Case No: HQ09XO3460 & IHQ09/1716

Neutral Citation Number: [2009] EWHC 2452 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 26 August 2009

BEFORE:

HIS HONOUR JUDGE SEYMOUR QC

BETWEEN:

THORNHILL AND OTHERS

Claimant/Respondent

- and -

NATIONWIDE METAL RECYCLING AND ROUNDWOOD RESTORATIONS LIMITED

Defendant/Appellant

MR J HYAM (instructed by Richard Buxton) appeared on behalf of the Claimant

MR CHRISTOPHER STONER (instructed by Birketts LLP) appeared on behalf of the Defendant

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Approved Judgment

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No of words: 2777
No of folios: 39

JUDGE SEYMOUR:

1. The application which is before me is that of Mrs Pamela Thornhill, the first claimant, Mr Trevor Foulkes, the second claimant, and Mrs Elizabeth Foulkes, wife of Mr Trevor Foulkes, who is the third claimant, seeking an injunction against the two defendants, Nationwide Metal Recycling Limited and Roundwood Restorations Limited.

2. The application was made by a notice issued on 30 July 2009 and attached to the application notice was a draft order. And the order, as drafted, sought substantively this at (a):

> "Until trial or further Order the Defendants or any of their associates, agents, or otherwise, be prohibited from causing a noise nuisance by reason of its scrap metal operations at Swanns Road, Cambridge."

That form of draft order is very much too vague to be one which it would be appropriate for the court to grant because it contains no indication whatsoever of what would be likely to amount to a noise nuisance. There is no clear indication of what it is that the defendants must or must not do and, in effect, the making of an order in those terms would be calculated to generate satellite litigation around the issue whether there had or had not been compliance with an order made in those terms.

3. The difficulties with the form of the order attached to the application notice were recognised, albeit rather late, because yesterday a revised draft form of order was prepared on behalf of the claimants. The revised draft form of order sought these injunctions:

> "(1) Until trial or further Order, the Defendants or any of their associates, agents, or otherwise, limit their noisy operations at their premises at Swann's Road, Cambridge to two periods each day; with each period being a maximum of 40 minutes at any one time.
>
> (2) Ensure that the two 40 minute periods referred to in paragraph 1 are between 8.30am and 10.00am (one 40 minute period) and between 2.30pm and 4.00pm (one 40 minute period) on weekdays only (i.e. Monday to Friday and excluding all public holidays).
> (3) Ensure that the levels of noise caused and experienced at the Claimants' home during the time periods referred to in paragraph 1 above are limited to the maximum noise levels recorded on 21 August 2009 and referred to in the statement of Dean Barke of 21 August 2009 (viz. an average sound level of the period inclusive of Newmarket traffic of 59 decibels (LAeq, 40 minutes, free field).
> (4) At all other periods ensure that noise levels are kept to a minimum and that level not to exceed 48 decibels LA A90).
> (5) Ensure that they comply with the operator's waste licence/environmental permit with regard to dust emissions, including that all dust causing activities are properly dampened down."

That form of draft order to some extent grapples with the manifest deficiencies in the original draft form of order.

4. Before considering further the relief which is sought by the claimants, it is appropriate to fill in something of the background. Mrs Thornhill, the first claimant, is the freehold owner of premises which are known as and situate at Station House, Barnwell Junction, Newmarket Road, Cambridge. Mrs Thornhill has lived in that property now for 50 years. Station House is on a disused railway station at a junction through which pass trains travelling from Cambridge to Ely and places past Ely to the north. The property Station House was conveyed to Mrs Thornhill's late husband by the British Railways Board by conveyance dated 24 January 1969. The property as conveyed included some two acres of land, and part of that land has been used for the construction of another house called Station Lodge, which was built for the occupation of Mr and Mrs Foulkes, the second and third claimants. Adjacent to the land which was transferred to Mr Thornhill in 1969 is what used to be the railway goods yard. The railway goods yard was itself disposed of progressively by the British Railways Board and its successors and, ultimately, prior to the beginning of this year, the relevant part of the railway goods yard was occupied by Sita Metal Recycling Limited and a company called Sita MR Limited, both companies in the Sita Group, and was operated as a scrap yard.

5. In proceedings which were commenced in 2008, Mrs Thornhill, and Mr and Mrs Foulkes sought relief against the Sita defendants in respect of alleged nuisance caused by the operation of the scrap yard. The defendants in that action accepted ultimately that their operations had caused nuisance and they agreed to pay an amount of £25,000, a sum which was itself agreed by the claimants, as compensation for that nuisance subject to one matter, which depended upon the question of the proper construction of the conveyance to Mr Thornhill in the first place.

6. The trial of the issue of construction of the relevant part of the conveyance came before me and was the subject of a judgment which was handed down on 23 April 2009 (Thornhill v Sita Metal Recycling Cambridge Ltd [2009] All ER (D) 162). As will be apparent from the circumstances, all I was concerned about at that trial was the issue of construction. I was not concerned with whether there had in fact been any nuisance caused by the Sita defendants by the operation of the scrap yard on the former goods yard. At about the time of the trial, the present defendants took over the operation of the scrap yard on the former goods yard. Essentially, the claim of the claimants against the current defendants is that the continued operation of the scrap yard amounts to a nuisance committed by these defendants as an extension of the nuisance previously committed by the Sita defendants.

