



Case No: C1/2011/0188

Neutral Citation Number: [2011] EWCA Civ 1750
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
(HIS HONOUR JUDGE FARMER)

Sitting at:
Cardiff Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET

Date: Wednesday 30th November 2011

Before:

LORD JUSTICE LAWS
LORD JUSTICE PITCHFORD
and
MR JUSTICE LLOYD JONES

Between:

Smout

Appellant

- and -

Welsh Ministers and Wrexham CBC

Respondent

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Official Shorthand Writers to the Court)

Mr Richard Harwood and Ms Caroline Allen (instructed by Gamlins) appeared on behalf of the **Appellant**

Mr Clive Lewis QC (instructed by the Treasury Solicitor) appeared on behalf of the **First Respondent**.

Mr Stephen Sauvain QC (instructed by Geldards) appeared on behalf of the **Second Respondent**.

Judgment

(As Approved)
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Lord Justice Laws:

1. This is an appeal with permission granted by Stanley Burnton LJ on 8 July 2011 against the decision of the late HHJ Farmer QC, sitting in Wales as an additional Queen's Bench judge in the Administrative Court, by which he dismissed an application brought under section 288 of the Town and Country Planning Act 1990 to quash orders modifying two planning permissions. I shall refer them as "the orders". Stanley Burnton LJ also made protective costs orders limiting the costs liability of the appellants in the Court of Appeal to £3,500 and the costs liability of the first respondents, the Welsh Ministers, to £12,500. The appeal requires the court to revisit the law relating to environmental impact assessments and the application of the Environmental Impact Assessment Council Directive 85/337/EC. The appellant chairs the Hafod Environmental Group which opposed the making of the orders.
2. The orders were made under Section 97 of the Town and Country Planning Act 1990. The two planning permissions which they modified were respectively dated 10 July 1995 and 17 September 1998. These permissions permitted the infilling of 30.9 hectares of land at Hafod Quarry near Wrexham with domestic, commercial and industrial refuse and associated operations. Minerals had been extracted from the quarry pursuant to earlier planning permissions dating back to 1988. The second landfill permission of 1998 was granted pursuant to an application, in effect, to change the date for approval of certain matters reserved in the first permission.
3. Conditions 6 and 7 in the 1995 planning permission, replicated in the 1998 permission, concerned great crested newts. They provided as follows :

"6) Prior to the commencement of the development hereby permitted a survey of the application site shall be carried out to determine the numbers of GCN present on the land and a scheme submitted to the Mineral Planning Authority, for approval by them. Such schemes shall provide details of a rescue programme for the relocation of the numbers of GCN which may be identified in the survey."

7) The land filling operations hereby permitted shall not be commenced until the GCN identified by the survey required by Condition 6 have been relocated in a suitable alternative habitat provided in accordance with a scheme to be agreed, in writing, with the Minerals Planning Authority."
4. The 1995 permission had been the subject of an Environmental Impact Assessment pursuant to the directive. That assessment was based on a 1990 environmental statement revised in 1992. A management plan for the great crested newts was evolved in February 1999 and the following month

approval was given for reserve matters in the planning permissions. Approval of the arrangements for the newts was included. The local planning authority confirmed in a letter dated 28 March 2001 that all conditions precedent had been fulfilled. On 23 August 2006 landfilling operations began at the site. The Welsh Ministers and the local planning authority, who are the second respondents, assert that conditions 6 and 7 of the 1995 permission had been fulfilled. The great crested newts had been "relocated", partly to a habitat outside the site, and the rest remained in an area to the southwest of the site; but, as I shall show, the orders took that location out of the planning site.

5. On 19 July 2001 that part of the site where the newts had been relocated or remained had been designated as a Site of Special Scientific Interest because of the very presence of the great crested newts. On 7 December 2004 the European Commission listed this area, called the Johnstown Newt Sites, as a special conservation area ("SAC"). In consequence the planning authority were obliged to review the 1995 and 1998 permissions and to assess the implications in light of the conservation objectives of the SAC. In the event three modification orders were made. One took the SAC out of the area for which permission had been granted in 1998 to extract gravel. This permission had been reviewed in 2006. That order has not been called in question but is part of the context of the case. The other two modification orders are the orders under challenge. The first, made on 2 May 2007, took the SAC out of the area in respect of which the 1995 landfill planning permission had been granted and made consequential modifications. The second made on 28 November 2007 did the same in respect of the 1998 landfill permission. However, by section 98(1) of the Town and Country Planning Act 1990 a modification order which is opposed, as these were, does not take effect unless it is confirmed by the Secretary of State or in this case of course the Welsh Ministers. Accordingly an inquiry into the orders was conducted by a planning inspector between 10 and 12 March 2009.
6. Having considered the inspector's report and an addendum report, the Welsh Ministers confirmed the orders without modification on 14 January 2010. At paragraph 42 of the inspector's report, the inspector noted that conditions 6 and 7 of the planning permissions had been satisfied and the newts relocated. He said:

