R (on the application of Sharp and another) v North Essex Magistrates Court

[2017] EWCA Civ 1143

Court of Appeal, Civil Division

Gloster VP, Gross and Briggs LJJ
31 July 2017

Judgment

Martin Edwards and Jack Parker (instructed by Holmes & Hills LLP) for the Appellant

Daniel Kolinsky QC and Gwion Lewis (instructed by the Environment Agency) for the Respondent

Hearing dates : 29 June, 2017

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Approved Judgment

Lord Justice Gross :

INTRODUCTION

1. This is an appeal from the judgment of Haddon-Cave J, dated 20th November, 2015 ("the judgment"), dismissing the (now) Appellants' claim for judicial review. The claim for judicial review was brought against the Respondent – which has played no part in the appeal – in respect of District Judge Woollard's decision, dated 28th January, 2015, refusing to state a case under s.111(5) of the *Magistrates' Court Act 1980* ("the MCA 1980"), arising from his decision to grant the Interested Party ("the EA") a warrant for entry onto the Appellants' property under s.172 of the *Water Resources Act 1991* ("the WRA").

2. There is only one substantive question in this appeal: in the case of new works involving entry onto land or premises, absent consent from the landowner, is the EA confined by s.165(6) of the WRA to its powers of compulsory purchase ("CPO") under s.154 or compulsory works orders ("CWO") under s.168, of the WRA, or is the EA entitled to exercise the powers of entry conferred by s.172 thereof?

3. The Appellants submit that in such circumstances the EA is confined to its CPO or CWO powers. The EA disagrees and argues that it is entitled to utilise the s.172 powers of entry.

4. Underlying this question of statutory construction is a broader concern as to the balance to be struck between individual rights of property and the interests of society in general, neatly encapsulated by Bean J in *Pattinson v*

Finningley Internal Drainage Board [1970] 2 QB 33, at p.39, concerning the powers of entry of the Drainage Board:

" It is another example of the inroad often made into individual rights in the interests of the wider community. In a modern civilised society, there must always be a delicate balance between the rights of the individual and the need of the community at large…. "

5. Given that compensation is payable whichever route is followed by the EA, the point of the appeal, as submitted by Mr Edwards for the Appellants, was the ability to challenge the *merits* of the proposal, furnished by way of the inquiry process where CPO or CWO powers are invoked. By contrast and as happened here, where the EA has sought to proceed under s.172, the landowner is confined, in large measure, to challenging the *legality* of the process. Furthermore, Mr Edwards submitted, there were real concerns as to the structures left behind on the land by the EA.

6. If that is the landowner's perspective, the EA's concern is that it should not be "mired" in the CPO or CWO process in the field of flood risk management works. Mr Kolinsky QC for the EA submitted that the WRA was indeed so designed to permit it to use the general s.172 powers of entry. The EA was entitled but not obliged to proceed by CPO or CWO powers. The purpose of s.165(6) was to permit the EA to maintain existing (flood risk management) works without even the formalities attached to the various notice provisions found in s.172.

7. In all this, the role of the Court is not to impose its own view of the merits but instead to construe the statutory provisions so as to give effect to the intentions of the legislature.

THE LEGISLATIVE FRAMEWORK

8. The EA's CPO powers are dealt with in s.154 of the WRA. By s.154(1), the EA has power to purchase compulsorily any land anywhere in England or Wales, for the purposes of, or in connection with, the carrying out of its functions. Via s. 154 (4) and (5) – the details need not be set out here – provision is made for a "merits" challenge to the proposed compulsory purchase by way of a public inquiry.

9. S.165 is headed "General powers to carry out works". Insofar as material, s.165 (1)(a) provides that the EA may:

" (a) carry out flood risk management work within subsection (1D) (a) to (f) if Conditions 1 and 2 are satisfied;

….

(1A) Condition 1 is that the ….[EA] considers the work desirable having regard to the national flood and coastal erosion risk management strategies under sections 7 and 8 of the Flood and Water Management Act 2010.

(1B) Condition 2 is that the purpose of the work is to manage a flood risk …..from:

….

(b) a main river."

There was no dispute before us that Conditions 1 and 2 were satisfied.

10. S.165 (1D), to which s.165 (1)(a) refers, provided as follows:

" In this section '*flood risk management work'* means anything done –

(a) to maintain existing works (including buildings or structures) including cleansing, repairing or otherwise maintaining the efficiency of an existing watercourse or drainage work;

(b) to operate existing works (such as sluicegates or pumps);

(c) to improve existing works (including buildings or structures) including anything done to deepen, widen, straighten or otherwise improve an existing watercourse, to remove or alter mill dams, weirs or other obstructions to watercourses, or to raise, widen or otherwise improve a drainage work;

(d) to construct or repair new works (including buildings, structures, watercourses, drainage works and machinery);

(e) for the purpose of maintaining or restoring natural processes;

(f) to monitor, investigate or survey a location or a natural process;

….."