7. That matter is very much in dispute in the evidence which has been put before me. While there are witness statements from each of the claimants explaining their perceptions of what has been going on at the scrap yard since April 2009, there is also a witness statement of Mr Douglas Edwards, who is a director and shareholder of both of the defendants, in which he explains that, from their perspective, the nature of the operations now conducted at the scrap yard is significantly different and significantly less noisy than the activities that had previously been carried on by the Sita defendants.

8. The witness statement of Mr Edwards is supported by a witness statement of Mr Dean Barke. Mr Barke is an associate of a company called Sharps Redmore Partnership Limited, who are acoustic consultants. Although Mr Barke's company has relatively recently been instructed, it is clear from the witness statement of Mr Barke that he has been able to attend the premises of the claimants in order to take certain measurements. That happened on Friday of last week. As a result of the readings taken by Mr Barke last week, it appears that there are significant differences between his results, and the assessment of the relevant results, and the results obtained on behalf of the claimants by Mr Michael Stigwood of MAS Environmental, also an acoustic consultant.

9. The circumstances therefore seem clearly to be, first, that there are serious disputes between the parties as to what activities are currently being carried on at the scrap yard and, secondly, what are the consequences in terms of noise and dust of the carrying on of those activities. Mr Edwards, in his witness statement, makes clear that the activities of the defendants are only conducted between 8.00am and 4.30pm from Mondays to Fridays and the defendants are prepared to undertake, until trial or further order, not to carry out any operations on the scrap yard other than between those hours on those days. Another issue, which has featured significantly is the use on the site of the scrap yard of what is described as a crane grab. It is accepted that the use of the crane grab is probably the single noisiest activity that the defendants engage in on the site, but the evidence of Mr Edwards is that that grab is not used on any working day for a total of more than two hours and it is not used on any working day for a continuous period of more than about 40 minutes. Mr Jeremy Hyam, who appeared on behalf of the claimants, explained that the first two paragraphs of the revised draft order were based upon the claimants' understanding of the evidence of Mr Edwards. Because of the late surfacing of this focus upon the evidence of Mr Edwards and what he meant, Mr Christopher Stoner who has appeared on behalf of the defendants, has had to explain, having taken instructions, the nature of the operations that the defendants in fact undertake using the crane grab.

10. Essentially, it amounts to this, that when somebody who wishes to dispose of metal, and in fact it is only non-ferrous metal that is dealt with at the scrap yard, appears with a load, that load has to be removed from the vehicle upon which it has been brought and placed somewhere. The crane grab is used for that purpose. How long it takes to remove the load depends upon the size of the load, but it may be a matter of just a few minutes. It may be in the course of a working day that there need to be a fair number of uses of the crane grab for quite short periods to unload relatively small vehicles. But Mr Edwards, Mr Stoner submitted, should be understood as intending to convey simply that the unloading of a particular vehicle is not, in any circumstances, going to take longer than 40 minutes.

11. There are serious differences between Mr Barke and Mr Stigwood not only as to the appropriate levels of the background noise, as it is described, as experienced at the property of the first claimant and the property of the second and third claimants which are referable to the activities at the scrap yard, but also as to the proper interpretation of the levels which have been recorded. I am not in a position today to reach any conclusion as to what is an appropriate background level for the use of the scrap yard during the ordinary working week, if it is indeed appropriate for the court ever to address the issue whether there has been or is a noise nuisance at the scrap yard by reference to decibel levels. Certainly, it would be wholly wrong for me to make an

order in terms of a particular decibel level which is not to be exceeded by the activities of the defendants at the scrap yard. The matter is further complicated because the particular decibel levels which are contended for are not, as it were, absolute levels, not to be exceeded at any particular given time, but rather to be assessed on an average basis over extended periods of perhaps one hour, or perhaps even longer. In those circumstances it would be wholly inappropriate for me to grant any injunction by reference to decibel levels as suggested in the revised draft order.

12. There is a serious objection to the granting of any injunction whatsoever in this case and that is that no cross-undertaking in damages is offered on behalf of the claimants or any of them. It is the almost invariable requirement of the court granting an interim injunction that the party seeking an injunction should offer a cross-undertaking in damages. This is not simply a ritual act. It is a matter of significance and of great relevance to the issue whether an injunction should be granted at all for this reason that, at an interim stage, the court cannot know what the eventual outcome of the litigation will be. It is entirely possible that the court being persuaded, at a preliminary stage, by reference to the well known criteria in American Cyanamid Co v Ethicon Ltd [1975] 2 WLR 316, that the balance of convenience favours an applicant for an injunction, the trial judge comes to the conclusion that the opposite party should succeed. If the trial judge reaches such a conclusion then the issue plainly arises as to the compensation of the party against whom the injunction had been granted for the consequences of the grant of the injunction ultimately found not to have been justified. That is the situation that the cross-undertaking in damages is intended to address.

13. In the present case it is clear that the activities of the defendants undertaken at the scrap yard are commercial activities. They are undertaking the processing and distribution of scrap metal with a view to making money. The evidence of Mr Edwards is that the gross profit which is made each month by the activities at the scrap yard is of the order of £40,000 and that, if the defendants were unable to continue to operate the scrap yard, then the cost to them would be of the order of £1,300 per day. Because of the way in which the issues have developed there is no specific evidence as to what would be the cost to the defendants of imposing upon the defendants some limitation as to their hours of work or mode of work during the ordinary working day. However, the submissions of Mr Stoner, based on instructions, make it clear that there would be likely to be implications for the defendants in terms of additional cost, and possibly loss of business, in the event that they were to be inhibited to any greater extent than the undertakings offered in the way in which the scrap yard is operated.