"There is no question that these conditions relate to future need."

Tipping or landfill operations had not yet occurred on that part of the planning permission site which formed the SAC: see paragraph 47 of the inspector's report. The inspector concluded and the Ministers agreed that (paragraph 153 of the report):

"...subject to the submitted modifications, each Order is necessary and sufficient to safeguard: the integrity of the SAC, and populations of great-crested newts and other amphibians within the SAC, the SSSI and the amphibian compensation areas."

7. I may deal with two matters by way of preliminaries. First, lest there be any doubt, it is now accepted by Mr Lewis QC on behalf of the Welsh Ministers that the orders are "development consent" within the meaning of Article 1 of the directive. Secondly, and this engages the sixth ground of appeal, it may be accepted strictly for the purposes of the argument that the directive has not been transposed by any measure of domestic law, whether the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 or any other measure, so as to apply modification orders made under section 97. Even so, that is not of itself a ground for quashing the orders under Section 288. It means only that *pro tanto* the directive has direct effect so that it may itself be relied on as testing the legality of the orders: see for example Marks & Spencer v Commissioners of Customs and Excise [2003] QB 866, paragraph 27, cited by the learned judge below at paragraph 8 of his judgment. There is no contest but that the relevant terms of the directive are sufficiently unconditional and precise as to engage the principle of direct effect. This to my mind disposes of ground 6 in the appeal, which asserted that the failure (as it was said to be) to transpose the directive was itself fatal to the making of the orders. The Welsh Ministers, by Mr Lewis, put in a respondent's notice to assert that, on a proper construction of the 1999 regulations, the directive had in fact been transposed vis-à-vis modification orders, but because the appellant is entitled anyway to rely on the doctrine of direct effect it is not necessary, as Mr Lewis accepts, to go into the respondent's notice.
8. Now it is common ground that the orders are development consents for a project falling within Annex 2 of the directive. Accordingly, by Article 4.2, the member state through its relevant authority was required to determine whether an environmental impact assessment was needed. This in turn meant that by force of Article 2.1 the authority had to decide whether the orders were "likely to have significant effects on the environment by virtue inter alia of their nature, size or location". The Ministers took the view that the orders were unlikely to have such effect. They so stated in a letter of 9 March 2009, agreeing with the screening opinion to the same effect obtained by the Wrexham County Borough Council, the second respondents. Accordingly the Ministers considered that no environmental impact assessment was required. That conclusion was reiterated in the decision letter of 14 January 2010 citing the responses of the Countryside Council for Wales ("CCW") and Environment Agency Wales ("EAW") to a consultation exercise conducted by the Welsh Assembly Government. It is worth noticing, with respect, what was said by those bodies. The CCW observed:

"To conclude, we wish to affirm that the outcome of the Modification orders will be to reduce any adverse effects on the environment and will prevent any significant effects on landfill or mineral extraction on statutory sites, their associated features and on the conservation status of European protected species. We therefore consider that an

EIA is not required for the purposes of informing the modification order process."

The EAW observed:

"The three Hafod Quarry Landfill Modification Orders 2007 [I interpolate that includes the modification order not under challenge] update the relevant Planning Permissions to reflect the status of the SSSI/SAC ..., and their specific exclusion from the proposed uses of the land and, in this respect brings the planning permissions in line with the Environmental Permitting (England and Wales Regulations) 2007 permit issued in 2004. It is not considered that the works under the terms of the Modification Orders are likely to have a significant impact on the environment. It is considered that these proposals will encourage an extension of the designated sites, which is welcomed by the Environment Agency."

