Neutral Citation No: [2023] NICA 15 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **HOR12012** *ICOS No:* **2021/41114/A01** *Delivered:* **27/02/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION BY NOELEEN McALEENON FOR JUDICIAL REVIEW

AND IN THE MATTER OF ONGOING FAILURES OF LISBURN AND CASTLEREAGH CITY COUNCIL AND/OR THE NORTHERN IRELAND ENVIRONMENT AGENCY AND/OR THE MINISTER, DEPARTMENT OF AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS TO ABATE A NUISANCE ORDER AND POLLUTION ARISING FROM MULLAGHGLASS LANDFILL SITE

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Hugh Southey KC with Sarah Minford BL (instructed by Phoenix Law, Solicitors) for the appellant
Gordon Anthony BL (instructed by Arthur Cox, Solicitors) for Lisburn and Castlereagh City Council
Tony McGleenan KC with Maria Mulholland BL (instructed by the Departmental Solicitor's Office) for the Northern Ireland Environment Agency and the Minister, DAERA
Stewart Beattie KC with Simon Turbitt BL (instructed by Carson McDowell LLP, Solicitors) for the notice party

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Before: Keegan LCJ, Treacy LJ and Horner LJ

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HORNER LJ (*delivering the judgment of the court*)

Introduction

[1] The appellant in this case, Noeleen McAleenon ("the appellant") resides at 17a Barleywood Mill, Lisburn, which is in the Milltown area. This property falls within the catchment area of Lisburn and Castlereagh City Council ("LCCC"). It is also in the vicinity of Mullaghglass landfill site ("the Site") which was opened in November 2006. The Site is occupied and operated by Alpha Resource Management Ltd ("Alpha"). The appellant claims that she and her family have been "plagued by the occurrence of a nuisance odour carried by emissions emanating from the Mullaghglass landfill Site" for the past four years, that is from in or about early 2018. She says that the odour has a distinct smell of rotten eggs which she finds very

disturbing. She has experienced, inter alia, painful headaches, a runny nose, eye watering and has felt nauseous on occasions. She also attributes problems with her stomach to the inhalation of these noxious fumes. She claims that she experiences these physical symptoms during periods when the Site appears to be emitting these odours.

[2] The appellant also claims that members of her family, including her grandchildren, have experienced similar symptoms when they come to visit her. The same problems trouble some of her neighbours apparently. She is especially concerned that the offensive odours will cause long term damage to herself and her grandchildren. The present consequences for the appellant include:

(a) Being unable to enjoy her garden;

(b) Being forced to remain inside with all the windows and doors firmly shut;

(c) Being worried about her mental health because she considers herself to be a prisoner in her own home.

[3] The appellant instructed her solicitors, who have also corresponded on behalf of other residents, to write to LCCC, Northern Ireland Environment Agency ("NIEA") and the Minister of the Department of Agriculture, Environment and Rural Affair ("DAERA") outlining her complaints in accordance with the pre-action protocol required for a judicial review application. The appellant seeks judicial review of the decisions, actions, and inactions of LCCC, NIEA and DAERA in relation to the management of the Site and their obligations under various Regulations and article 8 of the European Convention on Human Rights ("ECHR"). The appellant has not made Alpha a respondent nor has she sought any relief against Alpha despite her claims that it is responsible for the alleged toxic emissions.

[4] The Order 53 Statement has been the subject of much amendment, both in respect of the grounds and relief sought. In the latest iteration the appellant seeks, relief from the three different respondents referred to above. She seeks inter alia:

(i) An order of certiorari quashing various decisions set out by LCCC in a letter from its solicitors, Arthur Cox, dated 29 March 2021 and, in particular, the decisions concluding that the nuisance was not "a statutory one" and that no abatement notice need be served.'

(ii) An order of certiorari quashing the decision of the NIEA which concluded that the Site was operating in accordance with its permit conditions.

(iii) A declaration that LCCC had breached its statutory duty by failing to properly investigate the odour nuisance.

(iv) Declarations that DAERA had breached its statutory duties by failing to revise emission limits and amend the permit and failing to give consideration to regulation 11(2) of Part II of the Pollution Prevention and Control (Industrial Emissions) Regulations (NI) 2013 ("the Regulations") in determining the relevant conditions and limitations for the permit granted to Alpha.

(v) A declaration that DAERA had breached its statutory duty to give special consideration to Regulation 1 under Schedule 2 of the Regulations in determining and assessing the best available techniques ("BAT") with which Alpha operated the Site.

(vi) An Order of Mandamus requiring LCCC to undertake appropriate investigations, define the odour nuisance as a statutory nuisance and to serve an abatement notice.

(vii) In addition, the appellant seeks a declaration that the appellant's article 8 rights had been infringed contrary to section 6 of the Human Rights Act 1998 and damages for breach of rights pursuant to article 8 of the ECHR.

In addition, NIEA and DAERA cross appealed the finding that the appellant did not have an effective remedy in the form of issuing proceedings in the Magistrates' Court against Alpha.

[5] The application for judicial review came before the Court of Appeal in November 2022. On 22 November 2022 the Lady Chief Justice gave a short ruling of the court to the effect that the judicial review application of the appellant which had been heard and determined before Humphreys J, the Learned Trial Judge ("the LTJ") and then appealed to this court, would be dismissed to allow the appellant to avail of an alternative statutory remedy which remained open to her. Alternatively, the appellant had the option of taking civil proceedings in the County Court (or High Court) to achieve the relief she obviously desired, namely cessation of the alleged nuisance at the Site and compensation for any personal injuries and/or inconvenience which she and/or her family had suffered to date as a consequence of the operation of the Site by Alpha.

[6] This court also notes that there has been an earlier application for leave to apply for judicial review in respect of the operation of the Site which was refused by Scoffield J. This refusal was appealed to the Court of Appeal by Alpha, who is a notice party to the present proceedings. Alpha challenged, inter alia, the decision of Belfast City Council ("BCC") to serve an abatement notice upon it in respect of the statutory nuisance arising from the operation of the Site. We understand that the appellant, who applied unsuccessfully to become a notice party to that application, and whose legal representation include some of those representing her in the present application, was permitted to make submissions, and in these she supported the action taken by BCC.

[7] It is with some disappointment that this court notes that the application before Scoffield J and his decision were not cited before this court. His decision was only drawn to the court's attention following pointed questioning of counsel. This is against a background where a plethora of judgments had been cited by all the parties, many of which, as we shall discuss, had only the most marginal of relevance to the issues under appeal. We note that the Court of Appeal judgment upholding Scoffield J's decision came after the decision of Humphreys J.

[8] For the avoidance of doubt, this is the full written judgment promised by the Court of Appeal when the Lady Chief Justice gave the court's ruling at the end of November 2022.

Background facts

[9] The appellant lives 1.25 miles from the Site and she complains of a rotten egg smell emanating from the Site some years after it had opened in November 2006. As noted above, this has resulted, she claims, in her and her family experiencing various physical symptoms as outlined above and being restricted in their ability to enjoy outdoor activities at their home with the consequent deleterious effect on her mental health especially during the Covid-19 pandemic. Indeed, the appellant claims that the odours have been so bad at times that she has had to stay at different properties away from the Site at the weekends.