11. S.165(6) is, as already highlighted, at the heart of this appeal. It is in these terms:

" Nothing in subsections (1) to (3) above authorises any person to enter on the land of any person except for the purpose of maintaining existing works. "

12. S.168 deals with CWOs and provides, *inter alia*, as follows:

" Where the …[EA]…. is proposing , for the purposes of, or in connection with, the carrying out of any of its functions –

(a) to carry out any engineering or building operations….

the …[EA]… may apply to either of the Ministers for an order under this section ('a compulsory works order'). "

S.168(4) confers power on the EA, without prejudice to s.154, to acquire compulsorily any land, including the creation of new rights and interests. This power is subject to the provisions of Schedule 19 to the WRA. Schedule 19, para. 4 contains provisions (akin to those applicable to compulsory purchase) for consideration of merits based objections, by way of a local inquiry.

13. S.172 is headed "Powers of entry for other purposes". As to the word "other", there was no dispute before us that it distinguished the s.172 powers from those exercisable for specific purposes under ss. 169 – 171. Ss. 169 and 170 are irrelevant to the present dispute; s.171 confers a power of entry for the purpose of carrying out any survey or tests to determine whether it would be appropriate for the EA to exercise its CPO or CWO powers. S.172(1) itself provides as follows:

" Any person designated in writing for the purpose by ….the [EA]….may enter any premises or vessel for the purpose of –

(a) determining whether, and if so in what manner, any power or duty conferred or imposed on …the [EA]…by virtue of any enactment to which this section applies….should be exercised or, as the case may be, performed; or

(b) exercising or performing any power or duty which is so conferred or imposed."

14. I record that, on behalf of the EA, Mr Kolinsky QC expressly accepted that, should the EA exercise the power to carry out works conferred by s.165, in conjunction with the powers of entry conferred by s.172, then the compensation regime is that contained in Schedule 21, para. 5 to the WRA. Para. 5 provides as follows:

" (1) Where injury is sustained by any person by reason of the exercise by the ….[EA]….of any powers under section 165 (1) to (3) of this Act, the … [EA]…shall be liable to make full compensation to the injured party.

(2) In case of dispute, the amount of any compensation under sub-paragraph (1) above shall be determined by the Upper Tribunal."

15. This confirmation was welcome, putting to rest any doubts as to whether the applicable compensation regime was that found in Schedule 21 or the different scheme furnished by Schedule 20. In that regard, Mr Kolinsky underlined that the provisions of Schedule 20, para. 6(2)(b) (which need not be set out here) indicated that compensation was to be dealt with under Schedule 21, para. 5. For my part, I agree.

16. For completeness, we asked for assistance with the legislative history of the relevant sections of the WRA. However and though we were grateful for the further submissions from Mr Edwards, these submissions did not advance the matter – though they did (as it seems to me) furnish a vehicle for Mr Edwards somewhat modifying the submissions advanced orally before us.

THE FACTUAL HISTORY

17. In the briefest outline, the factual history may be taken from the judgment of Haddon-Cave J. The Appellants own a farm near Chelmsford, together with some neighbouring land, amounting in total to some 365 acres of agricultural land. The Judge was informed that, at the time the case was before him, some 1400 sheep and cattle grazed on their land.

18. The "Chelmsford Flood Alleviation Scheme" ("CFAS") was described by Haddon-Cave J in his judgment as follows:

" On 26 February 2013 Chelmsford City Council granted planning permission for the ….[CFAS]… for works to be carried out to implement….[it]… Flooding of various rivers in this part of the country is perceived to be an issue. The works in respect of which planning permission was granted included significant works on the claimants' land, in particular, the construction of an earth embankment of some 500 metres in length, 5.5 metres high, a concrete control structure with two sluice gates and various other ancillary features. The works are part of the CFAS scheme and include the rerouting of the River Wid which is prone …[to flooding]… Mr and Mrs Sharp complain that they will be deprived of some 3 hectares of their land as a result of these proposed works."

19. Thereafter, the EA sought to commence preliminary works on the Appellants' land but were unable to secure agreement from the Appellants as to entry. Notices were accordingly served under s.172 of the WRA. The Appellants then challenged the planning permission by way of judicial review proceedings, which were subsequently dismissed. Fresh notices of entry were served, followed by the EA giving notice of its intention to apply to Chelmsford magistrates' court for a warrant under Schedule 20 to the WRA to secure entry to carry out the intended works.

20. Matters drifted into 2014 and, eventually, the EA's application for a warrant came before DJ Woollard in November 2014. On the 1st December, 2014, DJ Woollard held that he was satisfied that there were reasonable grounds for the EA exercising the power of entry under s.172 and granted the warrant sought.

