18. Section 79(1) also imposes a duty on local authorities to review their areas in the following terms:

> "it shall be the duty of every local authority to cause its area to be inspected from time to time to detect any statutory nuisances which ought to be dealt with under section 80 below or sections 80 and 80A below and, where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practicable to investigate the complaint."

19. Section 80 provides as follows for the issuing of an abatement notice in respect of a statutory nuisance caused by noise:

> "(1) [Subject to subsection (2A) where] a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, in the area of the authority, the local authority shall serve a notice (*"an abatement notice"*) imposing all or any of the following requirements:
>
> (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.
>
> …
>
> (2A) Where a local authority is satisfied that a statutory nuisance falling within paragraph (g) of section 79(1) above exists, or is likely to occur or recur, in the area of the authority, the authority shall–
>
> (a) serve an abatement notice in respect of the nuisance in accordance with subsections (1) and (2) above; 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.
>
> (2B) If a local authority has taken steps under subsection (2A)(b) above and either of the conditions in subsection (2C) below is satisfied, the authority shall serve an abatement notice in respect of the nuisance.
>
> (2C) The conditions are–
>
> (a) that the authority 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 authority 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 area of the authority.
>
> (2D) The relevant period is the period of seven days starting with the day on which the authority was first satisfied that the nuisance existed, or was likely to occur or recur.
>
> …"

20. Those provisions impose a duty on the relevant local authority. If it is satisfied on the balance of probabilities that a statutory nuisance exists then an abatement notice must be issued subject only, in the case of a noise nuisance, to the provision of a seven-day period in which the local authority can seek to persuade the person responsible to abate the nuisance or to prohibit or restrict its recurrence: see per Carnwath J in *R v Carrick DC ex p Shelley* [1996] Env L R 273 at 277.

21. It will have been seen that an abatement notice served under section 80(1) can either, by a notice under section 80(1)(a), simply require the abatement of the statutory nuisance or the prohibition or restriction of its occurrence or recurrence or can, by subsection 80(1)(b), require the execution of such works as are necessary for any of those purposes. Counsel were agreed that in the circumstances here the Abatement Notice was to be seen as taking the second of those courses. I agree with that analysis. However, the distinction does not matter for the purpose of determining whether the Defendant may lawfully vary the Abatement Notice.

22. Section 80(3) gives a person served with an abatement notice a right of appeal to the magistrates' court subject to a time limit of 21 days.

23. Regulation 2(2) of the Statutory Nuisance (Appeals) Regulations 1995 lists the grounds on which such an appeal may be made. The following grounds are to be noted:

> "(2) The grounds on which a person served with such a notice may appeal under section 80(3) are any one or more of the following grounds that are appropriate in the circumstances of the particular case –
>
> …
>
> (c) that the authority have 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;
>
> …
>
> (e) where the nuisance to which the notice relates-
>
> (i) is a nuisance falling within [section 79(1)(a), (d), (e), (f), (fa) or (g)] of the 1990 Act and arises on industrial, trade, or business premises, or
>
> (ii) is a nuisance falling within section 79(1)(b) of the 1990 Act and the smoke is emitted from a chimney, or
>
> (iii) is a nuisance falling within section 79(1)(ga) of the 1990 Act 2 and is noise emitted from or caused by a vehicle, machinery or equipment being used for industrial, trade or business purposes, or
>
> (iv) is a nuisance falling within section 79(1)(fb) of the 1990 Act and—
>
> (aa) the artificial light is emitted from industrial, trade or business premises, or
>
> (bb) the artificial light (not being light to which sub-paragraph (aa) applies) is emitted by lights used for the purpose only of illuminating an outdoor relevant sports facility (within the meaning given by section 80(8A) of the 1990 Act),
>
> that the best practicable means were used to prevent, or to counteract the effects of, the nuisance;

> (f) that, in the case of a nuisance under section 79(1)(g) or (ga) of the 1990 Act (noise emitted from premises), the requirements imposed by the abatement notice by virtue of section 80(1) (a) of the Act are more onerous than the requirements for the time being in force, in relation to the noise to which the notice relates, of-
>
> (i) any notice served under section 60 or 66 of the 1974 Act (control of noise on construction sites and from certain premises), or
>
> (ii) any consent given under section 61 or 65 of the 1974 Act (consent for work on construction sites and consent for noise to exceed registered level in a noise abatement zone), or
>
> (iii) any determination made under section 67 of the 1974 Act (noise control of new buildings)."

24. By regulation 2(5)(b) the magistrates' court may, instead of either quashing the abatement notice or dismissing the appeal, "vary the abatement notice in favour of the appellant in such manner as it thinks fit".