9. I turn to the appellant's grounds of appeal. It is convenient to take grounds 1, 4 and 5 together. Ground 1 contains the substantive argument. Essentially it is contended that, in deciding whether an EIA was required, the Ministers ought to have considered the overall impact of the landfilling and mining scheme. Mr Harwood puts it on the basis that this was the Ministers' duty either by reference to the scheme as modified by the orders or by reference to the cumulative effects of the orders with the existing schemes. Those alternatives are thus set out at paragraph 35 of his skeleton argument. I detect no material difference to speak of between those formulations.
10. Some reliance is placed on a decision of Collins J in R(Baker) v Bath and North East Somerset Council [2009] EWHC Admin 595, cited by the learned judge below at paragraph 20 and following of his judgment. Collins J said this at paragraph 44:

"It seems to me that it is clearly not only consistent with but applies the approach that it is necessary to look at the effect of any modification or modifications on the project, or on the development, and to see whether the whole as modified, has or is likely to have other significant effects which need to be taken into account and may require an environmental assessment, albeit that they do not fall themselves within the criteria which have been adopted by the Member State."

This reasoning, with great respect to Collins J, is a little opaque. The correct position is in my judgment as follows, at any rate in relation to the present case.

- 1) The question for the Ministers was whether the "project" constituted by the orders would have significant environmental effects.
 - 2) The project is and is only the changes to the planning permissions effected by the orders. These were changes to another project earlier authorised by the two planning permissions. The orders effecting such changes constitute a distinct project within the meaning of the directive: see Annex 2 paragraph 13. Compare R(Barker) v Bromley London Borough Council [2007] IAC 470 paragraphs 22 to 25.
 - 3) Accordingly the environmental impact of the orders had to be assessed, as it seems to me, by reference to this question: what environmental difference did they make to the scheme? The Ministers were not required to revisit the effects of the original scheme as such. The issue may well be described as concerning the overall or cumulative effect of the changes, but it is the changes and their consequences that have to be considered. It is, I think, of the first importance to have in mind that the orders granted no permission for landfilling. They did not permit landfilling in any place where it was not permitted by the parent planning permissions.
 - 4) I do not consider that authorities such as Brown v Carlisle City Council [2010] EWCA Civ 523 assist the appellant, though Sullivan LJ's judgment in that case was pressed upon us by Mr Harwood this morning. In that case it was held, on the facts, that the airport works were part of the cumulative effect of the freight distribution centre, but it is plain that the learned Lord Justice concluded that the question as to cumulative effects was one of fact. It is useful to consider paragraph 21 and 25 of the judgment in that context.
11. The orders in this case, it has to be emphasised, are not planning permissions at all. Mr Harwood, in his submissions this morning, attached no little importance to the requirement in Annex 3 of the directive that the decision-maker consider the cumulative effect with other projects; but that, as it seems to me, is perfectly consistent with the question dealing with what environmental difference did the orders make. In my judgment the Ministers proceeded in accordance with that question and that view of the law. They also in my judgment gave legally adequate reasons for doing so. So much is clear from the letter of 9 March 2009 from the Ministers read with the earlier screening opinion obtained by the local planning authority, from the decision letter of 14 January 2010 together with the quoted observations of the CCW and the EAW and also from the evidence of Ms Thomas, a senior official who made the decision for the Ministers: see paragraph 5 of her witness statement of 10 June 2010.
12. Though the letter of 9 March 2009 itself contains no reasons, as I have stated the Ministers were agreeing with the screening opinion obtained by the planning authority in which these observations were made:

"The proposed modification would exclude mineral extraction from within the SAC, prevent tipping on the SAC and require the remainder of the site to be restored in accordance with a revised restoration scheme that also excludes the SAC. The planning merits of this proposal and particularly its impact on

conservation interests within the SAC were considered at appeal in 2004. While the appeal was later put aside the inspector found that the modifications proposed would not cause harm to those interests."

And then it continues:

"In terms of the potential environmental effects the key issues relate to the following...

(b) The working area is located further away from the existing housing than the current permission presently allows;

(c) There would be no further increase in visual impact;

(d) Predicted waste flows are no worse than the original approval (duration of works).

The principle of development has previously been established by the 1995 permission. Having considered all the relevant information I do not consider a modification of the permission to exclude mineral extraction and tipping from the SAC and to revise the final landform to reflect that last considered at appeal in 2004 will give rise to any further significant environmental effects or raise issues other than those of local significance.