[10] There have been other complaints from residents living close to the Site. For example, Mairead Connolly, who lives in the Mount Eagles area which is within the district of BCC and some 550 metres from the Site complains of the odours emanating from it and the potential for these gases to affect the health of her children. Her involvement with BCC and NIEA directly resulted in an abatement notice being served by BCC on Alpha on 27 April 2021.

[11] Expert evidence has been filed on behalf of the appellant from Dr Ian Sinha, a Consultant Respiratory Paediatrician, based at Alder Hey Children's Hospital in Liverpool. He had given evidence in the case of *R(Matthew Richards) v Environment Agency* [2021] EWHC 2501 (Admin) which raised similar issues. This case went to the Court of Appeal in England & Wales and is reported at [2021] EWCA Civ 26. Dr Sinha had suggested surveys be carried out in respect of local residents living in the vicinity of the Site and he then based his report on their responses without apparently visiting the Site, interviewing, or examining the children or interviewing the parents. On the basis of their responses, he concluded the Site was harmful to children living in the vicinity and there was a potential for them to develop Chronic Obstructive Pulmonary Disease ("COPD"). His conclusion was that the Site was:

(i) A threat to both the current and future health of children in the locality;

(ii) A threat to life because of the increased risk of premature deaths for those in the locality.

[12] In particular, Dr Sinha considered Hydrogen Sulphide (H_2S) as being the main pollutant and considered the levels of H_2S as being "clearly significant" and more importantly, sufficient to cause lung damage and reduction of life expectancy.

[13] Dr Sinha's opinion was vigorously challenged by Dr Cromie, a Consultant in Public Health and a qualified medical practitioner, who is employed by the Public Health Agency ("PHA") whose evidence was filed on behalf of the respondents. He did not accept Dr Sinha's conclusions. Dr Sinha responded as follows:

(i) He disagreed with Dr Cromie that the levels of H_2S were within the recommended level.

(ii) He did not agree with Dr Cromie's conclusion that the measured levels locally are "incapable" of causing a physical health effect."

(iii) He contradicted Dr Cromie's assertion that there was no widespread health impact of the Site on the community.

[14] Dr Sinha said that the potential for harm caused by low level chronic exposure was "the pivotal and central aspect of the *Richards* case" in which he had given evidence in England and in respect of which the citations of the first instance hearing and the Court of Appeal hearing are given above. The evidence for his claims was set out in extenso in the LTJ's judgment. It is important to note that:

(a) Dr Sinha seeks to gain traction for his views by pointing out that Fordham J who heard the *Richards* case at first instance in England & Wales was impressed by them. However, the first instance decision was overturned by the English Court of Appeal; and

(b) Dr Sinha's evidence was that children in Northern Ireland should not be subject to higher levels of pollution than those to which children in England are exposed.

[15] Although Dr Sinha's conclusions were robustly challenged by the other experts retained by the respondents, Dr Sinha did not change his opinion. It is important to emphasise two matters which give some perspective to this dispute. These are:

(i) The paediatrician responsible for looking after a child close to the Site did not claim to have found a causal link between the environs and the children's symptoms as reported by any of the children residing in the vicinity.

(ii) No medical evidence was produced making such a connection, other than that of Dr Sinha who, as we have noted, did not examine, or treat any of the children residing in the locality.

[16] The evidence from NIEA was to the effect that its investigations had revealed no scientific basis for commencing proceedings against Alpha in respect of the odour emissions from the Site. It regularly monitored the Site and had found no basis for concluding that Alpha operated the Site other than within the terms of the permit which it had been granted. There was in place an Odour Management Plan ("OMP") designed to prevent or minimise the escape of odours. The permit is dated 1 April 2021 and is subject to a stricture that the "activities shall be free from odour at levels likely to cause annoyance outside the Site." This recognises that odours are likely to be produced, but the OMP is designed to ensure that they are tightly controlled.

[17] The evidence was that following an NIEA inspection in September 2020, Alpha had carried out various works, which included:

(a) reducing the size of the work face;

(b) installing additional gas well plant and infrastructure; and

(c) an increase in odour monitoring and masking.

[18] It is noteworthy that:

(a) Background levels of H_2S at this Site were found to be similar to levels detected not near landfill sites at Antrim and Newtownards where there did not appear to be any complaints from those living in the surrounding area.

(b) No significant levels of H_2S were detected during cold flow drainage conditions in December 2021.

(c) Records of H_2S near the site were within the 5ppb WHO Guidelines.

[19] The Site has been the subject of scrutiny from NIEA, LCCC and BCC and PHA. Indeed, there has been contact with those responsible for the Walley's Quarry which was at the centre of the *Richards* case referred to above. According to the information gleaned, there is:

(a) No condition in the permit that requires air quality to meet any specific standard in relation to H_2S.

(b) There was a plan on the advice of UKHSA to reduce H_2S levels to meet the WHO 30-minute odour annoyance average and US EPA lifetime value.

[20] In May 2021 NIEA had engaged the services of Tetra Tech ("TT") to carry out an analysis of emissions at and near the Site. The analysis of the data obtained revealed:

(a) Monitoring data does not show elevated levels of H_2S.

(b) The levels recorded are below the lowest established dose effect which would result in a health defect.

[21] Sir Colin Berry, Pathologist and Toxicologist, points out in his affidavit that there is no record of any employee at the Site suffering adverse impacts since it opened in 2006. He considered that the absence of any adverse complaints from staff was significant because given their exposure they would be most readily identifiable if there was a problem attributable to the Site. We can see force in this conclusion.

[22] Dr Dickerson, a Director of Environmental Pollution Management Ltd, an environmental consultancy specialising in environmental assessment and management and who has a number of qualifications all relating to pollution control and environment management has sworn a number of affidavits on behalf of the appellant. He has concluded that the location of the Site is such that cold drainage flow is likely to occur at night carrying odorous air from the Site down to the settlements below displacing warmer air and "trapping" the released air "in a temperature inversion with little dilution of any odorous gases released." He claimed that NIEA had overlooked this phenomenon of cold flow drainage.

[23] Dr Dickerson made a number of points:

(i) He said that it was unsafe to rely on the conclusion of the TT Report.

(ii) He challenged the accuracy of the Jerome H_2S portable monitor.

(iii) NIEA's testing had revealed pollution was occurring but not serious pollution.

(iv) There was a failure to carry out sampling during cold drainage flow and that sniff testing carried out by Mr Thompson, a Chartered Waste Manager, was carried out at the wrong time and he attacked the survey for which Mr Thompson was responsible.

[24] The evidence was that the appellant had registered a complaint of "an extremely bad smell" to LCC only on 31 December 2019. This was referred to the NIEA. There was no further complaint or contact until a pre-action protocol letter dated 12 April 2021 arrived, a time lag of some 15½ months.

[25] In January 2021 another complaint from someone else in the vicinity led to a Site meeting with Mr McLaughlin of LCCC together with representatives of NIEA, BCC and Alpha. Mr McLaughlin had met local residents and elected representatives. By January 2021 there had been some 41 complaints made.

[26] Over the next few months following January 2021:

(a) Weekly meetings were held between representatives of LCCC and NIEA.