25. A person who without reasonable excuse contravenes an abatement notice or who fails to comply with any requirement or prohibition in such a notice is guilty of an offence by virtue of section 80(3). In addition to the provision in section 80(3) that the offence is of contravention or non-compliance without reasonable excuse section 80(7) provides that it shall be a defence for the person charged with an offence to prove "that the best practicable means were used to prevent or to counteract the effects of the nuisance". In respect of various categories of statutory nuisance including a noise nuisance the section 80(7) defence is, by virtue of section 80(8), only available "where the nuisance arises on industrial, trade, or business premises".

26. Where there has been a failure to comply with an abatement notice prosecution will typically be by the relevant local authority but it is open to others to bring a private prosecution. Thus in *Sovereign Rubber Ltd v Stockport MBC* [2000] Env LR 194 Sedley LJ envisaged that such a prosecution might be brought by "an aggrieved neighbour".

27. In addition to the provisions for the service of an abatement notice by a local authority section 82 of the 1990 Act provides for a person "aggrieved by the existence of a statutory nuisance" to make a complaint to the magistrates' court.

28. Section 82(2) provides as follows that in the event of such a complaint:

> "If the magistrates' court or, in Scotland, the sheriff is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises or, in the case of a nuisance within section 79(1)(ga) above, in the same street or, in Scotland, road, the court or the sheriff shall make an order for either or both of the following purposes—
>
> (a) requiring the defendant or, in Scotland, defender to abate the nuisance, within a time specified in the order, and to execute any works necessary for that purpose;
>
> (b) prohibiting a recurrence of the nuisance, and requiring the defendant or defender, within a time specified in the order, to execute any works necessary to prevent the recurrence;"

29. It is an offence without reasonable excuse to contravene any requirement or prohibition imposed by an order under section 82(2) but sub-sections 82(9) and (10)

provide a defence of having taken the best practicable means in terms echoing those of section 80(7) and (8).

30. There was a degree of debate before me as to whether the provisions to which I have just referred and those which accompany them are to be seen as providing a "detailed" or "skeletal" or "comprehensive" framework. On behalf of the Claimant Mr Riley-Smith characterised the framework as detailed and invoked Sullivan J's description of the Act as providing "a detailed statutory framework" (see *East Staffordshire BC v Fairless* [1999] Env LR 525 p12). For the Defendant Mr Wignall contrasted the provisions in the 1990 Act with detailed legislation of the kind dealing with embryology (such as considered in *R(Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687) or the disclosure of document to an inspector of taxes (such as considered in *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563).

31. That debate and the consequent characterisation of the framework laid down by the 1990 Act were said to be relevant to the question of whether a power to vary an abatement notice is to be implied into the Act. In my judgement the debate as to the way the framework is to be described rather misses the point. Although in *Fairless* Sullivan J did set out the statutory provisions at some length he was not using the words "a detailed statutory framework" as a term of art still less as determining how those provisions should be seen for all purposes. Rather that expression was a description of the provisions for the purpose of the issue the court was addressing namely whether additional requirements should be imported into a notice under section 82(6) in addition to those already expressly contained in the Act. It is also to be noted that Sullivan J's recital of the other provisions of the Act was in part for the purpose of contrasting the particularity which those provisions required in relation to an abatement notice with the less onerous requirements for a section 82(6) notice.

32. As I will discuss further below what is required is to consider the provisions of the 1990 Act to determine whether the criteria for the implication of a power to vary an abatement notice are present. At points Mr Riley-Smith's argument came close to saying that the court should seek to find the correct adjective to describe the provisions and then use that as the touchstone to determine the question of implication. That is not the appropriate course. The decision in *R v Bristol City Council ex p Everett* [1999] 1 WLR 92 and 1170, which I will consider in some detail below, makes it clear that there is scope for implying at least one power in addition to those provided expressly by the 1990 Act. The question for me is whether a power to vary an abatement notice is also to be implied. That will involve considering the provisions of the Act together with their context and purpose. Where those provisions fall on a notional spectrum ranging from skeletal to comprehensive is not determinative of the issue. It is, however, right to note that the more comprehensive the regime laid down by a piece of legislation the less scope there will be for the court to find that a further power is necessarily to be implied but all will depend on the particular provisions seen in context rather than on how they are to be described.

