

**THAMES WASTE MANAGEMENT
LIMITED v. SURREY COUNTY
COUNCIL [1996] EWHC Admin 183
(1st November, 1996)**

IN THE HIGH COURT OF JUSTICE CO 1026/96

QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)

Royal Courts of Justice
Strand
London WC2

Friday, 1st November 1996

B e f o r e:

LORD JUSTICE ROSE

-and-

MR JUSTICE MAURICE KAY

- - - - -

THAMES WASTE MANAGEMENT LIMITED

-v-

THE SURREY COUNTY COUNCIL

- - - - -

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MR J HAINES (instructed by Thames Water Utilities, Reading,
Berks RG1 8DB) appeared on behalf of the Appellant.

MR DM THOMPSON (instructed by Mr JH Jessup, Solicitor to
the Council, Surrey County Council, Kingston upon Thames

KT1 2DN) appeared on behalf of the Respondent.

J U D G M E N T

(As approved by the Court)

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Friday, 1st November 1996 .

1. LORD JUSTICE ROSE: There is before the court an appeal by way of case stated by Thames Waste Management Limited. On 14th December 1995 that company was convicted by the North West Surrey Magistrates sitting at Chertsey. The information on which they were convicted was in these terms, that they, on 29th May 1995, at the Norlands Lane Landfill Site at Thorpe, Near Egham "... unlawfully deposited controlled waste on the land otherwise than in accordance with the conditions specified in a disposal licence issued to you as the occupier of that land in pursuance of section 5 of the Control of Pollution Act 1974 in that deposits of waste were not covered over on the day the waste was deposited in the manner set out in the working plan, contrary to Section 33(1)(a) of the Environmental Protection Act 1990".

2. The appeal raises two points: (i) was the company properly charged with an offence under section 33(1)(a); (ii) if not, is the prosecution saved by section 123 of the Magistrates' Courts Act 1980 or by rule 100 of the Magistrates' Courts Rules.

3. In a careful case the Justices make the following findings of fact. The company was granted a waste disposal licence transferred to them in August 1991 in relation to this site. The site is very close to a housing development. Condition Number 8 of the waste disposal licence requires any deposit of waste to be covered over on the day that waste is deposited in the manner set out in the working plan.

4. On Bank Holiday Monday, 29th May 1995, Miss Heywood, a Waste Regulation Officer employed by the County Council,

visited the site to check that the conditions of the licence were being complied with. It was a little over 10 days since, due to illness, she had last visited. The site was closed; its last operational day had been the previous Saturday, 27th May. Miss Heywood smelt strong odours of what she thought was decomposing putrescible waste and sewage screenings. She took the view that there was an immediate risk of serious pollution of the environment and sought access to the site. She there discovered a large area along the north-eastern boundary where there was uncovered waste from which the strong odours, to which I have referred, were coming. She took samples and photographs.

5. On 20th June, in the presence of their solicitor and a solicitor from the County Council Legal Service, she interviewed under caution the company's Commercial Development Manager and General Manager. The case records that it was contended on behalf of the company (a contention, be it noted at the conclusion of the evidence), that the prosecution had been brought under the wrong section and should have been laid under section 33(6) rather than section 33(1)(a). It was further contended that there was no evidence to indicate that the company had deposited controlled waste otherwise than in accordance with the licence.

6. The Justices, as is apparent from paragraph 6 of the case stated, were of the opinion that:

"d) ... Although there was no evidence of how the site had been left on the Saturday prior to the inspection on the following Monday, the inspector's evidence was sufficient for us to be sure that the controlled waste had been deposited otherwise than in accordance with the licence.

(e) The appellant had deposited controlled waste on the site ... not in accordance with the terms of the licence ... -- which specified that waste be covered on the day the waste was deposited in accordance with the working plan.

