Neutral Citation Number: [2011] EWCA Civ 334

Case No: C1/2010/1224

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HIS HONOUR JUDGE PELLING QC
CO/14802/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2011

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE TOULSON
and
LORD JUSTICE SULLIVAN

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Between :

	THE QUEEN (ON THE APPLICATION OF SAVE BRITAIN'S HERITAGE)	**Appellant**
	- and -	
	(1)SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **(2) LANCASTER CITY COUNCIL**	**Respondent**
	AND	
	MITCHELLS OF LANCASTER (BREWERS) LTD	Interested Party

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Richard Harwood and Andrew Deakin (instructed by **Richard Buxton Solicitors**) for the **Appellant**
James Maurici (instructed by **Treasury Solicitors**) for the **First Respondent**

Hearing date : March 9th 2011

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Judgment

Lord Justice Sullivan :

1. Council Directive 85/337/EC ("the Directive") applies to the environmental effects of those public and private projects which are likely to have significant effects on the environment. For the purposes of the Directive "project" means:

> " - the execution of construction works or of other installations or schemes,

- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources…." (Article 1.2).

2. It is common ground between the parties that works of demolition are capable of having significant effects on the environment. Are they capable of being a project for the purposes of Article 1.2, and if so are they capable of being one of the projects listed in Annex II to the Directive?

3. This is an appeal from the Order dated 7th May 2010 of HH Judge Pelling QC dismissing the Appellant's claim for judicial review in which the relief sought included declarations that:

   i) Demolition of buildings is capable of constituting a project falling within Annex II of the Directive; and

   ii) Paragraph 2(1)(a)-(d) of the Town and Country Planning (Demolition – Description of Buildings) Direction 1995 ("the Direction") is unlawful and should not be given effect.

4. Throughout these proceedings the Respondent's position has been that demolition does not fall within the definition of project in Article 1.2 of the Directive, and that even if it fell within that definition, demolition was not one of the projects listed in Annex II. In the Respondent's view, demolition is not within the scope of the Directive unless it is carried out as part of a project that does fall within Annex I or Annex II to the Directive.

5. The Direction was given by the Secretary of State for the Environment on that premise: that demolition was not capable of being a project for the purposes of the Directive. The Direction effectively excludes much, if not most, demolition from the Directive by providing that the demolition of certain descriptions of building shall not be taken to be "development" for the purposes of the Town and Country Planning Act 1990 ("the Act").

6. If the proposed demolition does not amount to development, there is no need to apply for planning permission. For the purposes of planning control, the United Kingdom has implemented the Directive by grafting its requirements - for screening, to decide whether a proposed development falls within the Directive, and if so, for the production of an Environmental Statement – onto the planning application process: see The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the Regulations"). If there is no need for an application for planning permission, the Directive does not bite on demolition.

7. Section 55(1) of the Act defines development:

   "(1) Subject to the following provision of this section, in this Act, except where the context otherwise requires, development means the carrying out of building, engineering, mining or

other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

"Building operations" includes "demolition of buildings." (subsection 55(1A)(a)). However, subsection 55(2) provides that:

"The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land – …………….

(g) the demolition of any description of building specified in a direction given by the Secretary of State to local planning authorities generally or to a particular local planning authority."

8. The Direction is contained in Appendix A to Circular 10/95: Planning Controls over Demolition. It directs that:

"2.-(1) Subject to sub-paragraph (2), the demolition of the following descriptions of building shall not be taken, for the purposes of the Town and Country Planning Act 1990, to involve development of land:

(a) any building which is a listed building as defined in section 1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990;

(b) any building in a conservation area;

(c) any building which is a scheduled monument as defined in section 1(11) of the Ancient Monuments and Archaeological Areas Act 1979;

(d) subject to sub-paragraph (3), any building other than a dwelling-house or a building adjoining a dwelling-house;

(e) any building the cubic content of which, measured externally, does not exceed 50 cubic metres;

(f) the whole or any part of any gate, fence, wall or other means of enclosure.

(2) The descriptions of building in sub-paragraph (1) do not include the whole or any part of any gate, fence or other means of enclosure in a conservation area."

9. Thus, the practical effect of the Direction is to exclude the demolition of any listed building, any building in a conservation area, any scheduled monument, and any building that is neither a dwelling nor adjoining a dwelling from the application of the Directive. There are, of course, other controls over the demolition of listed buildings and ancient monuments, and demolition of buildings within conservation areas, but they do not engage the Directive.

10. The judge was reluctant to decide the primary issue between the parties – whether the Directive applied to demolition works – because there was then a case pending before the CJEU, Commission v Ireland (C-50/09) ("Ireland II") which was likely to resolve the issue. In Commission v Ireland C-66/06 ("Ireland I") the Court had decided that Ireland had failed to comply with the Directive on other grounds. Neither party agreed with his suggestion that the proceedings should be stayed pending the CJEU's determination of Ireland II, so he determined the issue. In paragraph 31 of his judgment he concluded:

> "that demolition other than demolition forming part of what would otherwise be a project within the meaning of the EIA Directive does not come within the scope of the EIA Directive."