33. The disagreement as to the purpose of the 1990 Act had rather more significance.

34. Mr Riley-Smith submitted that the purpose of the Act was the protection of members of the public from statutory nuisances. He said that the regime derived from the Act "operates in absolutes" with the aim being the prevention and removal of statutory

nuisances rather than the drawing of some form of balance between those affected by such nuisances and those whose operations give rise to them. The Claimant's position was that it was not open to a local authority to conclude that a statutory nuisance existed but then to decide that it would nonetheless permit that nuisance to continue to a limited degree. A nuisance continuing at a reduced level but still at a level such as to be a statutory nuisance would remain a statutory nuisance against which a local authority was required to take action.

35. In support of that view of the purpose of the Act the Claimant prayed in aid: the local authority's duty to inspect its area; the fact that the relevant authority has a duty and not a discretion to issue an abatement notice; the strict time limit for an appeal; the reservation of the express power to vary the notice to the magistrates' court; and the fact that once an abatement notice has been issued a private prosecution could be brought by a person other than the local authority.

36. Mr Riley-Smith also placed weight on the wording of section 80(1) and (2A). He said that "restricting" there was not to be read as meaning reducing or controlling while still allowing to continue. Instead when read in context it was addressing the prospect of a recurrence of the nuisance and was to be seen as the equivalent in relation to a recurrence of abating or prohibiting which were used respectively of a nuisance which either existed or which was likely to occur.

37. The Defendant's position was that the purpose of the Act was to enable local authorities to hold a balance between the interests of those affected by statutory nuisances and those whose activities give rise to such nuisances. In that regard for his part Mr Wignall also relied on the use of the word "restricting" in section 80. He said that this was a normal word of ordinary usage and should be given its normal meaning of reducing an activity rather than of ending it. Thus in accord with that interpretation it would be open a local authority to impose a requirement in an abatement notice which had the effect of restricting the activity in question while permitting it to continue at a level which remained a statutory nuisance. In addition Mr Wignall pointed to the fact that non-compliance with an abatement notice is only an offence in the absence of reasonable excuse and to the availability of the defence, limited in some instances to nuisances from industrial, trade, or business premises, that the best practicable means to prevent or counteract the effects of the nuisance had been used.

38. Although there is force in Mr Wignall's contention as to the ordinary meaning of "restricting" that term is to be read in its context. When that is done Mr Riley-Smith's reading of section 80(1) and (2A) is correct. In those provisions the term "restricting" is being applied to the occurrence or recurrence of a nuisance and is being used as the equivalent in relation to such events of abating and prohibiting. It is also significant that the section does not refer to restricting the nuisance (in which case Mr Wignall's reading would be compelling) but to restricting the occurrence or recurrence of the nuisance. Although a nuisance could be restricted in the sense of being left in being but reduced in its scope the same cannot readily be said of an occurrence or recurrence.

39. However, I do find that the provisions in the Act relating to reasonable excuse and to the defence of using the best practicable means to prevent or counteract the effects of the nuisance are significant. It is particularly telling that the best practicable means defence can operate even when those means are directed not at preventing the

nuisance but at counteracting its effects. That contemplates a nuisance remaining in being albeit with its effects minimised to the greatest extent practicable. It is also significant that, as was recognised in *Everett,* the local authority not only has a discretion whether to prosecute for breach of an abatement notice but also has a power to withdraw such a notice.

40. In light of those matters I do not accept Mr Riley-Smith's characterisation of the Act as operating in absolutes. The purpose of the Act is indeed to protect members of the public from statutory nuisances but that purpose is to be achieved against the background of a recognition of matters of practicality and of the interests of others. The purpose cannot be said to be that local authorities are to draw a balance between the competing interests because the primary thrust of the Act is clearly the prevention and removal of statutory nuisances. To the extent that there is a balancing exercise the scales start off weighted in favour of enforcement. However, that primary thrust is not unqualified and the balance can change. The purpose of the Act is to provide for the removal of statutory nuisances but for that to be done in a way which takes account of the existence of other factors including the fact that the total removal of a nuisance might not be practicable and that in such circumstances the taking of the best practicable means to counteract its effects might be the most that can be achieved.

The Parties' Cases in Outline.

41. The Claimant says that the regime under the 1990 Act is clear. The Act properly interpreted does not make express provision for variation of an abatement notice by a local authority and there is no necessity for such a power to be implied. The Claimant contends that the decision in *Everett* can be distinguished from the circumstances of the current case and does not compel the conclusion that a power to vary is to be implied.

42. The Defendant's position is that *Everett* is not distinguishable and that the approach taken there to the withdrawal of an abatement notice is applicable to the variation of such a notice. In any event such a power to vary exists either by way of interpretation of section 80 or by way of implication. Alternatively, the Defendant relies on section 111 of the Local Government Act 1972 contending that the power to vary an abatement notice facilitates a local authority's discharge of its powers under the 1990 Act or is conducive or incidental to such discharge.