(b) Briefings from NIEA took place as part of its inspection and compliance programme.

(c) Information sharing took place with councillors at an LCCC meeting.

(d) 46 daily odour monitoring visits were carried out by LCCC officers between 26 April and 30 June 2021.

(e) LCCC concluded from the evidence that they had gathered that there was no statutory nuisance. The complaints were reduced during 2021 and so did the frequency of monitoring.

[27] Mr Mullan, a Director of Alpha, a wholly owned subsidiary of Whitemountain Quarries, and a graduate civil engineer, points out, inter alia:

(i) Mr Thompson was appointed as an expert witness.

(ii) He had concluded that there was no "cold drainage flow" as asserted by Dr Dickerson.

(iii) There was no evidence that there was anything untoward either on the Site or being emitted from the Site which could amount to a statutory nuisance.

(iv) He then attacked the evidence and each of the dates/links of the appellant and her experts and averred that this "is plainly at odds with the data and expert observations presented by the respondents and their witnesses and those of Alpha."

[28] NIEA claims that:

(i) It has found no evidential basis for taking enforcement action against Alpha in respect of odour production and the escape of gases from the Site or on the Site.

(ii) The Site has been monitored regularly to ensure that there is compliance with the conditions of the permit.

(iii) H_2S is produced but that alone is not enough. There has been monitoring and a number of measures taken to prevent, or if that is not possible, to minimise any odour.

(iv) The FIDOR method of assessing the seriousness of pollution has been adopted and followed.

(v) Following the NIEA inspection in September 2020 various works have been undertaken by Alpha, these include reduction of the size of the working face, installation of provisional gas well infrastructure, a change of daily cover, an extension of odour monitoring masking.

[29] The evidence from Alpha is that:

(a) The Site is nearing the end of its natural life.

(b) It will cease operating as a landfill Site shortly, if it has not stopped already.

(c) The extraction of landfill gas will continue and be used to generate electricity.

(d) Alpha have used best available techniques ("BAT"), and engaged in full with NIEA and LCCC.

(e) There has been compliance with the terms of the permit which was issued.

(f) Alpha refutes the claim (unsupported by any evidence) that it accepted any gypsum at the Site.

(g) On the 40 occasions odour assessments have been carried out, only on two occasions was there a very faint, transient, and intermittent odour. This did not constitute a statutory nuisance.

[30] The above short synopsis of the expert evidence is provided to demonstrate just how hopelessly divided the experts are, with the experts all coming out, coincidentally, apparently, on the side of the party who had retained them to prepare a report. The court will return to this division of opinion later in the judgment, but it suffices to point out at this stage, just how difficult it is for a court to reach a concluded view on different expert opinions without the court being able to see and hear those opinions being challenged and tested in court.

History of the present litigation about the Site

[31] The history of this dispute is set out in some detail in the thorough and carefully thought through judgment of the LTJ, where he examines and summarises the appellant's evidence, the LCCC's evidence, NIEA's and DAERA's evidence and the evidence of Alpha. Accordingly, we feel that it is unnecessary to again set out the circumstances in the same amount of detail.

(i) The challenge of the appellant, which has undergone several changes, was to the failure of LCCC to conduct proper investigations into complaints of

nuisance odour pursuant to its statutory duties and the failing of the NIEA and DAERA in relation to the fixing of emission guidelines, limits, or standards for the permit under which the Site operated.

(ii) All the respondents, as alleged, failed to act appropriately to secure abatement of the nuisance which has interfered with the appellant's right to family and private life secured by article 8 of the ECHR.

(iii) The LTJ noted the medical evidence served by Dr Sinha on behalf of the appellant and by Dr Cromie on behalf of the respondents and drew attention to some of the disputes they had. He also referred to the evidence of Dr Dickerson, an Environmental Consultant on behalf of the appellant, and that filed on behalf of the respondents which included evidence from Ms Courtney and Mr Colin Millar and the evidence of Alpha which included expert evidence from a Director, Mr Mullan, Adrian Thompson, the Technical Director of Taggarts and an expert in waste management, and from Robert Gregory and Sir Colin Berry, acknowledged experts in their respective fields. In particular, the last two experts challenged the whole evidential basis put forward by the appellant and the analysis of the experts instructed on behalf of the appellant.

[32] The LTJ said the appellant's grounds for judicial review could be distilled into the following:

(i) LCCC failed in its statutory duty under the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011 ("the 2011 Act") by failing to investigate complaints;

(ii) NIEA and DAERA failed to comply with their duties under the Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013 ("the 2013 Regulations") in failing to review the permit and/or ensure that some guidance is adopted in relation to H_2S;

(iii) The impact of the pollution was such as to engage the applicant's article 8 rights and in response to fail to approach the matter with due diligence, to provide information and to set standards to ensure compliance with article 8 of the ECHR.

[33] As I have recorded the relief sought by the appellant in those judicial review proceedings included quashing decisions of NIEA and DAERA and compelling LCCC to undertake investigations and to serve an abatement notice.

[34] The LTJ concluded:

(i) The LCCC as the local district council was under duty to investigate a complaint of statutory nuisance made by a person living in the district: see

section 64(b) of the 2011 Act. Where such a nuisance exists, a council must serve an abatement notice under section 65.

(ii) The LCCC was entitled to determine the means by which the duty is satisfied. A discretion to investigate can be exercised in different ways although always in a manner consistent with the objects of the statutory duty. In such circumstances the only challenge can be on the basis of irrationality.

(iii) It was entirely reasonable for LCCC to refer a complaint to the NIEA which had a parallel regulatory jurisdiction.

(iv) The evidence of Ms Courtney, the Environmental Health Manager for LCCC, completely undermined the claim that LCCC in some way abrogated its responsibility for the investigation of the problem which had been reported.

(v) LCCC had investigated and reached a rational conclusion. Any claim that there was a breach of section 64 and that the discretion was exercised irrationally was bound to fail.

(vi) The claim that NIEA and DAERA breached the 2013 Regulations by failing to set some guidance or standard in relation to life-time exposure to H_2S can only be made good if it satisfies the standard of Wednesbury unreasonableness. There is no basis for concluding that they exercised their discretion irrationality.

(v) In respect of the claim made that there was a breach of article 8 of the ECHR the appellant had to establish "victim" status for the purpose of section 7 of the Human Rights Act. This required the appellant to show both that there had been actual interference with her family life and that a certain level of severity had been reached. The LTJ was satisfied that the appellant had met the minimum level of severity required to engage her article 8 rights. However, in applying the relevant tests from *R(Matthew Richards) v Environment Agency* [2021] EWHC 2501 (Admin) and *Fadeyeva v Russia* [2007] 45 EHRR 10, it was not the court's role to substitute its view for that of the public authorities. Once the court was satisfied that the appropriate level of due diligence had been exercised, then any interference with article 8 rights was justified and a claim for a breach must fail.

[35] The LTJ remained unpersuaded that there was an alternative remedy available through the courts although the only alternative remedy apparently drawn to his attention was one for the abatement of a statutory notice in the court of summary jurisdiction ("the Magistrates' Court"). He thought it would be an "unfortunate and unattractive position if a regulator could effectively be 'immune' from suit in this sphere by reference to alternative proceedings in the Magistrates' Court."