The Justices said:

"e) ... These requirements had not been complied with as detailed in the inspector's evidence.

f) The respondent had properly brought the prosecution under section 33(1)(a) of the Environmental Protection Act 1990. The facts found would equally have applied to section 33(6) of the same Act in respect of contravention of a waste management licence condition. The appellant had not in any way been misled as to the nature of the prosecution by the drafting of the information in the form that it took. The information had been laid in the clearest of terms setting out in detail the nature of the alleged offending..."

7. The case goes on to pose the following question for the opinion of the High Court:

"Whether there was evidence to support a finding of fact that the appellant had deposited controlled waste contrary to the condition of a waste management licence and therefore evidence on which the Justices could properly convict the defendant of an offence under section 33(1)(a)."

8. It is convenient at this stage to set out the relevant parts of section 33. Subsection (1), omitting material words, is in these terms:

"... a person shall not-

(a) deposit controlled waste, or knowingly cause or knowingly permit controlled waste to be deposited in or on any land unless a waste management licence authorising the deposit is in force and the deposit is in accordance with the licence;

(b) treat, keep or dispose of controlled waste, or knowingly cause or knowingly permit controlled waste to be treated, kept or disposed of-

(i) in or on any land, or

(ii) by means of any mobile plant,

except under and in accordance with a waste management licence."

9. Subsection (6) says:

"A person who contravenes subsection (1) above or any condition of a waste management licence commits an offence."

10. On behalf of the Appellant company Mr Haines, who represented them before the Magistrates, submits that failure to cover cannot give rise to an unlawful deposit because the failure to cover takes place after the initial deposit. He says that he did not, for tactical reasons, take the point at the outset of the case before any evidence was heard. He said frankly that, had he done so, that would, or might have, led to the prosecution seeking to amend the information and if such an application had been made it could not have effectively been resisted by him. An amendment to refer to section 33(6) would have been irresistible.

11. Mr Haines concedes that he could not make the submission which he made before the Justices and repeats to this court, if the licence had required a deposit to be covered immediately: such covering, coming so close in time to the act of deposit, would justify the Magistrates in finding that there was so close an association between the deposit and the covering as to be within the provisions of section 33(1)(b). However, he says, the obligation to cover during the course of the day of deposit could not properly be regarded as being part of the deposit.

12. He invited the court's attention to a decision of a differently

constituted Divisional Court in Leigh Land Reclamation Ltd and Others v Walsall Metropolitan Borough Council 1991 JPL 867, where the court was concerned with the construction of section 3 of the Control of Pollution Act 1974, the precursor of the present legislation. It is apparent from page 869 of the report that the first question for consideration in that case was whether an offence had been committed under section 3 by depositing acceptable material at a time when the site was in breach of site licence conditions unrelated to the disposal of that deposit.

13. In the course of giving the leading judgment, Bingham LJ (as he then was) said this at page 871:

"... section 3(1)(a) concentrated attention on the deposit and made it a contravention to cause or knowingly permit a deposit which was not in accordance with the conditions of the licence. These deposits of plastic off-cuts, filter cakes, office waste and wood and vegetation, on which these informations were founded, were of authorised materials and no criticism was made of the manner in which they were deposited. To hold that those deposits were not made in accordance with the conditions of the licence because there was some improper deposit previously or because, to take the examples mentioned in argument, there was no sign board or no eating facilities in the site office would, be to strain the language of this statute beyond the limits acceptable in a criminal statute..."

14. Bingham LJ went on to say that the word "deposit" took its colour from the context in which the word was used and he also construed the word in that case as identifying the final resting place of goods which had been dumped. Reference was made in the course of argument and in the judgment in that case (the judgment being delivered on 13th October) to the Bill currently before Parliament, which was enacted on 1st November: that became the Act with the provisions of which we are presently concerned.

15. It is Mr Haines' submission that the Leigh Land case supports his submission that no offence is committed where

there is nothing unlawful about the deposit. No doubt that is so, but for my part that does not resolve the question of whether failure to comply with licence conditions relating to deposit renders the deposit unlawful.