14. In all of the circumstances the appropriate way forward is for me to accept the undertakings offered on behalf of the defendants and to make no further order on the application for an injunction. There is a suggestion that I should direct that there should be a speedy trial of the issues between these parties. Certainly, I am minded to make appropriate directions to achieve that objective so far as it can be achieved but, so far as the application for the injunction is concerned, there will be no order on the undertakings which the defendants offered.

[Further Proceedings]

1 JUDGE SEYMOUR: For reasons which I have explained in the judgment which I have already delivered, the application before me was precipitate. It was ill

considered. The draft order which was prepared and attached to the application notice was deficient in the way that I have already explained. The implications of not offering a cross-undertaking in damages do not seem to have been assessed on the claimants' side until very recently. Even when assessed they do not seem to have been given appropriate weight. The application for an injunction has essentially failed. The undertakings which I have accepted were undertakings which it seems to me from the witness statement of Mr Edwards were essentially always available.

2 The substance of the matter, therefore, is that the claimants have failed and the defendants have succeeded, save with regard to one issue and that issue is relatively minor. It would have been necessary for there to have been a hearing in order to secure the directions for a speedy trial. To that extent it seems inappropriate to deal with the costs of the application. I propose therefore to split the costs in this way: that the claimants should pay 80 per cent of the costs of the application before me to the defendants to be the subject of a detailed assessment, unless agreed; 20 per cent of the costs of the application should be costs in the case, that being my rough assessment of the proportion of the costs referable to the necessity to consider directions for a speedy trial and whether it was appropriate to give those directions.

CO/5421/2006

Neutral Citation Number: [2006] EWHC 3495 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2

Tuesday, 12 December 2006

B E F O R E:

LORD JUSTICE PILL

MR JUSTICE TUGENDHAT

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ENVIRONMENT AGENCY

(CLAIMANT)

-v-

BIFFA WASTE SERVICES LTD

(DEFENDANT)

- - - - - - -

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MR MARK HARRIS (instructed by Environment Agency) appeared on behalf of the CLAIMANT
MR IAN CROXFORD QC and MR THOMAS de la MARE (instructed by Fairweather Whillis Toghill) appeared on behalf of the DEFENDANT

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J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE PILL: This is an appeal by the Environment Agency ("the appellants") against a decision of District Judge (Magistrates' Court) Crabtree, sitting at North and East Hertfordshire Magistrates' Court, dated 4 April 2006. The district judge dismissed charges brought by the appellants against Biffa Waste Services ("the respondents") which alleged that the respondents had failed to comply with condition 2.6.12 of Pollution Prevention and Control Permit BK 1988, contrary to Regulation 32 (1) (b) of Part 6 of the Pollution Prevention and Control Regulations 2000 ("the 2000 Regulations") and Section 2 of the Pollution Prevention and Control Regulations 1999 ("the 1999 Act"). Other charges alleging breaches of the Environmental Protection Act 1990 were not pursued on the ground that the relevant sections had been disapplied where the site in question was regulated, as this one was, by way of a permit issued under the 2000 Regulations. The appeal is by way of case stated.

2. The informations preferred arose out of complaints from local residents that strong odours had been emitted from the respondent's landfill site at Westmill Road, Ware, Hertfordshire. The informations covered a series of dates from August 2004 to February 2005. The case stated notes that the respondents had submitted that the charges were non-justiciable. The district judge recorded his findings, first, that the nature of the requirements imposed by condition 2.6.12 were unambiguous; secondly, he ruled that "the condition was ultra vires as it exceeded the object of the power to include conditions in permits, and also usurped the role of the court".

3. In stating a case, the district judge stated:

> "The question for the opinion of the High Court is:
>
> Was I correct to rule that, by the inclusion of the phrase ' ..... as perceived by an authorised officer of the Agency', Condition 2.6.12 of PPC permit number BK 1988 issued in respect of the respondent company's site known as 'Westmill II' was invalid or ultra vires on any or all of the following grounds:
>
> a. It offends the principles of certainty (clarity and foreseeability) required for the elements of an offence by:
>
> (i) Domestic law and/or
>
> (ii) Art 7 ECHR.
>
> b. It has the effect of usurping the fact finding and adjudicative roles of the Court by bestowing on an authorised officer the functions of establishing the relevant facts (according to that officer's subjective judgement) and obliging the Court to convict whenever it is satisfied that the officer honestly perceived those facts.
>
> c. It results in a Condition which extends beyond the object of the power provided for at Regulation 8 of the Landfill (England and Wales) Regulations 2002."

4. The Landfill (England and Wales) Regulations 2002 ("the 2002 Regulations") were made in exercise of powers conferred by Section 2 of the 1999 Act. They set out a specific regime for landfill permits, such permit being required by the 2000 Regulations for the disposal of waste in landfill. The respondents required a landfill permit to carry out the disposal of waste on their site. Regulation 8 (1) provides that -

> "A landfill permit shall include conditions specifying the list of defined types, and the total quantity, of waste authorised to be deposited in the landfill."