[36] The LTJ then went on to consider the use of extensive expert evidence in judicial review applications. He commented on the limited basis upon which expert evidence not before the decision maker could be relied upon. Although he noted it was admissible to prove (a) victim status and (b) due diligence as well as having the potential to go to the issue of irrationality.

[37] The LTJ then commented unfavourably on:

(i) The desk top approach adopted by Dr Sinha and Dr Dickerson which he found to be of limited probative value.

(ii) The claim that there was gypsum present on the site which required an evidential foundation but that this was absent.

(iii) Dr Sinha's reliance on the outcome of the case of *Richards* referred to above was undermined by his apparent lack of understanding of the meaning and impact of the judgment of the Court of Appeal.

The LTJ then dismissed the judicial review.

The expert evidence

[38] As we make clear in the next section, we consider that the LTJ's views as to the unsatisfactory nature of the expert evidence filed on behalf of the appellant is of real substance. We conclude that in the absence of the expert evidence on either side being tested in court that it would be imprudent to reach a concluding view on whether the Site is operating unlawfully and/or emitting H_2S which has the potential to harm those living in the immediate vicinity.

[39] In this case there has been a plethora of affidavits and reports filed on behalf of various expert witnesses retained on behalf of the appellant, the respondents, and the notice party. It would appear that in England & Wales under CPR Part 35 and its accompanying Practice Direction that expert evidence must be restricted to that which is reasonably required to resolve the proceedings. If a party wishes to call an expert or to file expert evidence, an application must be made to the court for permission to do so: CPR 35.4(1). There are good reasons for this. Firstly, it is essential to distinguish between the evidence that the decision maker had before it made its decision and the fresh evidence which it had obtained after the dispute crystallised. Undoubtedly, the expert evidence which was before the decision maker and influenced its thinking is key material. Expert evidence obtained subsequent to the decision may be more problematical. Firstly, this evidence was not before the decision maker and is generally admissible only in four scenarios set out in Judicial Review by Supperstone Goudie and Walker at 20.66. Collins J explained in *R(Lynch) v General Dental Council* [2003] EWHC 2987 (Admin) that fresh expert evidence should, in general, only be admitted in the same situations as fresh non-expert

evidence. This is set out at 20.39 and refers to the following four circumstances in which expert evidence can be adduced:

(a) To show the nature and details of the material that was before the decision maker at the relevant time;

(b) Evidence to determine a question of fact where the jurisdiction of a public body depends on that fact;

(c) Similarly, to (b) above, the court can consider additional evidence to determine whether the procedural requirements were observed;

(d) Finally, the court can consider evidence where the challenged act or decision is alleged to have been tainted by misconduct.

It is for a good reason that PD35 para 1 states:

> "In addition, where possible, matters requiring expert evidence should be dealt with by only one expert."

[40] The courts in England have addressed the issue of how to deal with disputed evidence in a judicial review application. The Divisional Court in *R(On the application of The Good Law Project Ltd and Runnymede Trust v The Prime Minister and the Secretary of State for Health and Social Care* [2022] EWHC 298 (Admin) endorsed the approach set out in Sir Clive Lewis's book, Judicial Remedies in Public Law (6th Edition) at 2020 at para 9.121. He said:

> "If there is a disputed fact not capable of being resolved on the documentary evidence, and no cross-examination is allowed, courts will proceed on the basis of the written evidence presented by the person who does not have the onus of proof. As the onus is on the claimant to make out his case for judicial review, this means that in case of conflict on a critical matter which are not resolved by oral evidence under cross-examination, the court shall proceed on the basis of the defendant's written evidence."

[41] The experts retained on each side are completely split on a whole host of issues. For example, there is no agreement even that the offending odour emanates from the site. There are a number of different premises in the vicinity which it is claimed could be responsible for the alleged odour complaints. None of these have been investigated. It appears that the Site had operated for a number of years without any apparent problem with smell and that the offending odour is of relatively recent duration. But most importantly, there is no empirical evidence available to the court to show that the odour complained of by the appellant is being produced on Site and then emitted into the surrounding areas.

[42] In the present judicial review application given that the experts on each side remain irredeemably divided, the only course a court could take would be to accept the expert evidence filed on behalf of the respondents who did not have the onus of proof. If the expert evidence is approached in this manner, the whole basis of the appellant's case is fatally undermined. We consider that this would be an unsatisfactory way of resolving the contentious scientific debate put before this court.

Relevant legislative provisions

[43] The legislative framework had been set out by the LTJ at paras [45]-[51]. This bears repetition:

> "[45] Section 63 of the 2011 Act defines 'statutory nuisances' as including:
>
> > '(d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance.'
>
> [46] Section 64 of the 2011 Act provides:
>
> > 'It shall be the duty of every district council—
> >
> > (a) to cause its district to be inspected from time to time to detect any statutory nuisances which ought to be dealt with under section 65 or 66; and
> >
> > (b) where a complaint of a statutory nuisance is made to it by a person living within its district, to take such steps as are reasonably practicable to investigate the complaint.'
>
> [47] Section 65(1) provides that where a district council is satisfied that a statutory nuisance exists, or is likely to recur, it shall serve an abatement notice imposing a requirement to abate the nuisance or carry out works or take such steps as may be necessary. Section 65(8) gives the right to any person served with an abatement notice to appeal to a court of summary jurisdiction.
>
> [48] In terms of enforcement, the section goes on to say:

> '(9) A person on whom an abatement notice is served who without reasonable excuse contravenes or fails to comply with any requirement or prohibition imposed by the notice shall be guilty of an offence.
>
> (12) Subject to subsection (13), in any proceedings for an offence under paragraph (9) in respect of a statutory nuisance it shall be a defence to prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance.'

[49] The 2013 Regulations were made pursuant to Article 4 of the Environment (Northern Ireland) Order 2002 ('the 2002 Order') which itself was amended to implement Directive 2010/75/EU on industrial emissions. Article 8(1) of the 2002 Order defines 'environmental pollution' as:

> 'pollution of the air, water or land which may give rise to any harm.'

[50] In turn, Article 8(2) defines 'harm' as:

> '(a) harm to the health of human beings or other living organisms;
>
> (b) harm to the quality of the environment;
>
> (c) offence to the senses of human beings.'

[51] The 2013 Regulations prohibit the operation of, inter alia, a landfill site without a permit and regulation 11 states:

> '(1) When determining the conditions of a permit, the enforcing authority shall take account of the general principles set out in paragraph (2);
>
> (2) The general principles referred to in paragraph (1) are that installations and mobile plant must be operated in such a way that—

(a) all the appropriate preventative measures are taken against pollution, in particular through the application of BAT; and

(b) no significant pollution is caused.'

[52] 'BAT' stands for 'best available techniques' and is defined by regulation 3 as meaning:

> 'the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing in principle the basis for emission limit values designed to prevent and, where that is not practicable, generally to reduce emissions and the impact on the environment as a whole.'

