Case No: C1/2006/1635 & 1635(A)

Neutral Citation Number: [2006] EWCA Civ 1742
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QBD, ADMINISTRATIVE COURT
MR JUSTICE COLLINS
CO/4781/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 20th December 2006

Before :

LORD JUSTICE CARNWATH
and
LORD JUSTICE NEUBERGER

– –

Between :

THE QUEEN ON THE APPLICATION OF ENGLAND	**Appellant**
− and −	
LONDON BOROUGH OF TOWER HAMLETS & ORS	**Respondent**
− and −	
TEAM LIMITED & ORS	**Interested Parties**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Richard Buxton (instructed by **Richard Buxton, Solicitors**) for the **Appellant**
Harry Spurr (instructed by **London Borough of Tower Hamlets (for Respondent**) **&**
Russell Harris QC (instructed by Messrs. Berwin Leighton Paisner (for Interested Parties)

– –

Judgment
As Approved by the Court

Lord Justice Carnwath :

1. This is the judgment of the court on an application for permission to appeal against a decision of Collins J.

2. The case originally began on 9th June as an application for an interim injunction to prevent the demolition of a warehouse on a site, known as Suttons Wharf in East London. The site adjoins the Grand Union Canal, and the warehouse had a canopy stretching over the canal. Demolition was required to make way for a proposed housing development.

3. The claimant, Mr England, has been an active campaigner for the protection of the industrial heritage of Tower Hamlets. According to his witness statement, he and other local residents were concerned at the loss of the "historically and architecturally important Suttons Wharf loading canopy, the only one of its type surviving in London". They also objected to other features of the proposed development. Mr England's solicitor, Mr Buxton, is a well known representative of environmental interests in the courts, with a notable record in some landmark cases in the domestic and European courts.

4. Planning permission for replacement development had been granted on 12th May 2006, and demolition work was due to begin on 12th June. An interim injunction was granted to preserve the position pending an expedited hearing of a judicial review application. That came before Collins J on 30th June. Although he granted permission to apply for judicial review, he dismissed the application and declined to continue the injunction. He refused permission to appeal, as did Keene LJ on the papers on 9th October.

5. One of the main grounds of challenge before Collins J was that the council in giving permission for the development had failed to take account of the relevant policies of the London Plan regarding waterside developments (the so−called "Blue Ribbon Network"). That issue is no longer pursued before us. The two issues which are pursued are:

   i) That the council was misinformed as to, and failed to take adequately into account, the problems of contamination of the site;

   ii) That by exempting demolition from planning control in relation to a project of this kind, domestic law is in breach of the requirements of European law.

6. Before returning to those points, we should mention the unusual circumstances in which the hearing before us proceeded. The application before Collins J had been funded by Legal Aid, and Mr England was represented by leading and junior Counsel. The hearing before us was fixed for Monday 27th November. By that time, demolition of the building works had been started, and was substantially complete, at least as regards the parts which Mr England was anxious to preserve. On 23rd November Mr Buxton wrote to the court, advising us that he was unable to obtain representation for the hearing. He informed us frankly that counsel was no longer able to support the application for legal aid. Although counsel considered the "Euro point" on demolition a good one, he was concerned about its "present relevance" following the commencement of development. Mr Buxton differed from counsel's

assessment and sought the assistance of the court. In these unusual circumstances we agreed to hear him, although he is not authorised as an advocate in this court.

7. Having done so, we had no doubts that we should also dismiss the application for leave to appeal. The grounds for doing so are simple. The contamination issue was raised for the first time in the appeal. Mr Buxton says that that is because his clients did not have, and could not reasonably have obtained, the relevant material in time for the application in the Administrative Court. That is in issue. But in any event it is clear that this matter raises significant factual disputes, not least as to whether the planning applicants misled the council in some way. Not surprisingly that is hotly denied on their behalf. We understand that a separate claim has already been lodged in the Administrative Court on this issue. We say nothing about the merits of that, either as to the substance or as to whether it is in time. However, we are quite satisfied that it would not be an appropriate matter to be investigated for the first time on an appeal.

8. The other ground raises a potentially arguable question of European law. The position under English law is that demolition as such, with certain exceptions specified by the Secretary of State, does not require planning permission. Mr Buxton suggests that that position is itself a breach of European law, in that where EIA is required for a project which includes demolition and remediation work, that must be subject to a consenting process just as the construction work is so subject.