Regulation 8 (2) (a) provides that such a permit -

> " ..... shall also include appropriate conditions -
>
> specifying [amongst other things] requirements for -
>
> .....
>
> monitoring and control procedures, including contingency plans."

Regulation 8 (3) provides that a landfill permit -

> " ..... shall also include -
>
> (a) appropriate conditions for ensuring compliance with the requirements ..... "

5. Paragraph (5) of Schedule 2 provides, inter alia, that measures must be taken to minimise the nuisances arising from the landfill in relation to the emission of odours and dust - (5) (1) (a).

6. Regulation 14 provides, insofar as is material:

> "(1) The following requirements shall apply to landfill sites from the start of the operational phase until definitive closure.
>
> (2) The operator shall carry out the control and monitoring procedures set out in Schedule 3.
>
> (3) Where the procedures required by paragraph (2) reveal any significant adverse environmental effects, the operator shall notify the Environment Agency as soon as reasonably possible.
>
> (4) When it receives a notification of significant adverse environmental effects in accordance with paragraph (3), the Environment Agency shall determine the nature and timing of corrective measures that are necessary and shall require the operator to carry them out.
>
> (5) The operator shall report at intervals specified by the Environmental Agency, on the basis of aggregated data, the results of monitoring and on

such other matters which the Environment Agency requires to demonstrate compliance with the conditions of the landfill permit or to increase its knowledge of the behaviour of waste in landfill."

7. By virtue of Regulation 32 of the 2000 Regulations, it is an offence to fail to comply with or to contravene a condition of a permit.

8. The permit issued for the respondents' Westmill II waste management facility, BK 1988, is dated 7 April 2003 and was transferred or endorsed to the respondents on 25 May 2004. Condition 2.6.8 requires the operator to provide, implement and maintain measures to prevent or otherwise control, minimise and monitor, amongst other things, "odour". The breaches alleged were of condition 2.6.12:

> "There shall be no odours emitted from the Permitted Installation at levels as are likely to cause pollution to the environment or harm to human health or serious detriment to the amenity of the locality outside the Permitted Installation boundary, as perceived by an authorised officer of the Agency [Environment Agency].

An authorised officer, as defined in the Regulations, is one duly authorised by the Environment Agency.

9. Section 6 of Schedule 3 to the Permit headed "Amenity Management" describes the measures required to protect the environment against pollution which may cause harm to health or to the amenity value of the area. These give substance and detail to the requirements in Regulation 14, to which I have referred. Paragraph 6.3 provides:

> " ..... Landfill gas odour monitoring and reporting will be undertaken in accordance with the methodology detailed below."

Paragraph 6.3.4 provides:

> "Frequency of landfill odour monitoring
>
> Landfill odour monitoring will be carried out a minimum of once per working week during operating hours unless a complaint is received. The monitoring will then be carried out daily for at least 5 working days from the date of the complaint."

Paragraph 6.3.5 provides:

> "Landfill odour monitoring methodology
>
> Landfill odour monitoring will be carried out around the boundary of the operational cell of the landfill and in the residential area, industrial area and Health Farm close to the landfill as these have been identified as the sensitive receptors most likely to be affected. If a complaint has been received the monitoring will also be carried out close to the origin of the complaint or the nearest receptors.

> The route will be walked by the designated person or site manager to detect any landfill odour with the designated person walking slowly and breathing normally.
>
> If landfill odour is detected while walking the intensity should be recorded as at least 3.
>
> When landfill odour cannot be detected in this way the designated person will stand still at the monitoring point and inhale deeply facing upwind. If landfill odour is then detected, but can only be detected in this manner, the intensity should be noted as 2."

There is also provision for monitoring from a car.

10. A classification system follows that condition. It defines level 3 as -

> "Moderate landfill odour (landfill odour easily detected while walking and breathing normally)."

11. Paragraph 6.3.6 provides:

> "Calibration of site operative
>
> In addition to the landfill odour monitoring carried out in Section 6.3.5, landfill gas odour monitoring will be carried out once a month by the site manager in conjunction with the designated person. This will be undertaken to calibrate the landfill odour monitoring carried out by the designated person.
>
> The designated person will also carry out landfill odour monitoring in conjunction with the Agency Officer when a visit is undertaken and this is requested by the Agency Officer. This will be undertaken to calibrate the landfill odour monitoring carried out by the designated person and ensure consistency in landfill odour monitoring.
>
> When dual monitoring is carried out by either the site manager or Environment Agency Officer, then individual observations shall be taken and recorded prior to any discussion being undertaken."

Classification systems for the extent of odour and the sensitivity of location are also provided.

12. Before the district judge, the appellants submitted, as recorded by the judge in his judgment, that, properly construed, condition 2.6.12 did not give the authorised officer a role which usurped that of the court. The court was not bound by the officer's opinion and it could consider all the evidence in determining whether the emission offended against condition 2.6.12. The words "as perceived by an authorised officer of the Agency" at the end of the condition protects the operator from the risk of prosecution based only on complaints by local residents about emissions.

13. Accepting the submissions of the respondents, the district judge held that the "as perceived" clause unquestionably introduced an element of subjectivity into the offence which undermined clarity and foreseeability and affected the traditional role of the court as the fact-finding tribunal. The condition is ultra vires, the judge found, because the Agency has no power to remove the fact-finding role of the court or to impose a condition that affects matters of evidence.