[53] Regulation 17 is concerned with the review of permit conditions and states:

> '(1) Enforcing authorities shall periodically review the conditions of permits and may do so at any time.
>
> (2) Without prejudice to paragraph (1), a review of a permit under this regulation shall be carried out where—
>
> (a) the pollution caused by the installation or mobile plant covered by the permit is of such significance that the existing emission limit values of the permit need to be revised or new emission limit values need to be included in the permit;
>
> (b) substantial changes in BAT make it possible to reduce emissions from the installation or mobile plant significantly without imposing excessive costs;
>
> (c) the operational safety of the activities carried out in the installation or mobile plant requires other techniques to be used; or

(d) it is necessary to comply with a new or revised environmental quality standard.'

[54] Section 6 of the Human Rights Act 1998 ('HRA') makes it unlawful for a public authority to act in a way which is incompatible with a Convention right and section 7 entitles a person to bring proceedings against a public authority, or rely on the Convention right in legal proceedings, but only if she is or would be a victim of the unlawful act.

[55] Article 8 of the ECHR provides that everyone has the right to respect for private and family life, home and correspondence. By article 8(2), interference by a public authority within the exercise of this right is prohibited unless it is in accordance with law and necessary in a democratic society."

[44] It is also important to note that Article 34(1) of the County Court (Northern Ireland) Order 1980 states:

"34.—(1) A county court in relation to any proceedings within its jurisdiction shall have the like powers as the High Court, and in particular (but without prejudice to the generality of the foregoing words of this paragraph) may—

(a) grant such relief, redress or remedy or combination of remedies, either absolute or conditional; and

(b) give such and the like effect to every ground of defence or counterclaim equitable or legal;

as ought to be granted or given in the like case by the High Court and in as full and ample a manner."

[45] Valentine in Civil Proceedings The County Court describes this provision as being "perhaps the most important provision in all the County Court Order and County Court Rules". He says:

"It has a potential effect in incorporating many of the express inherent powers of the High Court." (see 2.85)

[46] This means that a court can grant a decree embodying the remedy of an injunction when, but only when it is ancillary to, for example an award of damages.

It allows the judge in the County Court to make awards of damages within the County Court limit and to support such an award with a prohibitive or mandatory injunction if the facts call for the exercise of the judge's discretion.

[47] In this judicial review the appellant is effectively inviting the court to substitute its view as to what is the appropriate policy for the respondents to adopt, in a difficult technical area where the expert evidence is completely polarised. In *Fadeyeva v Russia* [2005] 45 EHRR 10 the European Court of Human Rights (ECtHR) stated at para [96]:

> "However, where the State is required to take positive measures, the choice of means is in principle a matter that falls within the contracting state's margin of appreciation. There are different avenues to ensure "respect for private life", and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. Therefore, in those cases the criterion "in accordance with the law" of the justification test cannot be applied in the same way as in cases of direct interference by the State."

[48] It will also be noted that in the case of *Hatton v UK* [2002] 343 EHRR 1 the Grand Chamber held that "it would not be appropriate for the court to adopt a special approach in this respect by reference to a special status of environmental human rights." In the earlier case of *Powell and Rayner v United Kingdom* [1990] 12 EHRR 355 the court held that:

> "It is certainly not for … the court to substitute for the national authorities any other assessment of what might be best policy in this difficult social and technical sphere. This is an area where the Contracting Parties are to be recognised as enjoying a wide margin of appreciation."

[49] In *Fadeyeva v Russia* [2005] 45 EHRR 10 at paragraph [128] the ECHR said:

> "It might be argued that, given the complexity and scale of the environmental problem around the Severstal steel plant, this problem cannot be resolved in a short period of time. Indeed, it is not the court's task to determine what exactly should have been done in the present situation to reduce pollution in a more efficient way. However, it is certainly within the court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests. In this respect the court reiterates that the onus is on the state to justify, using detailed and rigorous data,

> a situation in which certain individuals bear a heavy burden on behalf of the rest of the community."

Grounds of appeal

[50] The grounds of appeal can be briefly summarised as follows:

(i) As against LCCC the LTJ erred in concluding that LCCC's misdirection (as recorded in the affidavit of Ms Courtney) was not material. Further, in the alternative, the judge erred in construing LCCC's duty under section 64B of the 2011 Act. LCCC had no duty other than to take such steps as were reasonably practicable. This led the judge into error because the judge had simply considered the steps taken by LCCC rather than, as he should have done, considered whether LCCC had properly addressed whether it could do more.

(ii) The LTJ had also erred in law in relation to his findings and conclusions about the duty owed by NIEA and DAERA. In particular, he failed to engage with arguments that there had been a failure to exercise powers in accordance with statutory requirements, including a requirement to keep up to date and this implied proper consideration being given to the approach adopted by the English authorities, which was to work towards reducing H_2S levels to below 1 ppb.

Citation of authorities

[51] In this case the court was provided with almost 2,000 pages of authorities. Many of the cases were never referred to in argument, either in writing or orally. However, as we have made clear, particularly relevant authorities were not referred to at all. We draw attention to the decision of Girvan J in *In the matter of an application by Christopher Doherty for Judicial Review* [2006] NIQB 33 where he said at para [28]:

> "In this case the documentation as presented to the court by the applicant was not in a satisfactory state. The papers included four large files of documents exhibited as SH1. These contained nearly 1,200 pages. In fact, the applicant only relied on a limited number of pages in the files. No attempt had been made to reduce unnecessary documentation or to prepare a sensible working core bundle of documents for the hearing. The proliferation of unnecessary documents in judicial review applications has now become a matter of practical concern… The copying of all this unnecessary documentation is time consuming, expensive, and wasteful of human physical resources. It is the responsibility of the legal team to sift

> the documents to get the core of the case and produce the core bundle of documents relevant to the issues to be argued before the court.
>
> The same applies mutatis mutandi to citations of legal authorities. The parties should only cite relevant authorities which they intend to refer to in argument. It must be obvious to everyone that the preparation of the authorities bundle involves substantial wasteful expenditure. This is particularly true when one particularly relevant authority is not included among the many cases to which we were not referred."

[52] In this appeal there was an obvious failure on both sides to follow the clear guidance offered by Girvan J. There was an omission to sift the documents to get to the core of the case. The citation of legal authorities has made the case appear more complicated than it was, rather than illuminating the contentious issues between the parties.

[53] The citation of numerous authorities should never be used:

(a) to try and confuse the issues which the parties are disputing; and/or

(b) to complexify any disputes; and/or

(c) to try and earn additional costs.

[54] In this case, as the court has already made clear, we consider that at a bare minimum the court could have expected to have been referred to the decisions of Scoffield J and the Court of Appeal in the related matter of *In the matter of an application by Alpha Resource Management Ltd for leave to apply for Judicial Review* [2022] NICA 27.

[55] Whilst we feel unable to determine why such long lists of authorities were given in this appeal, we want to make it clear that in the future if we find that legal authorities have been cited unnecessarily and/or for the purposes of making proceedings appear more complicated than they actually are, then we will have no hesitation in drawing that conclusion to the attention of the Taxing Master.