Is it too Late for the Claimant to challenge the Lawfulness of the Provision for Variation?

43. In its Detailed Grounds of Resistance and in Mr Wignall's skeleton argument the Defendant had contended that the claim was in reality a challenge to the lawfulness of clause 21 of the Schedule to the Abatement Notice. It said that the Claimant was very substantially out of time to make a challenge to the Abatement Notice or to the incorporation of clause 21 in the Schedule. It said that the Variation of 31st March 2022 was consequent upon the incorporation of clause 21 in the Abatement Notice as originally issued and was to be seen as the implementation of the decision made in 2014. In the course of argument Mr Wignall accepted that the Defendant could not maintain that stance. He was correct to do so. The short point is that if as a matter of law the Defendant does not have power to vary the Abatement Notice then it cannot give itself such a power by including in that notice a clause providing for variation. Such a clause would amount, on this hypothesis, to the Defendant purporting to give

itself a power which it does not have. That exercise would be ineffective to increase the Defendant's powers meaning that the Variation of March 2022 was a fresh decision which is open to challenge by the Claimant. By virtue of the same reasoning the Defendant could not rely on clause 21 as providing lawful authority for the Variation if it did not otherwise have power to make such a variation.

Does a Power to vary the Abatement Notice arise by Interpretation of and/or necessary Implication from the 1990 Act?

44. The approach to be taken in interpretation of a statute was summarised thus by the Chancellor in *Darwell v Dartmoor National Park Authority* [2023] EWHC 35, [2023] Ch 141 at [16] - [19] of which [16] and [19] are of particular relevance for current purposes saying:

> "16. The correct approach to statutory interpretation has recently been authoritatively stated by Lord Hodge DPSC in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2023] AC 255, paras 29—31 as summarised by Lord Stephens JSC in *R (Coughlan) v Minister for the Cabinet Office* [2022] 1 WLR 2389, para 13:
>
> > `In R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] 2 WLR 343, Lord Hodge DPSC in his leading judgment, with which all in the majority concurred, reiterated, at para 29, that the primary source by which meaning is ascertained is by way of conducting an analysis of the language used by Parliament. Lord Hodge DPSC stated, at para 31, that `Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered'. Lord Hodge DPSC also stated, at para 30, that external aids to interpretation therefore must play a secondary role. He continued by stating: `Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity``.
>
> …
>
> 19. The rights conferred by an Act include rights which are necessarily implied. A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context and having regard to their purpose:…"

45. In *R (Morgan Grenfell) v Special Commissioner of Income Tax* (above) at [45] Lord Hobhouse emphasised the requirement of necessity thus:

> "It is accepted that the statute does not contain any express words that abrogate the taxpayer's common law right to rely upon legal professional privilege. The question

> therefore becomes whether there is a necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in *B (A Minor) v Director of Public Prosecutions* [2002] 2 AC 428, 481. A necessary implication is one which necessarily follows from the express provisions of the statue construed in their context. It distinguishes between what it could have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

46. Lady Hale qualified that analysis of the law as follows in *R(Black) Secretary of State for Justice* [2017] UKSC 81,[2018] AC 215 at [36(3) and (4)]:

> "The goal of all statutory interpretation is to discover the intention of the legislation."

> "That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose. In this context, it is clear that Lord Hobhouse of Woodborough's dictum *in R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, 616, para 45, that "A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context must be "modified to include the purpose, as well as the context, of the legislation."

47. Lady Hale's modification of Lord Hobhouse's dictum so as to require account to be taken of the purpose of the statute as well as its context means that the focus of attention must be wider than the narrow concentration on language which Lord Hobhouse's words contemplate. In that regard the dicta of Lords Bingham and Steyn in *Quintavalle* at [8] and [21] respectively are also of note. Nonetheless the requirement of necessity remains. The proposed implication must be necessary and it is not sufficient for the court to find that it is reasonable, desirable, or sensible.

48. Mr Riley-Smith submitted that questions of interpretation and of necessary implication are distinct and that the processes of interpretation and implication are different ones. That view is supported by the last sentence of Lord Hobhouse's dictum and as a matter of strict logic interpretation and implication are distinct exercises. The academic distinction between the two is, however, of little relevance because both are parts of a single process namely discovering the intention of the legislature by reference to the words used when seen in context and in light of the purpose of the legislation under consideration. It is of note that both Lady Hale and the Chancellor in the passages I have quoted above regarded interpretation and necessary implication as stages in a single process.