11. The judgment of the CJEU (First Chamber) in Ireland II is dated 3rd March 2011. The Commission's complaints included a complaint (the third complaint) that the relevant national legislation failed to apply the Directive to demolition works. The Court concluded that:

> "101. It follows that demolition works come within the scope of Directive 85/337 and, in that respect, may constitute a 'project' within the meaning of Article 1(2) thereof.
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> 103. Ireland does not deny that, under the national legislation in force at the date of the additional reasoned opinion, demolition works were not subject, as a general rule, to an environmental impact assessment but, on the contrary, were entitled to an exemption in principle.
>
> 104. It is clear from the rules laid down in sections 14 to 14B of the NMA as regards the demolition of a national monument that, as the Commission claims, they take no account of the possibility that such demolition works might constitute, in themselves, a 'project' within the meaning of Articles 1 and 4 of Directive 85/337 and, in that respect, require a prior environmental impact assessment. However, since the insufficiency of that directive's transposition into the Irish legal order has been established, there is no need to consider what that legislation's actual effects are in the light of the carrying-out of specific projects, such as that of the M3 motorway.
>
> 106. In those circumstances, the Commission's third complaint in support of its action must be held to be well

founded.

> 107. Accordingly, it must be declared that….
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> -by excluding demolition works from the scope of its legislation transposing that directive,
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> Ireland has failed to fulfil its obligations under that directive."

12. On behalf of the Appellant, Mr Harwood submitted that this declaration disposed of the principal issue between the parties: demolition works were capable of constituting a project for the purposes of the Directive, and by effectively excluding them from its scope the Direction was unlawful.

13. The CJEU's judgment in Ireland II did not cause the Respondent to alter his position. Mr Maurici submitted that the CJEU's reasoning was (i) "demonstrably erroneous"; and (ii) even if the Court's reasoning was correct, it applied only to the second limb of the definition of project in article 1.2 – other interventions in the natural surroundings and landscape – and had no application to the present case, which is concerned with the demolition of a brewery in an urban area. Having previously resisted the Appellant's submission that there should be a reference to the CJEU on the basis that this Court could decide the principal point in issue in his favour with "complete confidence", the Respondent now contends that if his submissions are not accepted there should be a reference to the CJEU, because it is at liberty to, and should, reconsider its previous decision in Ireland II.

14. The Commission's three complaints in Ireland II, including the third complaint, were concerned with Ireland's failure to ensure full and correct transposition of the Directive. It is true that the Commission argued that demolition works may constitute a 'project' for the purposes of the Directive because they fell within the second limb in Article 1.2 (para 86). The Commission illustrated its submission by reference to the National Monument Act 1930 (NMA):

> "87 The Commission claims that Ireland's interpretation that demolition works fall outside the scope of the directive is reflected in the NMA, and refers in that regard to section 14, 14A, and 14B of that Act which relate to the demolition of a national monument.
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> 88 By way of illustration of how, in contravention of Directive 85/337, the exclusion of demolition works allowed, by virtue of section 14A of the NMA, a national monument to be demolished without an environmental impact assessment being undertaken, the Commission cites the ministerial decision of 13 June 2007 ordering the destruction of a national monument in order to permit the M3 motorway project to proceed."

In response, Ireland submitted that "Demolition works do not fall within the scope of [the] Directive….. since they are not mentioned in Annex I or II thereto" (para 90).

15. Against this background, the reasoning that led the CJEU to its conclusion in paragraph 101 (above) was as follows:

> "97 As regards the question whether demolition works come within the scope of Directive 85/337, as the Commission maintains in its pleadings, or whether, as Ireland contends, they are excluded, it is appropriate to note, at the outset, that the definition of the word 'project' in Article 1(2) of that directive cannot lead to the conclusion that demolition works could not satisfy the criteria of that definition. Such works can, indeed, be described as 'other interventions in the natural surroundings and landscape'.
>
> 98 That interpretation is supported by the fact that, if demolition works were excluded from the scope of that directive, the references to 'the cultural heritage' in Article 3 thereof, to 'landscapes of historical, cultural or archaeological significance' in point 2(h) of Annex III to that directive and to 'the architectural and archaeological heritage' in point 3 of Annex IV thereto would have no purpose.
>
> 99 It is true that, under Article 4 of Directive 85/337, for a project to require an environmental impact assessment, it must come within one of the categories in Annexes I and II to that directive. However, as Ireland contends, they make no express reference to demolition works except, irrelevantly for the purposes of the present action, the dismantling of nuclear power stations and other nuclear reactors, referred to in point 2 of Annex I.
>
> 100 However, it must be borne in mind that those annexes refer rather to sectoral categories of projects, without describing the precise nature of the works provided for. As an illustration it may be noted, as did the Commission, that 'urban development projects' referred to in point 10(b) of Annex II often involve the demolition of existing structures."