Alternative remedies

[56] We note that the LTJ had decided that proceedings before the District Judge did not afford a satisfactory alternative remedy. He did not consider whether civil proceedings for an injunction before a County Court judge (or a High Court judge) would have been a suitable alternative remedy either. He considered that issues of

alternative remedy should be argued before the judge at the leave stage. We note that no point was not taken at the leave stage. We would agree with the LTJ that any jurisdiction dispute should be raised at the earliest possible opportunity, that is at the leave stage. However, that does not stop this court, where the court at first instance has failed to do so, from looking at this issue, especially when the circumstances demand that this should be done.

[57] We note the LTJ's concern that it would be wrong to prevent a member of the public with sufficient interest from holding a regulator to account by pursuing a public law wrongdoing. And that "it would be an unfortunate and unattractive position if a regulator could effectively be immune from suit in this sphere by reference to alternative proceedings in the Magistrates' Court." These are fair points but, ultimately, they are without substance. If the regulators are failing to regulate in accordance with statutory obligations, they can be reported to the Ombudsman who can carry out the necessary investigation. Indeed, an inquiry by an independent person who had access to all the evidence would be better suited to resolving difficult disputes of expert evidence than a judicial review application.

[58] Certainly, no court would want to see a regulator escape from its responsibilities. However, the LTJ did not have his attention drawn to the Public Services Ombudsman Act (NI) 2016 ("the 2016 Act"). This gives the Ombudsman power to investigate complaints of a person aggrieved. Section 5 of this Act provides:

> "5. The Ombudsman may investigate a complaint, made by a member of the public who claims to have sustained an injustice (in this Act referred to as 'a person aggrieved'), if the requirements are met.
>
> (ii) The complaint must relate to action taken by a listed authority (see sections 12 and 13).
>
> (iii) The complaint must relate to a matter which can be investigated (see sections 14-23)
>
> (iv) The procedural requirements of sections 24-27 must have been followed …"

The matters defined by section 14 include maladministration through the action taken by the exercise of administrative function by DAERA, LCCC and/or NIEA. Where a person complains to the Ombudsman about maladministration by specified local public bodies, a report finding injustice entitles the complainant to damages and/or an injunction in the County Court under section 52 of the 2016 Act.

[59] It is likely that the parties appreciated that in this judicial review application any cross-examination of the expert witnesses would be self-defeating as it would

have been likely to have occupied considerable court time if all those offering expert advice gave evidence, and would only have served to demonstrate the weaknesses in that party's case. As we have stressed it is not possible in a judicial review application, nor is it desirable to try and resolve contentious disputes of fact. Of course, "… to allow cross-examination presents the court with a temptation, not always resisted, to substitute its own view of the facts for that of the decision-making body upon whom the exclusive jurisdiction determined facts had been conferred by Parliament": see Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237. In this case that temptation did not arise absent any application to cross-examine any of the expert witnesses.

[60] In any event, it is important to record that our reading of the papers is that the appellant wanted primarily to prevent noxious gases escaping from the Site because they were allegedly harming her, her family, and her neighbours. Her complaint about the regulator(s) was very much a secondary one, we find, but one which has been used as the excuse to commence more complex judicial review proceedings against the regulators rather than proceeding directly against the alleged tortfeasor(s) who it is alleged were responsible for the nuisance.

[61] We are satisfied that either civil proceedings in the County Court (or High Court) or statutory nuisance proceedings before the Magistrates' Court offered a much better means for the appellant to achieve her desired goal, namely the cessation of the alleged toxic emissions from the Site and compensation for such injuries and inconvenience as she and her family may have sustained. Either process will be fairer because the court will be able to weigh up the evidence, especially the expert evidence, and come to a considered conclusion. The appellant, if she succeeds, will be granted relief that will abate the alleged nuisance, and in civil proceedings, will ensure she receives such compensation as the court assesses are due to her and her family. This will be calculated on the basis of expert medical witness evidence and of its ability to link the alleged ill effects apparently suffered by those in the vicinity to the emission of noxious fumes from the Site.

[62] There was another argument addressed to us which was that the judicial review proceedings were academic because the Site is effectively closed, and the wells capped. We can deal with this argument briefly. There may be no more material to be dumped on the Site and it may be that the landfill has been capped. But there is still a potential risk that gas produced from the earlier landfill and emitted could escape and cause problems to those living in the vicinity. We are not in a position to determine whether gas produced on the site has been, and will be permanently captured by the wells being capped, and therefore, we do not decide the case on the basis of this argument.

[63] The decision of this court is that the appellant has an alternative remedy either by taking the statutory route or by following the civil route. As the Lady Chief Justice said that means that there is no further utility in judicial review

proceedings and, accordingly, the appeal will be dismissed, and the cross-appeal allowed.

Duties to the court

[64] At this juncture it is worthwhile reminding ourselves, of the duty owed to the court by each side in a publicly funded case such as this. Lord Denning MR in *Kelly v London Transport Executive* [1982] 1 WLR 1058 summarised the duties of lawyers in legal aid cases. Although his comments were made 40 years ago, they still resonate today. He said:

> "These then are duties of solicitors who act for legally aided clients. They must enquire carefully into the claim made by their own legally aided client so as to see it is well founded and justified – so much so that they would have advised him to bring it on his own if he had enough means to do – with all the risks that failure would entail. They must consider also the position of the other side. They must not take any advantage of the fact that their own client is legally aided and so not able to pay any costs. They must not be used as a means to extort a settlement from the other side. They must remember the position of the defendant and that he is bound to incur a lot of costs to fight the case. If reasonable payment is made into court – or a reasonable offer is made, they must advise its acceptance. They must not proceed with the case on the chance of getting more. They must put out of their minds altogether the fact that, by going on with the case, they will get more costs themselves. They must not run up costs by instructing endless medical experts for expert reports or by a necessary expenditure. …
>
> All this is not only in regard to solicitors but to counsel as well. We all know that the Area Committees depend largely on the opinion of counsel – as to whether legal aid should be given for the purpose or not, and as to whether the case should proceed further or not. So much so that council have a special responsibility in these cases. They owe a duty to the Area Committees who rely on their opinions. They owe a duty to the court which is to try the case. They owe a duty to the other side who have to fight it and pay all the costs of doing so. If they fail in their duty, I have no doubt that the court can call them to account and make them pay the costs of the other side."

[65] Although Lord Denning's comments were made some time ago, they still have relevance today. A party who is legally assisted from public funds should be as careful as if he was privately funded. We are of the opinion that a litigant relying on private funds would not have sought a judicial review against the regulator in the present circumstances. Judicial review has the double disadvantage in this case of offering only indirect relief while incurring very considerable costs. A privately funded client would have issued proceedings against the person allegedly responsible for the nuisance.

This appeal

[66] The practice in Northern Ireland in respect of when it is appropriate to commence a judicial review application has been well settled for well over 25 years.

[67] In *Re Molloy's Application* [1998] NI 78 at 86 Carswell LCJ gave guidance to practitioners which still remains good today when he said:

> "Judicial review will always lie where required to reverse decisions of lower courts where appropriate in the exercise of the supervisory jurisdiction of the court. It is, however, a discretionary remedy, and it is well established that it will not be granted where the applicant has failed to exercise another remedy open to him… We must make it clear, nevertheless, that if applicants bring applications for judicial review where they should properly proceed by way of case stated, the court may in the exercise of its discretion refuse a remedy or impose sanctions in costs."