14. In seeking to uphold the conclusion of the district judge, Mr Croxford QC, on behalf of the respondents, submits that the last clause in the condition deprives the courts of their essential role in a criminal case of deciding the relevant facts. Objection is taken only to the "as perceived" clause. It is not suggested that the rest of the condition is invalid or ultra vires. The relevant issue before a court, hearing a charge, is simply whether the officer has honestly held the opinion expressed. If that is so, the court cannot reject his evidence. The vice, it is submitted, is in the fact that it is the officer's decision which matters. That is the sole issue for a court. Is the officer honest in expressing the opinion he does?

15. Mr Croxford refers to the difficulty of measuring odour, as compared with measuring some other forms of environmental pollution. What the condition seeks to achieve, he submits, and does so for reasons of administrative convenience, is that the officer can decide whether there has been a breach of the condition. The condition has been drafted advisedly to achieve the result it has achieved. Any difficulty there may be in measuring odour and considering at what level it becomes a nuisance does not permit the removal of the protection of a court performing its fact-finding function, it is submitted.

16. If the condition did have that effect, the case that it infringes fundamental safeguards would be a strong one. The issue was considered in the High Court in Scotland in Procurator Fiscal v Seed Crushers (Scotland) Ltd [1998] Env LR 586. The wording of the condition in issue in that case was: "All emissions to air from the process shall be free from offensive odour as perceived by an authorised officer of the Scottish Environment Protection Agency (SEPA) outside the process boundary." While the sequence of words is different, Mr Croxford accepts that the condition has the same effect as the present one. Several points were taken, including the one taken in the present case.

17. The submissions of the operator in that case are set out in detail in the judgment. I refer only to the last sentence at page 596:

> "In this way, counsel argued, the drafting of the condition took the decision as to whether any breach had occurred away from the court and left it in the hands of the SEPA officials. That result would be unobjectionable if Parliament had provided for it by legislation, but it was unacceptable for SEPA to seek to achieve it by skillful drafting of the condition."

The Lord Justice General stated at page 597:

> *"We reject this argument also. The position might well have been different if the condition had said that a certificate by the authorised officer would be conclusive evidence that there had been an offensive odour outside the process boundary due to emissions to air from the process. In that event SEPA would in effect be seeking to set its own officer up as the final arbiter of a matter which might lie at the heart of a prosecution under section 23 (1) (a) of the Act [Environmental Protection Act 1990]. Here, however, as Sir Crispin [counsel for the operator] accepted, there was no certification procedure and a sheriff could reject the authorised officer's evidence about an offensive odour, if he thought it incredible or simply unreliable. He might even reach the view that the officer had acted so unreasonably that he had in effect failed to apply the correct approach in deciding that an odour was offensive. As the Advocate Depute argued, the condition lays down a standard which is ascertainable and it refers to the authorised officer as a way of verifying, readily but not conclusively, whether the standard has been met. It remains open to the court before which any prosecution is brought to determine whether the Crown has proved that the operators failed to meet the required standard and so carried on the process in breach of condition 2.1.3."*

18. I can read that paragraph only as accepting, and indeed insisting, that the normal fact-finding role of the court is preserved when deciding a case under the condition. The Lord Justice General stated that the court may reject evidence of an officer if it is simply unreliable. Other bases on which it might be rejected are added.

19. Secondly, the paragraph concludes with the judge stating that it remains open for the court to determine whether the Crown has proved that the operators have failed to meet the required standard.

20. I respectfully agree with the conclusions of the Lord Justice General in those circumstances, which are the same circumstances as in the present case.

21. Seed Crushers has been cited in this jurisdiction in R (On the application of United Kingdom Renderers Association Ltd) v Secretary of State for the Environment, Transport and the Regions [2002] Env LR 21. The issue in that case was whether a Departmental Guidance Note, which authorised a condition which would make it an offence for offensive odours to be perceived by a local authority officer beyond the process site boundary, unless it could be shown that all due diligence had been used and all reasonable steps taken to prevent the escape of odour, was unlawful guidance.

22. Mr Justice Ouseley considered the submission also made in the present case. He stated at paragraph 89:

> "Of course issues may be raised in criminal proceedings about the undue sensitivity or sensitisation of local inspectors or as to differing standards as to what is 'offensive', or indeed as to whether a prosecution had been influenced by local pressure. But in principle, it is not irrational for a

> court to be able to receive and rely on the evidence of an insepctor that he smelt a smell and that it smelled horrible. He may be untruthful, he may be unreliable, he may be unduly sensitive, but courts are not unaccustomed to dealing with that sort of issue. The offensive escape has to be proved before the question of due diligence and reasonable steps arises."

Mr Justice Ouseley then cited the passage from Seed Crushers set out above and stated:

> "I accept the force of that conclusion and adopt it in rejecting this part of the subjectivity argument."

23. Mr Justice Ouseley did refer to a further point made in Seed Crushers. It is one that bears upon the argument of the appellant before the district judge in the present case that the reference to the agency officer in condition 2.6.12 is a protection for the operator. The Lord Justice General had stated:

> "The respondents can - and indeed must - themselves check to see whether the emissions from the process are free from odour outside the boundary. By specifying that only a SEPA official can determine that there has been a breach, SEPA have narrowed the condition and have made its operation more certain and predictable, thus providing a substantial safeguard for the operators."