49. I turn against that background to the decision in *Everett.* The claimant sought judicial review of the defendant council's decision to withdraw an abatement notice which had required removal of a steep internal staircase in a dwelling house. The council had changed its view as to whether the staircase was a statutory nuisance and had concluded that it was not a nuisance because it was not prejudicial to health. Richards J agreed with the council that a steep staircase could not constitute a statutory nuisance. However, he went on to consider what the position would be if he was wrong. It follows that Richards J was addressing the question of withdrawal on the hypothesis that the staircase was capable of being a nuisance.

50. Richards J summarised the submissions of counsel for the council thus at 105H – 106C:

> "For the council, Mr. Bhose submitted that there must be an implied power of withdrawal. A local authority is both the enforcing and prosecuting authority under Part III of the Act of 1990. Service of an abatement notice is a step in a procedure which may lead to criminal liability. It must be the 'position (and the applicant does not suggest otherwise) that the authority has a discretion whether to prosecute for breach of an abatement notice. The principles of finality and certainty require that, if the authority decides not to prosecute, it may also formally withdraw the abatement notice itself. Moreover the whole thrust of the relevant provisions is to place upon a local authority a continuing duty of review. There is a general duty under section 79(1) to cause the authority's area to be "inspected from time to time" in order to detect any nuisances that ought to be dealt with under section 80. The duty under section 80(1) is to serve a notice where the authority "is satisfied" that a statutory nuisance exists or is likely to occur or recur. It would be very surprising if the authority, having served a notice on the basis that it was satisfied on the evidence available at a particular point in time, were thereafter unable to withdraw the notice even if, because of changes of expert opinion or other changes in circumstances, it ceased to be satisfied that a statutory nuisance existed or was likely to occur or recur. Further, in reaching a decision under section 80(1) the local authority is performing an executive function, not a judicial function…."

51. The judge said that he accepted those submissions and added:

> "In the absence of an implied power to withdraw an abatement notice, the enforcement provisions would in my view be unduly rigid. It seems senseless that an authority should be unable to withdraw an abatement notice which, for whatever reason, it no longer considers to be appropriate. It is particularly unsatisfactory that the recipient of the notice should remain subject to it and, by reason of a failure to comply with its requirements, should remain in breach of the criminal law in circumstances where the local authority does not consider the notice to be appropriate and has no intention of bringing a prosecution for breach of it. A power of withdrawal is therefore consistent with, and serves to promote rather than to undermine, the legislative scheme. I see no difficulty in implying such a power…."

52. The Court of Appeal agreed with Richards J that the staircase was not a statutory nuisance. Mummery LJ dealt shortly with the question of a power to withdraw an abatement notice thus at 1179H – 1180A:

> "The issues relating to the power of the council to withdraw a valid abatement notice, which has been served and not successfully appealed, and the lawfulness of the exercise of that power by the council do not need to be decided on this appeal.
>
> I intend no disrespect to the careful a submissions advanced on behalf of the applicant when 1 simply say that, if Richards J. was wrong on the main point (which he was not), there is no error in his conclusions on the other two issues: the council clearly had an implied power to withdraw the notice and it exercised that power lawfully."

53. Buxton LJ delivered a short concurring judgment which did not address the question of withdrawal and Hirst LJ agreed with both judgments.

54. Although the point was only addressed shortly in the Court of Appeal it is apparent that this was because Mummery LJ had no doubt that the conclusion reached by Richards J was correct. In that regard it is to be noted that Mummery LJ pointed out

that the court had heard full argument on the point. It follows that this is clear authority to the effect that a local authority has power to withdraw an abatement notice.

55. Mr Wignall submitted that the decision in *Everett* could be seen either as an exercise in necessary implication or as having been reached on the basis that the council had a power of withdrawal by reason of section 111 of the 1972 Act. I do not agree that the decision can be seen as having been an application of section 111. Not only was there no reference to that provision in the judgments either at first instance or in the Court of Appeal but both Richards J and Mummery LJ proceeded expressly on the footing that the court was engaged in an exercise of implication. Thus Richards J concluded his analysis by saying "I see no difficulty in implying such a power" and Mummery LJ said "the council clearly had an implied power to withdraw the notice". It follows that the decision in *Everett* was on the basis that the power to withdraw arose by way of necessary implication from the terms of the 1990 Act.