[68] Professor Anthony in his book on Judicial Review in Northern Ireland offers clear advice to practitioners when he wrote at 2.29:

> "The basic position here is that judicial review should be regarded as a remedy of last resort and that individuals should avail themselves of alternative remedies."

[69] This whole issue was again explored and reviewed by the Court of Appeal in the related proceedings of *In the matter of an Application by Alpha Resource Management Ltd for leave to apply for Judicial Review* [2022] NICA 27. In that related case Scoffield J had determined that the statutory right of appeal was an effective alternative remedy when there was a dispute about the abatement notice which had been issued. His decision was appealed to the Court of Appeal who looked at the issue of alternative remedy in some detail. In the judgment the Lady Chief Justice definitively reviewed and explored the issue of alternative remedies in judicial reviews at paras [11]-[20]. We make no apology for setting out her observations in full:

"**Alternative Remedies in Judicial Review**

[11] The general principle is that judicial review is a last resort and its pursuit is generally inappropriate where a suitable alternative remedy exists. Issues regarding the availability of an alternative remedy are appropriately dealt with at the leave stage in judicial review proceedings.

[12] The nuances in the application of this general principle are explained by Carswell LCJ in *In re Director of Public Prosecutions for Northern Ireland* [2000] NI 174. In this case, the applicant sought to have set aside an order granting leave to the Director of Public Prosecutions ("DPP") to apply for judicial review of a decision of a resident magistrate ordering the DPP to pay costs to the applicant following the dismissal of a summary prosecution brought against it. Appeal to the Court of Appeal by way of case stated was available to the DPP and it was argued that the application for leave should be set aside on the basis that the DPP had failed to avail himself of this procedure.

[13] Refusing the application on the basis that a case of the requisite strength for setting aside a grant of leave to apply for judicial review had not been made out, Carswell LCJ noted:

> 'It tends to be assumed that an applicant's failure to resort to an alternative remedy open to him will almost inevitably result in the rejection of an application for judicial review. On examination, however, it may be found that the principles governing the exercise of the court's discretion are less rigid and draconian and that a degree of flexibility exists which allows the court to take into account a number of factors in its decision. …
>
> The trend of modern authority is to be more ready to look at the balance of cost and convenience between an application by judicial review and resort to an alternative remedy…'

[14] Carswell LCJ then went on to endorse the general principles set out by Beloff and Mountfield in an article in Judicial Review [1999] JR 143, namely:

> '(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."

[15] The Northern Ireland Court of Appeal dealt with alternative remedies more recently in *Re McDaid* [2016] NICA 5. In that case, the applicant, a personal litigant,

was refused leave to apply for judicial review of the decision of a Master of the High Court on the basis that the decision was not amenable to judicial review. Refusing the appeal on the ground that the decision was correct, Gillen LJ went on to find that judicial review was an "inappropriate avenue" for the applicant to pursue, stating:

> '[35] 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.
>
> [36] An existing alternative remedy raises a question for the court's "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).
>
> [37] 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).
>
> [38] This applicant had another means of redress conveniently and effectively available to him which he should ordinarily have used before resorting to judicial review. It would have been no less effective, convenient and

suitable to determine the issues he wished to raise."

[16] Established legal texts reiterate the principle in play. Lewis on *Judicial Remedies in Public Law* (6th Edition, 2021) at [12-055] states:

> 'The position is not as straightforward as the dicta suggest. The exhaustion of remedies "rule" is only a general principle governing the exercise of judicial discretion. There are qualifications on that principle, and different formulations and understandings of the rule can be seen in the case law. Judges have also exhibited "… varying emphasis on the reluctance to grant judicial review." One recurrent theme is the extent to which errors which could be corrected by way of judicial review should be left to the appellate system. Another important issue is the adequacy of the alternative remedy as a means of resolving the complaint. These issues can be seen as defining the scope of the "exhaustion of remedies" principle, or as exceptions to the general rule. In addition, an alternative remedy which may normally be adequate may not on the particular facts of a case be appropriate, and that may justify allowing recourse to judicial review. In exceptional circumstances, which, "… by definition … defy definition", judicial review may be used notwithstanding the availability of alternative remedies.'

[17] In this vein Supperstone Goudie and Walker on Judicial Review (6th Edition, 2019) at paragraph 18.69 states that there is not yet a generally accepted statement of principle regarding the factors that determine whether a judicial review claim may proceed where a statutory right of appeal exists. The authors suggest that factors which may influence the courts include:

> '(1) Nature of the issues — where the claimant contends that there has been an error in applying the particular statutory regime that an appellate tribunal is specifically set up to

deal with, then in general the claimant should proceed by way of appeal, not judicial review. On the other hand, where the claim raises general issues of public law, the courts may well consider that it is appropriate to permit a judicial review claim.

(2) Adequacy of remedies — if the court considers that the alternative remedy is inadequate then it is unlikely to require that the claimant pursue it, save in the rarest of cases. A statutory appeal may offer an inadequate remedy because, for instance, there is no power to quash the disputed decision (but merely to alleviate its consequences).

(3) Interim remedies — the case may be one in which urgent interim relief is required. It is unlikely that a statutory appeal will meet this need.'

[18] Fordham – Judicial Review Handbook (7th Edition, 2020) also comments on alternative remedies as follows:

'36.1 Judicial review alongside other safeguards. Judicial review is not the sole protection against legal wrongs by public authorities. The existence of other avenues of protection, and the question whether these have been or can be pursued, affect whether judicial review will be available and, if so, how it will operate. Judicial review is, however, an ever-present safeguard and safety net against public authority action, by reference to public law standards. The means that, even where there are bespoke statutory remedial schemes, judicial review can fill any judicially perceived gaps.

36.2 Exclusive alternative remedy. In certain contexts, usually under bespoke legislative provisions, special alternative mechanisms are regarded as the exclusive means of challenge, so that judicial review does not arise or is effectively replaced.

> 36.3 Alternative remedy as a discretionary bar. Judicial review is regarded as being a recourse of last resort. It can be declined when the court assesses that there is a suitable alternative remedy. The question whether the pursuit of judicial review is inappropriate on this basis is generally a permission-stage issue when that pursuit has just begun, rather than an issue for the substantive hearing when the pursuit has happened. The vast body of case law (old and new), providing working illustrations on this topic, demonstrates a judicial robustness with room for a bespoke approach tailored to the interests of justice and the public interest in the specific context and circumstances.
>
> 36.4 Whether action/avenue curative of public wrong. The claimant's past or present pursuit, or future ability to pursue, another means of protection may be able to 'cure' or remedy a public law wrong, whether by virtue of a substantive decision or otherwise curative approach.'

[19] Finally, to complete this brief survey of the texts, De Smith's Judicial Review (8th Edition, 2018) deals with alternative remedies at paragraphs 16-013 – 16-024 and summarises the position as follows:

> 'Claimants are refused permission to proceed with judicial review where the court forms the view that some other form of legal proceedings or avenue of challenge is available and should be used. Judicial review is a true remedy of last resort. Questions as to whether a claimant should have used another type of redress process should arise on the application for permission and not at or after the substantive hearing of the judicial review claim. Once the court has heard arguments on the grounds of review, there is little purpose in requiring the parties to resort to some other remedy, indeed, to do so may be contrary to the overriding objective of the CPR. But a failure to pursue

other remedies may influence how the court exercises its discretion to award costs.'