Mr Justice Ouseley adopted that conclusion. In the result, Mr Justice Ouseley held at paragraph 96:

> "I cannot accordingly conclude that an odour boundary condition, framed by reference to the perception of a local authority enforcement officer, would be irrational or unlawful."

24. The case went to the Court of Appeal. That conclusion of Mr Justice Ouseley was upheld but the court did not consider the present issue.

25. I do not accept the submission that condition 2.6.12 was ultra vires or that it requires the court to convict upon honest evidence from an officer of the agency. I construe the closing words of the condition as requiring evidence relevant to the requirements of the condition from an authorised officer of the agency as a necessary ingredient in the case. It is a requirement that is likely to be a safeguard for operators against irresponsible prosecutions. It does not limit the jurisdiction of the court to decide, on the basis of all the evidence presented to it, whether odours had been emitted at levels which offend against the standards and conditions.

26. Construed in that way, the condition does not offend against principles required by the criminal law. In the absence of apparatus able to assess the level of odours, the fact-finding exercise may be a difficult one but it is one which the court is entitled and required to make on the basis of the evidence presented. A different wording would have been used had it been intended to take the drastic step of excluding the court's

fact-finding function when an offence is alleged, and the closing words of the condition do not have that effect.

27. I have set out the required monitoring methodology in detail because it demonstrates, first, the extent of the operator's duty to monitor and, secondly, the close co-operation contemplated between the operator and the officers of the Environment Agency in achieving environmental protection. The procedure provided does not support a construction of 2.6.12 which gives the first and last word in determining whether a breach of condition has occurred to the officer of the Agency. His opinion provides the necessary starting point for a prosecution and is likely to be treated by a court as important evidence. The power and duty of the court to perform its usual function of making a judgment on the basis of all the evidence before it is not affected.

28. I would answer the question posed by the district judge by stating that condition 2.6.12 of permit number BC 1988 is neither invalid nor ultra vires. I would allow the appeal and hear submissions as to whether further relief should be granted.

29. MR JUSTICE TUGENDHAT: I agree.

30. MR CROXFORD: May I mention something before that. Your Lordship referred to the court deciding the case on all the evidence before it. I am not trying to be rude for one moment, but I think you have indicated that the test for the court will be the usual one which, in this case, will then have two limbs: to prove the emission - - - - -

31. LORD JUSTICE PILL: I am not prepared to elaborate.

32. MR CROXFORD: Your Lordship used the expression "on the basis of all the evidence - - - - -

33. LORD JUSTICE PILL: Yes.

34. MR CROXFORD: - - - - - before it." I was uncertain whether you were intending to shift away from the burden being on the prosecution or merely to re-state the ordinary position that in the ordinary course the prosecution - - - - -

35. LORD JUSTICE PILL: My judgment stands.

36. MR CROXFORD: So be it.

37. LORD JUSTICE PILL: I am sure you are trying to be helpful, but I am not prepared to elaborate on that.

38. MR CROXFORD: I was trying to be helpful. So be it, there is nothing further I can say.

39. LORD JUSTICE PILL: Are there any applications?

40. MR HARRIS: Would your Lordships consider directing the matter to be remitted to the Magistrates' Court and the district judge to hear the summonses?

41. LORD JUSTICE PILL: Mr Croxford?

42. MR CROXFORD: In the ordinary course that would be an application that would be very difficult to resist. Could I ask you to look at a paragraph in the materials before the district judge which has not been referred to today. It is central to what was before the district judge and the position that my clients faced; it is page 25. This is in the prosecution case summary, paragraph 13. The description is there given as to charge 1 which is the relevant charge here. In contradistinction, at the end is charge 2 which was not depended upon on perception. It goes to the point which I know your Lordship has found and relied upon, that passage in the judgment (page 59). It goes to the point as to the way the case was in fact advanced below which is reflected also in the ruling in the case - page 10, paragraphs 12 (v) and 12 (f) of the case stated itself. The way in which this case was put was very particular and, with the greatest respect, not in accordance with the ruling of this court. I did not understand Mr Harris to be putting it that way.

43. My observation is that in circumstances where my client has come to court in order to fight the case once, has fought it on the basis on which the prosecution then chose to put its case, it has come here and your Lordships have disposed of the case on a footing which was not that before the district judge.

44. LORD JUSTICE PILL: Why did the district judge not spell it out?

45. MR CROXFORD: He did, with respect. If you go to page 59, turn to page 60, he did spell it out. Your Lordship, with respect, ought not to treat the judgment of the judge as if it were a statute. When one turns over the page and finds that the district judge was reflecting at the top paragraph, just over half-way down:

> "The judgement of the authorised officer therefore affords the 'best evidence' so to speak ..... "

and so on. What he was doing was, in his own words, explaining what had been put before him. What had been put before him both by that case summary and sections of the written submissions from Mr Banwell that I showed you earlier, in particular paragraph 17 was it, and indeed the way Mr Harris puts it here was that he was not grappling with the case on the basis of the way you have just disposed of it.

46. In those circumstances I would respectfully say that we having gone to court once to fight the case, put very clearly as it was, we should not now be sent back to fight the case simply because you have given the prosecutor the opportunity to put his case in a different way. It is very clear from that passage at page 55 that I have just shown you on the summary of the case precisely how that case was being put and we would then be in a position of the prosecutor having a second bite of the cherry, not upon the case that was actually put but on a case that has emerged during the course of today and that would be unfair.