16. While I accept that the CJEU's focus in Ireland II was on the second limb of the definition of "project" in Article 1.2, I do not accept Mr Maurici's submission that there is an implicit recognition in both the Commission's submissions and the Court's judgment that demolition works cannot fall within the first limb of the definition; indeed the reference to "urban development projects" in paragraph 100 of the judgment would suggest the contrary.

17. Mr Maurici readily accepted the proposition that the Directive must be interpreted in a purposive manner. If it is accepted that works are capable of having significant effects on the environment, the definition of "project" in Article 1.2 should, if possible, be construed so as to include, rather than exclude, such works. Applying this approach to the first limb of the definition in Article 1.2, it seems to me that the execution of demolition works falls

naturally within "the execution of ….other….schemes….". Demolition works are the antithesis of construction works, but the first limb of the definition is not confined to "construction works", it expressly includes "other schemes", ie schemes which are not construction works.

18. Mr Maurici submitted that this approach to the first limb of Article 1.2 was contrary to the decision of the House of Lords in R (on the Application of Edwards) v Environmental Agency [2008] UKHL 22 [2009] 1 All ER 57, in which Lord Hoffman and Lord Hope said that the first limb of Article 1.2 appeared to contemplate the creation, or construction, of something new: see paras. 51 and 69. Lord Walker agreed with Lord Hoffmann's reasons for dismissing the appeal (para 74). Mr Maurici accepted that the observations of Lord Hoffman and Lord Hope were obiter. In Edwards the House of Lords unanimously concluded that there had been no breach of the Directive. Even if the proposal, which was a proposal to replace some of the fuel used in an existing cement works with shredded tyres, was a project which fell within the Directive, the requirements of the Directive had been complied with in any event. The observations of Lord Hoffmann and Lord Hope must be considered in the context of the particular proposal under consideration: to change the type of fuel in an existing plant. They were emphasising the distinction between the creation or construction of something new, and making a change to something which was already in existence. They were not attempting to provide a definitive interpretation of the first limb of Article 1.2 for all purposes.

19. Mr Maurici fairly pointed out that Lord Brown in his speech (para 76) agreed with Lord Mance, who said that had the issue been relevant, he would have thought it probable that the change to tyre burning was within Annex I to the Directive: see paras 83-88. For present purposes, the point made by Lord Mance in paragraph 83 of his speech – that both Annex I and II list projects falling within Article 1, and some of those projects do not involve construction works – is relevant; as is his observation in paragraph 85 that "the European Court of Justice has said repeatedly that the scope of [the] Directive is very wide and its purpose very broad."

20. I therefore accept Mr Harwood's submission that Edwards is not authority for the proposition for which Mr Maurici contends: that a "project" for the purposes of the first limb in Article 1.2 must involve the construction of something new. Schemes other than the execution of construction works are plainly within the first limb, and there is no reason why demolition works should be excluded from those schemes. Moreover, while demolition is the antithesis of construction, the act of demolition, when coupled with the restoration of a site, is capable of creating something that is new: eg. an open and hard surfaced or grassed area where there was once a building.

21. In this context references to "demolition per se" or "mere demolition" are apt to be misleading. With some exceptions, which are not relevant for present purposes, persons intending to demolish buildings must give prior notice to the local authority under section 80 of the Building Act 1984 ("the 1984 Act"). In response to such a notice, the local authority may serve a notice under section 81 requiring the person to whom it is given:

(a) to shore up any building adjacent to the building to which the notice relates,

(b) to weatherproof any surfaces of an adjacent building that are exposed by the demolition,

(c) to repair and make good any damage to an adjacent building caused by the demolition or by the negligent act or omission of any person engaged in it,

(d) to remove material or rubbish resulting from the demolition and clearance of the site,

(e) to disconnect and seal, at such points as the local authority may reasonably require, any sewer or drain in or under the building,

(f) to remove any such sewer or drain, and seal any sewer or drain with which the sewer or drain to be removed is connected.

(g) to make good to the satisfaction of the local authority the surface of the ground disturbed by anything done under paragraph (e) or (f) above,

(h) To make arrangements with the relevant statutory undertakers for the disconnection of the supply of gas, electricity and water to the building,

(i) To make such arrangements with regard to the burning of structures or materials on the site as may be reasonably required by the fire and rescue authority,

(j) To take such steps relating to the conditions subject to which the demolition is to be undertaken, and the condition in which the site is to be left on completion of the demolition, as the local authority may consider reasonably necessary for the protection of the public and the preservation of public amenity.