[20] Drawing together the authorities and texts we have referred to above, we summarise the principles as follows:

(i) Judicial review is a remedy of last resort and may not be the only available avenue of challenging a particular decision. That is because statute may have provided an appellate machinery to deal with appeals against decisions of public bodies.

(ii) A court may, in its discretion, refuse to grant permission to apply for judicial review or refuse a remedy at the substantive hearing if an adequate alternative remedy exists, or if such a remedy existed but the claimant had failed to use it.

(iii) The general principle is that an individual should normally use alternative remedies where these are available rather than judicial review. The courts take the view that save in the most exceptional circumstances, the judicial review jurisdiction will not be exercised where other remedies were available and have not been used.

(iv) The rationale for the exhaustion of alternative remedies principle is that it is not for the courts to usurp the functions of the appellate body which has the expertise and ability to determine disputes.

(v) The courts will not insist that claimants pursue an alternative remedy which is inadequate. The principle can be defined as one that requires the use of adequate alternative remedies, or the fact that an alternative remedy is inadequate may be seen as an exceptional reason why judicial review may be used.

(vi) There may be other exceptional reasons why judicial review is the preferred course as each case is fact sensitive and the court must consider in exercising its discretion to hear a judicial review where an alternative remedy is available the overall circumstances including in some cases the

> urgency of the case, delay, cost, or public interest concerns."

[70] In giving this judgment the Court of Appeal expressly endorsed the decision of Scoffield J to refuse leave to apply for judicial review and made it abundantly clear that in the opinion of the Court of Appeal there was a statutory appeal system which should "now be utilised as soon as possible." This decision of the Court of Appeal should have come as no surprise to practitioners.

[71] Unfortunately, that appeal decision came after the hearing before Humphreys J and accordingly he reached his decision without the benefit of being able to consider its contents

[72] We also consider that there was an alternative civil route available in addition to the statutory appeal system which would have provided the appellant with satisfactory relief from the alleged nuisance if there had been one in existence. The appellant could simply have issued proceedings for an injunction and damages in the County Court. This would have given her the potential (subject to proof) to:

(a) Obtain an immediate interlocutory injunction prohibiting the nuisance from continuing;

(b) Obtain a final injunction on the same terms; and

(c) Obtain damages to compensate her (and her family) for any personal injuries and inconvenience she claims to have suffered as a consequence of the alleged unlawful activity on the Site.

[73] Therefore, in this court's view, there were two alternative remedies open to the appellant to provide her with the relief she required if her claims are correct, namely cessation of the alleged nuisance on the Site. Each of these remedies, we find, offered her the opportunity of obtaining relief against the alleged wrongdoer. Each of them offered the prospect of a court being able to determine various issues which were the subject of contested expert evidence. Each of these routes was direct, almost certain to be less complex, almost certain to be cheaper and certainly more effective. No satisfactory explanation has yet been offered to us as to why neither of them was chosen by the appellant.

Conclusion

[74] In our view, this application is unsuited to the judicial review procedure for many reasons. Primarily, there is a plethora of experts retained on each side who cannot agree. As we have made clear, it is simply impossible for any court to reach a final conclusion on that contentious, but untested expert evidence, in a judicial review application. Of course, we do accept that in some cases, even when there is contested expert evidence, there may be no alternative to a judicial review. In this

case neither side sought leave, we understand, to cross-examine the other side's experts. This leaves the court with no option but to follow the approach adumbrated by Sir Clive Lewis which we have set out above. As we have pointed out, if such an approach was adopted, then there is no way that we could be satisfied that the Site has created a nuisance, statutory or otherwise or that there is any real risk to the health of all those living in the vicinity. We do not consider that to dispose of such a case in this way would be either fair or just.

[75] In any event in this case, there are two alternative remedies available which we are satisfied will deal directly with the core objection of the appellant, namely the alleged emission of noxious gas from the Site which has the ability to unlawfully interfere with her and her family's enjoyment of her property and/or to cause her or her family physical injury and upset. This lies at the very heart of her case.

[76] Firstly, proceedings could be commenced in the Magistrates' Court under the 2011 Act. The District Council under Articles 64 and 65 of the 2011 Act has a duty to investigate any complaint of a statutory nuisance (see Article 64) and an obligation to serve an abatement notice and then to take enforcement action in the Magistrates' Court, if this is ignored. There is also the ability to take proceedings in the High Court: see Article 67(7). Indeed, the appellant may act herself if she is aggrieved by the statutory notice: see Article 70(1). Again, these proceedings are effective, cost controlled and expeditious. We consider that they are a suitable alternative remedy.

[77] Secondly, the appellant has the option of issuing proceedings in the County Court claiming damages for physical and mental injuries that she and her family have suffered to date because of the continuing nuisance from the Site, allied with a claim for an injunction preventing Alpha from continuing to create and maintain a nuisance. These proceedings have in-built cost controls, they can be dealt with expeditiously and they will permit the fact finder to hear the expert evidence on both sides being tested and thus, able to reach a final conclusion as to whether the Site constitutes a nuisance and/or gives rise to a claim under, for example, *Rylands v Fletcher*.

[78] We are satisfied in the present circumstances that:

(i) Judicial review proceedings still remain the proceedings of last resort in most cases.

(ii) Judicial review proceedings do not lend themselves to resolving issues where, as here, there is untested, contentious expert evidence.

(iii) The issue of alternative remedy when there is a judicial review application should be raised as soon as possible. In most cases this will be at the leave stage, which is the filter system, and has the potential to save costs and provide a focus as to how the dispute can best be resolved.

(iv) In this case there were suitable alternative avenues open to the appellant to pursue which will give her the relief she required. Firstly, there is a statutory option available in the Magistrates' Court. Secondly, there is a civil one available in the County Court (or High Court). Both these routes will give the appellant the relief she wants if she is able to prove her case, namely the permanent abatement of the nuisance she alleges is created by the dumping of materials on the Site.

(v) If the appellant has any continuing problems about the way in which any of the regulators have acted to date, then she should file a complaint with the Ombudsman.

(vi) The citation of authorities did not comply with the directions given by these courts and, in particular, by Girvan J. The citations seemed designed to complicate rather than simplify the issues. Many of the authorities were never referred to in argument, either in writing or orally.

(vii) The legal aid authority should have been fully informed on the issue of the alternative remedies which were open to the appellant. If the legal aid authority had been so informed, it is difficult to understand how legal aid for this judicial review could have been granted, especially given the difficulties which were bound to arise on the issue of contested expert opinion.

[79] The decision of this court is that the appellant has an alternative remedy either by taking the statutory route or by following the civil route. As the Lady Chief Justice has said that means that there is no further utility in judicial review proceedings and, accordingly, this appeal will be dismissed, and the cross-appeal allowed.

[80] We will hear the parties on the issue of costs when they have had an opportunity of digesting this judgment.