47. LORD JUSTICE PILL: I am not clear on your point on page 60. Are you saying that page 60 reverses page 59?

48. MR CROXFORD: I am saying it goes to explain rather more what it was that the district judge was looking at. That paragraph:

> "The supposition ..... Mr Banwell denies this and submits that reliance on the subjective perception of the authorised officer does not make the condition inherently uncertain. Practically, determination of whether emissions reach a level which contravene the condition would be difficult to measure in empirical terms, given the wide - - - - - "

49. LORD JUSTICE PILL: That is your other point which you say - - - - -

50. MR CROXFORD: That is the other point, but if you just allow me to finish. Then he said, after one gets over that:

> "The judgement of the authorised officer therefore affords the 'best evidence' so to speak."

51. LORD JUSTICE PILL: "So to speak".

52. MR CROXFORD: Yes. What the district judge was doing was paraphrasing, in the course of this ruling, the arguments which had clearly been put before him. Those arguments put by the prosecutor were that this was a case which, subject to the Seed Crushers review-type restrictions - - - - -

53. LORD JUSTICE PILL: You are re-arguing the case - - - - -

54. MR CROXFORD: I am not intending to.

55. LORD JUSTICE PILL: - - - - - that is offensive.

56. MR CROXFORD: In that case, I am sorry, my Lord, I did not intend to.

57. LORD JUSTICE PILL: Having heard the judgment and the argument, you say Seed Crushers is a judicial review case; that is offensive.

58. MR CROXFORD: I apologise. It is not what I intended. The sole point that I was seeking to make is that if one looks at page 60 and looks at paragraph 13 or paragraph 17 of Mr Banwell's written submissions (and you will find it at page 43), you will see the way the case was dealt with below. I take objection to the prosecutor having a second bite of the cherry.

59. LORD JUSTICE PILL: Yes, I agree you may have a good point; it is the way you are putting it. How was it put below?

60. MR CROXFORD: It was put precisely that subject only to the restriction of Seed Crushers, the prosecutor had to prove that the officer had formed the opinion that there had been emissions which led to pollution.

61. LORD JUSTICE PILL: Which paragraph is that?

62. MR CROXFORD: You will see it at paragraph 13 of the case summary - page 55 - the opening part dealing with the first alternative (paragraph 13). You see the contradistinction in charge 2, the ones that were not proceeded with. It is not dependent upon the perception of an authorised officer whereas charge 1 was. Page 43 - paragraph 17 - explaining the status there; in the findings of the district judge (paragraph 12-page 10 sub-paragraphs (e) and (f) as to his findings) and lastly I think - - - - -

63. LORD JUSTICE PILL: That is the ruling.

64. MR CROXFORD: It is. If you go back to page 6 and see sub-paragraph (f) in the description of Mr Banwell's submission, beginning, "The condition did not usurp ..... "

65. LORD JUSTICE PILL: Where?

66. MR CROXFORD: Page 6 in the case stated where the judge was dealing with the Environment Agency's arguments and the limited role which was there conceded for the court.

67. LORD JUSTICE PILL: It is not necessarily conclusive that the court could reject that evidence.

68. MR CROXFORD: Echoing Seed Crushers approach.

69. LORD JUSTICE PILL: Yes, which I too have echoed.

70. MR CROXFORD: Of course. The manner in which your Lordship has echoed them, and the basis I have just shown you, the case summary and the skeleton argument put before the court, is not the basis upon which it was argued before the district judge.

71. LORD JUSTICE PILL: Thank you. Is there anything further? What do you say, Mr Harris?

72. MR HARRIS: If and to the extent that the case is based on your Lordship's judgment, it is a problem which is regularly in front of the criminal courts, that at the outset of the proceedings if submissions are made as to certain aspects of the prosecution's case which requires an amendment in any way, shape or form to the way in which the Crown's case is to be put, if that amendment requires that the defence have a further opportunity to prepare their case to reflect the amendment that time is afforded. The position here is that this matter was dealt with solely by way of argument of law. There has been no material consideration of the evidence in the case. The defendants are in no way prejudiced in my submission, having to meet a case based upon the judgment that your Lordships have given this afternoon.

73. LORD JUSTICE PILL: So we only retire once, are there any other applications.

74. MR HARRIS: I would seek the Environment Agency's costs.

75. MR CROXFORD: May I reply shortly on the last point?

76. LORD JUSTICE PILL: Yes.

77. MR CROXFORD: I do not rely on prejudice. I simply say that the prosecution having decided to put its case one way and lost should not be allowed a free hand to go a second time. As far as costs are concerned, I invite you to say that the Environment Agency should not have their costs for the reason I have just indicated. They have been successful insofar as they have on this appeal on a new ground. I invite you to consider whether we should have our costs out of central funds. You have discretion, as I understand it, under the Costs in Criminal Cases Act for a defendant in the final disposal of the case before this court. They should not have their costs. I invite you to say we should have ours. At worst, it should be a no score draw. There is nothing else I can say.