9. These are no doubt interesting points. However, it is unclear to us what interest Mr England has in litigating them once the structure which he was seeking to protect has gone. There is no evidence before us as to his position on this. Although judicial review proceedings may often serve to clarify issues of wider importance than the particular concerns of the parties, it is important not to forget the interest of the person or group in whose name the case is being brought. The court decides issues between interested parties, not issues in the abstract. In the present circumstances, we think that it would be wholly disproportionate to throw further doubt over the progress of this development while such a point is litigated through the courts, possibly to the European Court.

10. It is of interest to note that in one of Mr Buxton's successes involving a proposed development in Crystal Palace, the decision of the House of Lords, following a reference to the European Court was finally given on 6th December 2006 (*R v Bromley LBC ex p Barker* [2006] UKHL 52). The judgment records that the outline planning application was originally made in April 1997; the application for detailed approval (which was the subject of the dispute) was made in January 1999; the original planning permission lapsed in 2001; and the developers had since intimated that they were no longer interested in proceeding with the development. Those protracted proceedings did indeed reveal a discrepancy between English planning law and the requirements of the European directives. There may have been exceptional factors in the case, and there may have been other reasons why the developers withdrew. But the case illustrates the potential risks to other interested parties of setting in motion proceedings in a case of this kind. Such litigation is not the only

means to seek redress for concerns about compliance of English law with European requirements. As is apparent from another case decided by the European court at the same time as *Barker* (*Commission v UK* [2006] QB764), a complaint to the Commission may be equally effective.

11. In a last throw, in the form of a letter to the court on 9th December, Mr Buxton warned us of the risks of breaching our duty under Article 234 (as the final court for these purposes) to refer to the European Court any point of significant doubt under European law. He referred us to the judgment in *Kraaijeveld* [1996] ECR 5403. We do not accept that this is an obstacle to refusal of leave. Our decision does not depend on taking a view on the European issue, but is simply the exercise of a discretion on the facts of this case.

12. Another unanswered question was how Mr England proposed to finance these proceedings. This may not normally be an issue for the court when granting permission for what is an otherwise arguable case. Indeed the grant of permission may itself be sufficient to encourage a more positive response from the Legal Services Commission. However, it is a factor we are entitled to take into account in the exercise of our discretion to allow a case to continue, once its main practical purpose has gone, and having regard to the other interests involved.

13. Mr Buxton suggested that the court could make a protective costs order under the jurisdiction explained in the well known *Cornerhouse* case [2005] 1WLR 2600. There is no such application before us. It would be wrong to grant such an order without an opportunity for the affected parties to comment.

14. It is important, however, that means should be found to do this without that process itself becoming a source of additional cost. The recent report of a group chaired by Lord Justice Kay "Litigating the Public Interest" (July 2006) provides a valuable discussion of the issues arising from the *Cornerhouse* case. In particular, the report questions the requirement in the criteria there laid down that the applicant should not have any "private interest" in the outcome of the case. For our part we respectfully share the doubts expressed by Sir Mark Potter as to the appropriateness or workability of this criterion (*Wilkinson v Kitzinger* [2006] EWHC 835), but we note that a restrictive approach has been taken by this court in other cases (eg *R (Goodson) v Bedfordshire and Luton Coroner* [2005] EWCA Civ 1172).

15. Different considerations may in any event apply to a case such as the present where Mr England's "interest", as I understand, it is not a private law interest but simply one he shares with the other members of his group in the protection of the environment. In this context the provisions of the Aarhus Convention on assess to justice in environmental matters (referred to in *R (Burkett) v Hammersmith LBC* [2004] EWCA Civ 1342 para 74) may also be relevant. We hope that the Civil Procedure Rules Committee will take the opportunity in the near future to review these questions in the light of the findings and recommendations of the Kay Report.

16. For these reasons, we were agreed that the application must be refused. We had appearances on behalf of the developer and the local authority. The local authority appeared because they thought that we might make a protective costs order. As we have made clear, we would not do that without finding appropriate means to ensure that the authority could make representations. Even if we had made an order in the absence of the Authority, the rules would have allowed it to apply to set it aside. Accordingly we see no reason to make an award of costs in favour of the authority. Counsel for the developer realistically accepted that it would be unusual to make an order in favour of the respondents in circumstances such as the present and he did not press a claim. Accordingly we will simply dismiss the application for permission with no order as to costs.

17. Since we have touched on issues of wider significance, we authorise reference to this judgment where relevant in other proceedings (as an exception to the ordinary rules for judgments on permission applications).