56. It is apparent that there were three particular factors which together led to Richards J's conclusion. First, that the provisions would be "unduly rigid" in the absence of a power to withdraw an abatement notice. Second, that in light of the fact that the authority had a discretion as to whether or not to prosecute for a failure to comply with an abatement notice it would be "senseless" and "particularly unsatisfactory" if there was no power of withdrawal. Finally, such a power was consistent with and promoted the purpose of the legislation.

57. Mr Riley-Smith accepted that if *Everett* could not be distinguished from the current case then it was binding authority in favour of the Defendant. However, he said that *Everett* was distinguishable. In summary Mr Riley-Smith's contention was that the withdrawal and the variation of an abatement notice were materially different exercises. In the case of the former the notice ceased to exist and no longer had any effect whereas in the case of a variation the notice remained in being but in altered terms. Mr Riley-Smith said that this distinction was both material and important because of the different consequences for certainty of knowledge. If an abatement notice was withdrawn all concerned knew that it was no longer in existence. In the absence of a power to vary the position was the binary one that there was either a notice in particular terms or there was no notice and all would know where they stood. However, if a notice could be varied then there was uncertainty, Mr Riley-Smith submitted, both as to the present and the future. As to the present there was uncertainty because of the scope for doubt as to what the terms currently in force actually were and as to the future scope for doubt as to whether a notice would be varied or would continue in the same terms. Mr Riley-Smith proceeded from this point to contend that a power of variation would be contrary to the scheme and purpose of the 1990 Act in the way that a power of withdrawal was not. In large part that was because of the need for certainty and the binary distinction (between there being a notice in force and the absence of a notice) which he said the Act envisaged.

58. For a later case to be distinguishable from an earlier decision it is not sufficient that there is some difference between the facts of the two cases. There will almost always be some differences between the facts of two different cases. What is necessary is for the factual differences between the two cases to be relevant to the application of the principles or rule of law in question. An earlier case is distinguishable from a later one if the differences are such that to apply to the later case the principles or rule applied

in the earlier one would be to apply those principles or rule in materially different circumstances. The circumstances will be materially different if the points of difference between the cases are potentially relevant to the application of the principle or rule. Cases will not be distinguishable if the factual differences do not relate to the considerations which caused the principle or rule to be applicable in the earlier case. Putting the point more shortly are the differences such that there is a reason which justifies not applying the principle or rule to the second case and which does not contradict or undermine the basis on which it was applied in the first case?

59. Therefore, I have to consider (a) whether there is any rational basis on which it can be said that the considerations which caused the court in *Everett* to conclude that a power to withdraw an abatement notice is necessarily to be implied do not also apply to a power to vary such a notice and (b) whether there are additional considerations relevant to a power to vary which do not apply to a power to withdraw and which are such as to warrant a different approach being taken to the former than to the latter. If the considerations which were found to be relevant in *Everett* are also applicable to a power to vary and if there are no other considerations present which could rationally warrant a different approach being taken then I must apply the approach adopted in *Everett*. It is immaterial whether that is analysed as being on the footing that *Everett* is not distinguishable because the differences in the circumstances are not material in terms of the principles to be applied or because the reasoning which led to the conclusion in *Everett* is seen as being equally applicable to a power to vary.

60. For the reasons I will now explain I have concluded that the difference between a power to withdraw an abatement notice and a power to vary such a notice is not material for the purposes of the approach to be taken when considering the necessary implication of such a power. Although the withdrawal and the variation of an abatement notice are different acts the material considerations are the same in respect each of those powers. The considerations which led the courts in *Everett* to find that there was a power to withdraw are also present when considering whether there is a power to vary. Such differences as exist between the acts are not relevant to the considerations which caused the courts in *Everett* to conclude that there was an implied power to withdraw a notice.

61. As a consequence the approach taken in *Everett* to a power to withdraw a notice applies equally to a power to vary and I am bound to conclude that a local authority can lawfully exercise the latter power.

62. As explained above in *Everett* Richards J and Mummery LJ both addressed the question of an implied power to withdraw the abatement notice on the footing that the council and the court were wrong to conclude that the staircase did not constitute a statutory nuisance. It follows that they were contemplating withdrawal of the notice notwithstanding the presence of a nuisance.