22. In those cases (such as the present case) where it is said that demolition is not part of a wider scheme for redevelopment, so that the site may well remain vacant for some time, that is a factor which may well be relevant for the purpose of deciding what steps are "reasonably necessary" to be undertaken in order to leave the site in a condition which both protects the public and preserves public amenity. Simply clearing and fencing a site may not be sufficient to preserve public amenity. If a site is to remain vacant for some time, it may well be appropriate for the local authority to require that the cleared site be surfaced with suitable materials: either some hard surface, or by leaving the site topsoiled and grassed.

23. Mr Maurici accepted that, other than the obiter dicta of Lord Hoffmann and Lord Hope in

Edwards, he could point to no other authority which supported the Respondent's submission that demolition works are not capable of falling within the first limb of Article 1.2. In my view, it is unnecessary to give Article 1.2 a broad and purposive construction in order to reach the conclusion that, in ordinary language, demolition works which leave a site on completion in a condition which protects the public and preserves public amenity are capable of being a "scheme" for the purposes of Article 1.2. If there was any doubt that as to whether they were capable of being a scheme, that doubt would be resolved by giving a purposive interpretation to "other … schemes."

24. The Directive must be interpreted as a whole. The CJEU considered that its interpretation of the second limb of Article 1.2 was supported by the fact that, if demolition works were excluded from the scope of the Directive the references to "the cultural heritage" in Article 3, and certain other references in Annexes III and IV of the Directive would have no purpose (para 98). If works are capable of having a direct or indirect effect on the factors mentioned in Article 3, which include the cultural heritage, there would have to be a powerful reason for excluding such works from the definition of project in the Directive. It is a curious, and thoroughly unsatisfactory, feature of the Direction that those demolitions which are most likely to have an effect on the cultural heritage – the demolition of listed buildings, ancient monuments and buildings in a conservation area – are effectively excluded from the ambit of the Directive.

25. This approach to the first limb of the definition of project in Article 1.2 is consistent with CJEU's approach to the second limb of the definition in Ireland II. The Respondent's submission that the CJEU's decision in Ireland II has no application to demolition in an urban area would produce a most unsatisfactory result. Demolition in rural areas would be capable of falling within the Directive, as an "intervention in the natural surroundings and landscape"; whereas demolition in urban areas would not fall within the Directive because it would be neither within the first limb in Article 1.2, nor, according to the Respondent, would it be an intervention in "the natural surroundings and landscape." In view of my decision as to the scope of the first limb, the issue does not arise, but I would not accept the premise underlying the Respondent's submission: that "landscape" in the second limb must be a reference to a rural landscape. For the purposes of the Directive "landscape" is something other than "natural surroundings." In the context of a Directive the purpose of which is to ensure that significant environmental effects are properly assessed before projects proceed, I do not see why "landscape" in Article 1.2 should be confined to rural landscapes.

26. Mr Maurici submitted that demolition could not fall within the Directive, even if it fell within the definition of project in Article 1.2, because it was not included in the lists of projects in Annexes I and II to the Directive. As Lord Mance pointed out in Edwards, the lists of projects include "projects" that do not necessarily involve construction works; see eg. the list of "Agriculture, silviculture and aquaculture" projects, and some of the "Food Industry" projects. The CJEU explained in paragraph 100 of its judgment that the Annexes refer to sectoral categories of projects, and do not describe the precise nature of the works which may comprise such a project. If demolition is capable of being a "scheme" for the purposes of Article 1.2, it is also capable of being an "urban development project" within paragraph 10(b) of Annex II, even though the project comprises only demolition and restoration of the site in accordance with a notice under section 81(1) of the

1984 Act.

27. For these reasons, I would allow the appeal and grant the two declarations sought by the Appellant (para 3 above). I see no need for a reference to the CJEU.

28. On 28th October 2009 the City Council (the Second Defendant) wrote to the interested party saying that prior approval for the demolition of the buildings was required under the Town and Country Planning (General Permitted Development) Order 1995 ("the GPDO") on the basis that the proposed demolition of the Brewery was not within the Direction because it adjoined a dwelling house. Having obtained advice from Counsel, the Council advised the Appellant's Solicitors by letter dated the 2nd December 2009 that its position had changed. Because the Brewery did not adjoin a dwelling house its demolition fell within the Direction, and therefore did not amount to development, so prior notice was not required under the GPDO.

29. The relief sought before HH Judge Pelling QC included a quashing order in respect of the decision of the Council in its letter dated 2nd December 2009. Having granted the two declarations sought by the Appellant (above), I would also grant a quashing order in respect of the Council's decision in its letter dated 2nd December 2009.

Lord Justice Toulson

30. I agree

The Chancellor

31. I also agree