16. Mr Haines also invited the court's attention to the decision of a differently constituted Divisional Court in R v Metropolitan Stipendiary Magistrate, ex parte London Waste Regulation Authority & Others [1993] 3 All ER 113 where the leading judgment was given by Watkins LJ. In the course of that judgment he differs from the construction placed by the court in the Leigh Land case on the meaning of "deposit". Watkins LJ was of the view that the word was not limited to the final resting place of the goods deposited. In the course of giving judgment, at page 120H, Watkins LJ said:

"We have no doubt that the policy of the 1974 Act is to regulate operations having substantial consequences for the local environment ..."

17. Mr Haines in the second part his submission says that section 123 of the Magistrates' Courts Act, which it is unnecessary to read, and rule 100 of the Magistrates' Courts Rules, which it is unnecessary to read, do not enable the prosecution to bring charges where there is a significant variation between the evidence and the charge. Amendment of the information is only appropriate if there is a comparatively trivial variation. Where the wrong section is charged Justices should not be invited and, if invited, should not accede to the invitation to convict.

18. He referred to Hunter v Coombs [1962] 1 WLR at 573 in support of this proposition. It is to be noted that, in that case, the Justices had convicted on an information characterised as bad, in that it made no reference to the appropriate section of the Road Traffic Act and it identified, in particular, activities other than those which were said to give rise to the offence charged.

19. Mr Main Thompson, on behalf of the Respondent, submits

that it is difficult to see how the Justices' question can be answered other than in the affirmative. The company, through Mr Haines, concedes that the failure identified in the information occurred; that is to say the goods deposited were not covered up in accordance with the licence. Mr Main Thompson submits that the only point which, therefore, can arise is whether the Justices were unreasonable in interpreting "deposited" in the way they did. In that connection he referred the court to Brutus v Cozens [\[1973\] AC 854](#) and, in particular, to a passage in the speech of Lord Reid at 861D which is in these terms:

"It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision."

20. The Justices' interpretation of Condition 8 is, submits Mr Main Thompson, one which presupposes that the deposit continued to be a deposit until the end of the day. It is convenient here to recite the terms of Condition 8 which is headed "Waste Cover":

"Any deposit of waste formed whole or in part of wastes of Classes B or C, or contaminated soil shall be covered over in the day that waste is deposited in the manner set out in the working plan. The cover shall be maintained and not removed except immediately prior to the deposit of more waste on top of the covered waste."

21. The working plan, in fact, required cover to a depth of 10 centimetres.

22. Mr Main Thompson submits that the word "deposit" is to be

broadly construed unless the context otherwise requires. In support of that submission he referred to Scott and Another v Westminster City Council, The Times Law Reports, 7th February 1995. Waite LJ, giving the judgment, with which Nourse LJ and Sir Tasker Watkins agreed, had this to say in relation to a prosecution for unlawfully depositing a chestnut brazier on the highway, contrary to the provisions of section 149 of the Highways Act 1980:

"The judge decided that the barrows were not 'deposited'. He said 'it is stretching words beyond their natural meaning to say something was - deposited' if (a) the person responsible for it is standing by it and (b) he has not demonstrated unwillingness to move it if asked to do so. 'Deposit' in itself has some connotation of extent in time, and connotes putting and leaving. Trading without a licence is not enough. If he went away for any length of time then it could be said that the item had been deposited".

23. Waite LJ then went on:

"The judge was wrong. The verb 'to deposit' was a term of wide connotation apt to describe the placing of one object on another. It could be used in a limitless number of contexts. But unless the context in which it appeared required [otherwise] it should be used in a broad sense."

24. Mr Main Thompson submits that, far from being unreasonable, the Justices' interpretation of the statutory provision was entirely sensible. Subsection 1(a) most appropriately reflects the activities which were here complained of. The deposits were not in accordance with the conditions. There could be no question in this case of the defendant being misled in any way by the terms of the summons, which correctly identified the section, namely section 3, of the relevant Act. Mr Haines in reply submitted that the Justices' construction of the word "deposit" was unreasonable.