Therefore an Environmental Impact Assessment is not required in this instance based upon the information known at this stage."

13. That the Ministers addressed the cumulative effects of the orders is also indicated by the terms of the inspector's report whose conclusions were accepted in the decision letter. Reporting the local planning authority's case at the inquiry, the inspector said this (paragraph 52):

"Even if an EIA was required, it would have to compare any development allegedly authorised by the Modification Order with a baseline position represented by the development which already has planning permission. The highest case that could be put is that the Modification Orders authorise a level of development commensurate with that which would result from the existing planning permissions. That does not indicate an environmental impact over and above that already permitted. ..."

Then the Baker case was referred to :

"...which was dealing with an entirely different situation, [which] is that there is a need to look at any cumulative effect. Here the orders would actually substantially reduce the development that would be permitted such that the potential impact would be similarly reduced."

14. The inspector for his part clearly accepted this case. See paragraph 139:

"If EIA was required, there would be a need to compare the environmental effect likely to arise from the modified development with that which would result from the implementation of the unmodified planning permissions. At worst, the modified development would be comparable with that resulting from implementation of the existing permissions outside the SAC.... In such circumstances I cannot see how any likely environmental effect would be greater, and it would probably be less with the reasons given in paragraph 143 below."

Accordingly, in my judgment, ground 1, grounds 4 and 5 associated with it fail. The Ministers asked the right legal question and provided a legally sustainable answer. I turn to ground 2.

15. This ground overall asserts that in the events which had happened landfilling could not lawfully be carried out at the site or could only be so carried out over a restricted area. This proposition is said to be justified by three considerations. The first is that, so it is asserted, condition 7 on the permission was incapable of fulfilment because the great crested newts had not been removed from the southwest corner of the site and so the landfilling operations ought not to have been commenced. It will be recalled that condition 6 required a survey of the planning site to be carried out to ascertain the numbers of great crested newts on the land and to submit a scheme with a rescue programme for relocation. Condition 7 then forbade the commencement of landfilling until the newts so identified "have been relocated in a suitable alternative habitat".
16. Mr Harwood says that the great crested newts have not been relocated from the southwest corner of the site. It is certainly true that they remain there; but in my judgment, in the particular circumstances, condition 7 on its true construction did not require anything different to happen. It required the newts to be relocated in a suitable alternative habitat. But the presence or continued presence of some of them was the very basis for the designation of the Site of Special Scientific Interest and the SAC. As I have said, the planning authority on 28 March 2001 confirmed that all conditions precedent had been fulfilled. By then, the decision to set aside the southwest corner as a nature reserve and to notify it as an SSSI had been taken, although it was not confirmed as such until July 2001. So condition 7 was treated as having been

fulfilled in the full knowledge that newts would stay in the southwest corner. So much, it seems to me, appears also from a decision of the Lands Chamber of the Upper Tribunal to which Mr Harwood drew our attention: NWH Associates v Wrexham County Borough Council [2011] UKUT 269.

17. Despite Mr Harwood's urging the contrary, this is, I have to say, an attempt to challenge either the 2001 confirmation that the conditions precedent had been fulfilled or the commencement of works in 2006. It is far too late for either and these proceedings are not directed to those acts. I quite acknowledge Mr Harwood's submission this morning that the 2001 confirmation was contained in an informal letter rather than a statutory decision. That might or might not have created some questions had there been proceedings at the time, but the broad point is that the thrust of these proceedings must be to the modification orders and not, by contrast, to this alleged violation of condition. However, for my part, I would hold that in any event, in the particular circumstances prevailing here, condition 7 was not violated.
18. The second basis on which it is said that the landfilling could not lawfully be carried out rests on the terms of what is called phased development plan JB1. This is incorporated as part of the description of the development permitted by the two landfill planning permissions and there is no contest but that it represents part of the planning permission. It demarcates the areas of six phases of the development tabulated A to F. Phase D is subdivided into D1 and D2. Mr Harwood's submission is that these phases were required to be carried out in the alphabetical order in which they were tabulated, and because of the newts in the SAC in the southwest corner most of phases C and D1 could not in practical fact be executed. Moreover, submits Mr Harwood, to progress straight from B to D2 could not be development in accordance with the permission.
19. The inspector said this:

“134. Phased development Plan JB1 has been incorporated into the two landfill planning permissions. It would appear that the intention was that the phases would be tipped in an alphabetical sequence, reflecting the fact that mineral extraction would still be ongoing. However, there is nothing on the plan or in the permissions which requires an alphabetical sequence and there is no evidence that there was a planning reason to do so. In practice, there would also be a need for different areas to support other areas and it would have been inevitable that more than one Phase would be under development at any time.”