78. LORD JUSTICE PILL: We will retire.

(The Bench retired)

79. LORD JUSTICE PILL: The court having allowed the appeal of the Environment Agency and answered the question posed in a way favourable to them, Mr Harris submits that the district judge should be directed to proceed with hearing the informations. For the respondents, Mr Croxford has submitted that the Agency should not be allowed a second bite of the cherry, that having put the case in one way before the district judge they should not, now that the court has answered the question in the way it has, be permitted to put the case in a different way. We do not accept that the case needs to be put in a different way.

80. We have had regard, and it is cited in my judgment, to the passage at paragraph 59 of the district judge's judgment which says how the case was put; in substance, in the same way as this court has found to be accurate. We do not find the raising of further points, including the reference to "best evidence" at page 60, detracts from the way in which the case was put. When the district judge at the Magistrates' Court was summarising how the case was put at page 6 of the bundle - 7 (f) - he referred to Procurator Fiscal v Seed Crushers (Scotland), a case which has been followed by the decision of this court, and, whatever else may have been said, the summary in this respect of the appellants' case was that the verification of the Environment Agency officer was "such verification was not necessarily conclusive" - the court could reject it. There are nuances, as there often are, when cases go to a higher court. That is a common feature at all levels.

81. We are not prepared to say that there is any injustice or abuse whatever in the Agency being permitted to proceed with their case in the Magistrates' Court. What course they take, having regard to the lapse of time, is for them.

82. Mr Harris has asked for his costs. Mr Croxford submits that his client should have the costs because the case has been put in a different way. The Agency have been successful and, in our judgment, they are entitled to the costs of the appeal. The question has been answered. The question was, with respect, a clear, straightforward and apt one. It has been answered in favour of the Agency. Thank you both for your submissions.

83. MR CROXFORD: In the light of that, may I mention one other matter which I do not ask you to rule on at the moment. I ask with some trepidation because I have probably said too much already unintentionally.

84. LORD JUSTICE PILL: Not at all.

85. MR CROXFORD: Obviously we will want to consider very closely your Lordships' judgment in the coming hours. It may be that we might come and trouble you, if we think it appropriate, if we formulate an appropriate question having read and better understood your judgment. We might at some point by the end of the week, if your Lordships are sitting together, if necessary, come back with a point we would ask you to certify.

86. LORD JUSTICE PILL: I am not going to stop you doing that. If it is to be done - it is entirely a matter for you - then the sooner the better.

IP/10/312

Brussels, 18 March 2010

Environment: Commission warns UK about unfair cost of challenging decisions

The European Commission is warning the UK about prohibitively expensive challenges to the legality of decisions on the environment. The Commission sent an initial warning to the UK government in 2007; failure to respond to this could result in a summons to the European Court.

European Environment Commissioner Janez Potočnik said: "When important decisions affecting the environment are taken, the public must be allowed to challenge them. This important principle is established in European law. But the law also requires that these challenges must be affordable. I urge the UK to address this problem quickly as ultimately the health and wellbeing of the public as a whole depends on these rights."

High costs preventing legal challenges

Under European law, citizens have a right to know about the impact of industrial pollution, and about the potential impact projects may have on the environment, and a right to challenge such decisions. The law explicitly states that such challenges must not be prohibitively expensive. The Commission is concerned that in the United Kingdom legal proceedings can prove too costly, and that the potential financial consequences of losing challenges is preventing NGOs and individuals from bringing cases against public bodies.

The warning letter also raises concerns about the requirement in the United Kingdom for applicants for interim injunctions to give expensive and often unaffordable "cross undertakings in damages" (deposits that may be used to compensate defendants) before such orders are granted by the courts. This is a serious impediment to the use of such injunctions, which are essential for temporarily halting operations that may have a potentially damaging impact on the environment while their legality is being assessed.

The Commission sent an initial warning letter about this issue in October 2007, and the UK replied that the procedures were under review. Whilst the reviews undertaken since 2007 have been illuminating they have not resulted in any changes having been made to improve on the situation that existed in 2007 The Commission therefore considers that the UK is failing to comply with the legislation. A failure to comply with this final warning could see the UK brought before the European Court of Justice.

Access to environmental information

Several pieces of environmental legislation, including the Environmental Impact Assessment (EIA) Directive and the integrated pollution prevention and control (IPPC) Directive, aim to boost public awareness of environmental matters in Member States and ensure increased transparency. The measures – which are also

necessary under the Aarhus Convention on Access to Justice, which has also been signed by the UK – have been transposed to UK legislation, but the current financial obstacles have led the Commission to conclude that the laws covering this area of the Directive have not been fully transposed and are not being properly applied in practice.

Legal Process

The Commission has the power to take legal action against a Member State that is not respecting its obligations under Community law, under Article 258 of the Treaty on the Functioning of the European Union.

The infringement procedure begins with a first written warning ("Letter of Formal Notice") to the Member State concerned, which must be answered within two months.

If the Commission is not satisfied with the reply, this first letter may be followed by a final written warning ("Reasoned Opinion") clearly explaining the infringement, and calling on the Member State to comply within a specified period, usually two months.

A failure to act on the final written warning can result in a summons to the Court of Justice. If the Court rules against the Member State, it must then take the necessary measures to comply with the judgment.

If, despite the ruling, a Member State still fails to act, a further round of the infringement process begins under Article 260 of the Treaty, this time with only one written warning. This second round can ultimately result in financial penalties for the Member State concerned.

For current statistics on infringements in general see:

http://ec.europa.eu/environment/legal/implementation_en.htm

Case

2006/4033