25. Before stating my conclusions it is convenient to make several preliminary observations. I accept that the word

"deposit" takes its flavour from its context, as Bingham LJ said, in Leigh Land Reclamation Ltd v Walsall. The view expressed in that case that "deposit" means the final resting place was, as I have indicated, not accepted by a subsequent Divisional Court in R v Metropolitan Stipendiary Magistrate. The statutory provision under consideration in those cases, however, was section 3(1) of the 1974 Act. It is right to say that the decision in Leigh Land has been subjected to academic criticism for taking a very narrow view of that section. However, reference was made in the judgment, as I have already indicated, to the Bill giving rise to the present Act. Bingham LJ recorded that the new Act had apparently remedied the defects in the 1974 Act. The question in that case was that which I have earlier identified and it was plainly a different question from that which arises in the present case as well as being a question arising under a different Act.

26. In any event, it is to be noted that in Leigh Land, no criticism was made of the manner in which the authorised materials were deposited, whereas it is inherent in the present case that the Justices have concluded that "waste had been deposited otherwise than in accordance with the licence".

27. For my part, I have no difficulty, if it be necessary to do so, in distinguishing Leigh Land from the present case.

28. Section 33(6) clearly envisages different kinds of offences, namely a contravention of either subsection (1) or of any condition of a waste management licence. It is apparent that in some cases there will be an overlap between the two subsections because subsection (1) expressly contemplates the possible breach of licence conditions as a result of the different kinds of activities identified in (a) and (b). Subsection (1) states that those two groups of activity must be carried out in accordance with licence conditions.

29. In the present case, the licence conditions related in part to the specific activities, to which subsection (1) refers, namely

deposit, processing and disposal and, in part, to the general running of the site. Some conditions of the licence, when one looks at them, are particularly apt to apply to deposit and expressly do so. For example: Condition 3 as to kinds of waste; Condition 4 as to levels of waste and the prohibition on depositing in water; Conditions 5 and 6 as to the recording of information about and inspection of deposit; and Condition 8 as to the prompt covering of deposited waste.

30. Some conditions are particularly apt to apply to processing and disposal, for example, Conditions 9 and 12(b) as to noise and dust control. Some conditions are equally apt for activities in (a) and (b) in subsection (1): for example, Condition 10 as to hours of operation, and Condition 11 as to litter control. Some conditions apply not to particular activities but to the general running of the site, for example, Conditions 13 to 16, relating to various kinds of monitoring and pest control.

31. Accordingly in the present case, as it seems to me, subsection (6) is apt to embrace both the activities in subsection (1) which breach the licence conditions and other breaches of licence not arising from those identified activities. It follows, to my mind, that the Justices were entitled to conclude that the facts found by them would have justified a charge under both section 33(1)(a) and section 33(6). The fact that failure to cover gave rise to a breach of licence under section 33(6) did not preclude a finding that, because of the failure to cover, the deposit had not been in accordance with the licence under section 33(1).

32. To my mind, although clearly "deposit" is a putting down, it has also, as Waite LJ made plain, to be construed, unless the context otherwise required, in a broad sense. The context in the present case does not, in my judgment, otherwise require. A continuing state of affairs is in my judgment capable of being embraced within the meaning of the word "deposit". It was, therefore, the Justices' duty to construe the word, as Lord Reid said, and it was open to them to construe it as they did. It

follows that their construction on the facts found by them was a reasonable one. In my judgment, the answer to the question posed by the Justices is in both parts "Yes". There is no need, therefore, to consider the second half of Mr Haines' submission.

33. For my part, I would dismiss this appeal.

MR JUSTICE MAURICE KAY: I agree.

34. MR THOMPSON: My Lord, there is an application for the costs by the Respondent?

35. MR HAINES: I cannot resist that, my Lord.

LORD JUSTICE ROSE: No.

36. LORD JUSTICE ROSE: Very well, with costs.

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