63. It is apparent that Richards J was particularly influenced by the fact that a local authority has a discretion as to whether or not to prosecute for non-compliance with an abatement notice. He concluded that it was inconsistent with the existence of that discretion for there not to be a power to withdraw the notice. The same consideration applies and arguably does so with greater force to the question of a power to vary the notice. Thus it would be open to a local authority to conclude that the steps being taken by a business which was subject to an abatement notice amounted to the best

practicable means to counteract the effects of a nuisance for the purposes of section 80(7). In those circumstances a decision not to prosecute would be unimpeachable. It would also be senseless, to adopt Richard J's term, if the authority could not in those circumstances vary the notice so as to make it clear that the activity in question was permissible provided that those counteracting actions continued. Similarly, if an authority takes the view that in light of the reduced level of impact on members of the public a prosecution would not be justified if an activity is conducted in a particular way it would be unsatisfactory if that could not be made clear by way of variation.

64. Mr Riley-Smith placed great emphasis on the need for certainty. However, as the examples I have just given indicate variation of an abatement notice can operate to promote certainty rather than to impair it. A variation can operate to formalise and publicise the approach which a local authority is taking as a matter of its discretion. The position may be that an authority has decided not to prosecute if certain circumstances continue but in the absence of a variation it may be uncertain how long that approach will continue. Mr Riley-Smith was right to say that withdrawal of an abatement notice means that all concerned know the position clearly. However, that is also the position if there has been a variation. In such event the terms of the abatement notice as varied are clear and certain. A variation which was in unclear terms or potentially one which was not adequately publicised would be liable to challenge on other public law grounds but the Claimant makes no such criticism of the Variation. Mr Riley-Smith made reference to a need for "future certainty" and said that a power to vary an abatement notice would create uncertainty as to what might or might not be permissible in the future. The difficulty with that submission is the existence of the power to withdraw a notice. It follows that it cannot safely be assumed that any given abatement notice will remain in force indefinitely and the existence of a power to vary does not create any new or greater uncertainty in that regard.

65. The variation of an abatement notice is a lesser step than its withdrawal. As a matter of strict logic it does not necessarily follow that the power to take the greater step must carry with it the power to take the lesser. It would be possible to have a regime which allowed withdrawal of an abatement notice but not its variation. That would, however, be highly unusual arrangement and the normal approach is to regard a power to take a greater step as carrying with it a power to take a lesser step. The absence of a power to vary an abatement notice would not fit easily with the existence of a power to withdraw such a notice and would, as already explained, be inconsistent with the view taken in *Everett* of the consequences of a local authority's discretion to prosecute. Some limited support for this analysis is provided by the views of the editors of *McCracken* on *Statutory Nuisance* (4th ed) at 2.95 – 2.97 and the author of *Murphy* on *The Law of Nuisance* at 8.55. In each instance they express some reservations about the reasoning underlying *Everett*. However, the editors of *McCracken* assume without elaboration that the power to withdraw a notice carries with it the power to vary the notice. Mr Murphy appears to take the same view albeit somewhat tentatively and refers to "the implied power to withdraw (or vary) an abatement notice".

66. It is relevant to note that the arguments which Mr Riley-Smith has advanced to me are in very similar terms to those which were advanced to Richards J by counsel for the claimant in *Everett*. Those arguments were summarised by Richards J at 105E – G.

The fact that the same arguments were seen as relevant in each case strongly suggests that the underlying issues of principle are the same.

67. Mr Riley-Smith pointed out that although the 1990 Act does not make any express provision for the withdrawal of an abatement notice it does make express provision for variation albeit in the strictly limited circumstances of the power given to the magistrates' court on the hearing of an appeal against the making of a notice. He said that this was relevant in three related respects. First, it is a material distinction between withdrawal and variation. Next, it provides an explanation for why it would be necessary to imply a power of withdrawal when there is no similar necessity to imply a power of variation. Finally, it is an indication that Parliament did not intend a local authority to have a power of variation. If there had been such an intention the power could have been provided expressly and could have been provided to the local authority but that course was not taken. I am not persuaded by this argument. The power to vary an abatement notice in the particular circumstances of an appeal and as part of the provisions governing an appeal is directed at those particular circumstances and is not to be seen as an indication as to whether there should or should not be the implication of a similar power to be exercised in the very different circumstances which apply once an abatement notice is in force.