135. Although phases C and D could not be fully implemented, because that would intrude into and have a significant effect on a European site, considerable parts, including the whole of sub-phase

D2, lie outside the SAC. On the basis of the evidence submitted and what I saw on the site visit, I am satisfied that they could be partly filled without encroaching onto the SAC. Even if there was a need to progress alphabetically, there is nothing in the plan or in the permissions to require one phase to be tipped to any particular level or completed before moving to another phase.”

20. In my judgment the inspector was right. Specifically, there is nothing in the planning permission to require the phases to be developed in alphabetical order. If a planning authority desires to impose a restriction or limitation upon development being permitted by the permission in hand, that must be done by means of a condition attached to the planning permission: see the decision of Mr Robert Purchas QC, sitting as a divisional judge of the Queen's Bench in I'm Your Man Limited v Secretary of State [1999] 77 P&CR 251. Here the conditions attached to the planning permission are set out in Annex C. There is no condition requiring the phases to be developed in alphabetical order. Mr Harwood referred this morning to the terms of the environmental statement in the case, consolidated as I have indicated in 1992. He says that that shows the importance of fulfilling the phases in order. However, the environmental statement plainly does not constitute a planning condition.

21. The third argument advanced by Mr Harwood to show that the permissions could not lawfully be implemented concerns what is called the restoration concept plan, which was incorporated into the planning permission. Mr Harwood says that the effect of leaving out the southwest corner from the landfill operation would be that the ground levels and slopes on the rest of the site would be at variance with the restoration concept plan. The inspector said this:

"137. Restoration Concept Plan R48/19B has also been incorporated into the two landfill planning permissions. However, it is only a concept plan and condition 29 of the permissions requires that restoration details for each phase be submitted for approval. As a result, restoration details could be submitted, in accordance with this condition which addresses any issues, including levels of contours arising out of the presence of the SAC."

22. Again, there was no planning condition requiring restoration to be carried out only in accordance with the concept plan. Mr Harwood submitted, addressing us this morning, that condition 29 did not provide for any alteration to the restoration concept plan and indeed it does not; but that does not relegate fulfilment of the restoration concept plan into a condition of the planning permissions.

23. For all these reasons, then, ground 2 in my judgment fails. Ground 3 is parasitic on ground 2. It is, as I have said, important to have in mind that the

orders do not grant permission to do anything. If they were quashed, the planning permissions would presumably remain and as far as I can see separate proceedings would be required to prevent or undo the landfill operations. Quite aside from anything else, it must surely be too late for proceedings of that sort.

24. I turn briefly to grounds 7 and 8. Mr Harwood acknowledged that these are in truth also parasitic on earlier grounds. By them he asserted that the Ministers failed to have regard to the planning merits of landfilling, the objectives of the waste directive and the landfill directive and local policy on waste disposal and landfilling; and they failed in their duty to give substantial weight to the objectives of the waste and landfill directives. The suggestion here is that "the effect of the orders was to completely reconfigure the land filling and mining operations on the site" (see paragraph 61 of Mr Harwood's skeleton) and in consequence the Welsh Ministers were obliged to give consideration or fresh consideration to a whole raft of matters described in these grounds. However to the extent that the permitted operations were indeed reconfigured by the orders, the Ministers asked and answered the question what difference the orders made. That is the territory of ground 1 with which I have already dealt. Again these orders were not planning permissions nor did they lift any condition attached to the original planning permissions. The permission for landfill operations would have engaged no doubt a series of considerations including issues arising in relation to European Union law. The basis of ground 7 and 8 is, in my judgment, wrong and the grounds are misplaced.

25. Mr Harwood has been tenacious in advancing his client's case and the court is indebted to him, but for my part I would dismiss this appeal for the reasons given.

Lord Justice Pitchford:

26. I agree.

Mr Justice Lloyd Jones:

27. I also agree.

Order: Appeal dismissed