68. Finally, I turn to the contention that there is a material distinction between a power to withdraw an abatement notice and a power to vary such a notice because the former power promotes the purposes of the Act while the latter does not. In large measure this submission was premised on Mr Riley-Smith's contentions that the 1990 Act dealt in absolutes; that its purpose was purely the prevention and removal of statutory nuisances; and that the exercise of a power to vary would be productive of uncertainty when a power to withdraw promoted certainty. As already explained I do not agree that the existence of a power to vary would generate uncertainty. Similarly, I have explained that the purpose of the Act is to be seen as being rather more nuanced than it was said to be by the Claimant. I am satisfied that a power for a local authority to vary an abatement notice will promote the purposes of the Act in the same way as a power to withdraw would and essentially for the same reasons namely the avoidance of undue rigidity and the avoidance of artificiality flowing from the existence of the discretion not to prosecute. Indeed it can be seen by reference to the scenarios I have posited at [63] above that the existence of a power to vary will promote the purposes of the Act by regularising and formalising positions which might otherwise be unstated or unclear. In that regard the existence of a power to vary will operate to promote the purposes of the Act rather more effectively the use of the power of withdrawal. That is because variation means that the control provided by an abatement notice will remain in place but as a consequence of the variation that control will be more appropriately directed to the particular circumstances at a given time.

69. The consequence of that analysis is that there is no material difference for these purposes between the variation of an abatement notice and its withdrawal and substantially the same considerations apply to the question of whether the power to take either of those steps arises by way of necessary implication from the 1990 Act. There is no proper basis for distinguishing the approach applied in the circumstances of *Everett* from that to be applied here. I am, therefore, required to find that it is lawful for a local authority to vary an abatement notice so as to reduce the restrictions

imposed thereby. In those circumstances I need not address the issue between the Claimant and the Defendant as to whether the Variation did or did not reduce the protection provided by the Abatement Notice. As already noted different considerations may well apply to a variation which increased the restrictions imposed by an abatement notice and the conclusion that it is lawful for an authority to make variation such as that here does not necessarily apply to a variation of that type.

70. Even if I were not bound by *Everett* I would find that the same conclusion follows from a proper analysis of the meaning and effect of the 1990 Act. The considerations which I have set out above when addressing the argument that *Everett* is distinguishable from the current case also operate to indicate why a power to vary arises by way of necessary implication. In addition even if strictly distinguishable and not binding on me the circumstances of *Everett* are closely analogous to those here and the reasoning adopted there is highly persuasive as to the approach to be taken. That is particularly so given the terms in which the conclusion that a power to withdraw an abatement notice arose by way of necessary implication was reached. Richards J saw "no difficulty" in implying such a power and Mummery LJ said that a local authority "clearly" had such a power. The considerations appertaining to the implication of a power to withdraw are so similar to those relevant to the question of whether a power to vary is to be implied that what is so clear as to the former must also be correct in respect of the latter.

Does Section 111 of the Local Government Act 1972 empower the Defendant to vary the Abatement Notice?

71. It is not necessary for the Defendant to rely upon section 111 of the 1972 Act in light of the conclusion I have just expressed as to the implication of a power to vary into the 1990 Act. I will, however, explain briefly why that provision would not operate to empower the Defendant to vary an abatement notice if such a power had not arisen by way of necessary implication.

72. Section 111(1) of the Local Government Act 1972 Act provides as follows:

> "Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

73. That section has a wide ambit but its scope is not unlimited. Where there are provisions expressly defining the ways in which a local authority's particular statutory powers are to be exercised then section 111 does not operate to enable the exercise of those powers in some different way (see *Sutton LBC v Morgan Grenfell & Co Ltd* (1997) 29 HLR 608 at 617 per Peter Gibson LJ). Similarly, the section cannot be used as an "escape route" from statutory controls or to allow a local authority to act in a way which is inconsistent with other statutory provisions (see *Credit Suisse v Allerdale BC* [1997] QB 306 per Neill LJ and Peter Gibson LJ at 332H and 346G respectively).

74. If the analysis I have set out above as to the close analogy of the power to vary an abatement notice with the power to withdraw such a notice and the effect of a power to vary as furthering the purpose of the 1990 Act is correct then the same reasoning

would apply to the application of section 111 to such a power. It would warrant seeing such a power as facilitating and being conducive or incidental to the Defendant's discharge of its functions under the 1990 Act. However, in those circumstances it would not be necessary for the Defendant to rely on section 111 because the power would be derived from the 1990 Act by way of necessary implication. However, if my analysis above is wrong then section 111 will not assist the Defendant. That is because the matter would then have to be approached on the footing either that a power to vary an abatement notice is different in material ways from a power to withdraw it or that the use of a power to vary would not further the purposes of the 1990 Act. In those circumstances the purpose of the 1990 Act would have to be seen as being simply the removal of statutory nuisances and as creating a regime of the kind identified by Mr Riley-Smith with a binary distinction between circumstances when an abatement notice was in force and those when it was not. A power to vary would be inconsistent with such a purpose and such a regime and would not arise through the operation of section 111.

Conclusion.

75. In the light of that analysis the Defendant had the power to make the Variation and the claim is to be dismissed.