21. The Appellants then applied to DJ Woollard to state a case. By his written decision, dated 28th January, 2015, DJ Woollard refused to state a case, concluding that the application was “frivolous”, within the meaning of s.111(5) of the MCA 1980. DJ Woollard's Certificate, refusing to state a case, is set out in full in the judgment (at [9]) and need not be repeated here, save for his key reasoning:

“ The owner of the land is aggrieved that another course was not followed i.e., service of a compulsory purchase notice which would have entitled him to a public hearing. That is not …a ground for refusing to grant a warrant. ……

The point on section 165(6) is simply based on a misreading of the section. It simply prohibits entry for new work under that section. Section 172 is the

relevant section for this application. ”

THE JUDGMENT UNDER APPEAL

22. In the judgment, Haddon-Cave J robustly dismissed the Appellants' claim for judicial review in respect of DJ Woollard's refusal to state a case.

23. Haddon-Cave J's key conclusions were expressed in answer to Questions 2 and 3 of the questions raised in the application to state a case (set out at [10] in the judgment), framed as follows:

“ Question 2: Whether based on the evidence and in light of the impact of the proposed works on the Applicant's land and farming operations, the District Judge was wrong to conclude that it is reasonable for the Environment Agency to seek to exercise powers under Section 172 of the Act to carry out the intended works and not its compulsory purchase powers under Section 154 of the Act and accordingly there are reasonable grounds for the grant of the Warrant….

Question 3: Whether the District Judge was wrong to conclude that Section 165 and 172 of the Act give the Environment Agency powers to carry out new works, in the form of the works proposed in this matter, in light of the provisions of Section 165(6) of the Act…. ”

24. Taking Questions 2 and 3 together, Haddon-Cave J held (at [20]) that s.165(6) clearly limited the power of entry of the EA to “maintaining existing works”; however, it was clear that s.172 was intended to be a general power of entry, because that is what it said. That general power was

"complementary and/or supplementary" (at [21]) to the various rights of entry contained in (*inter alia*) ss. 165 and 171 of the WRA. It would be "absurd" if the limited right of entry under s.165(6) was the only right of entry available under that section "because how then would the Environment Agency perform its general powers to carry out flood risk management work?" The (now) Appellants' construction effectively rendered s.165 nugatory.

25. In Haddon-Cave J's judgment (at [22]), the proposed works were lawful under s.165 of the WRA and s.172 granted a general power of entry to carry out the sort of works contemplated by s.165. As to the works, there was nothing in their "…type, scale or purpose" which fell outside those contemplated by Parliament when enacting s.165. To the contrary, the nature of these flood risk management works was very much contemplated by s.165:

" They directly related to the problems caused by the fact that (i) Chelmsford lies at the junction of these three rivers: the Wid, the Cam and the Chelmer; (ii) …there had been significant flooding in the past… (iii) in the Environment Agency's opinion, it was imperative that these flood risk managements works on the claimant's land and other land were put in place without further delay… "

26. Next (at [23]), Haddon-Cave J rejected the submission that the only routes open to the EA were by way of its CPO or CWO powers under s.154 or s.168 of the WRA.

" There is nothing in the legislation to suggest that the Environment Agency are bound to issue compulsory purchase orders or, indeed, compulsory works orders in connection with any particular type of work. Sections 154,

165 and 168 are each permissive and use the word 'may' and are not interdependent. The fact that the scale of the works in the present case may be larger than some others is irrelevant. Mr Edwards had no answer to the point that if the works in question were very minor, but nevertheless deprived the landowner of the use of the tiny parcel of land that would not make any difference in principle to his central submission that the Environment Agency was always bound to issue a compulsory purchase order. ”

27. Haddon-Cave J went on to reject (at [24]) the complaint that the Appellants had had no opportunity to challenge either the *raison d'etre* of the CFAS or its significant effect on their own land, involving intermittent flooding while alleviating flooding elsewhere. There was nothing in this point; the Appellants had plenty of opportunity to challenge the CFAS and had done so, including pursuing a judicial review challenging the planning permission.

28. Finally, Haddon-Cave J said this (at [29]):

“ …. Mr Edwards began his submissions with a peroration about fundamental principles, common law, and the fact that the common law is astute to ensure that there should be no deprivation of a person's land without both clear legislative language and compensation and that this was, he submitted, a 'disturbing case'. It is not. It is a fairly straightforward and prosaic example of a government agency going about the lawful exercise of its powers in fulfilment of its important duties. The legislation in this case is crystal clear. Mr and Mrs Sharp have a right to compensation under schedule 21 for any damage that they will suffer….. It is the Environment Agency's important role to anticipate and seek to ameliorate the risk of

flooding. That is why they are given such wide powers, in particular under section 165 and 172…."

DISCUSSION

29. I return to the only substantive question in the appeal, already highlighted at [2] above. It is a relatively short point of statutory construction – and, for completeness, it may be noted that Mr Edwards, with commendable realism, did not pursue a variety of other points contained in his skeleton argument.

30. On the face of it, the language of s.172 of the WRA confers on the EA a general power of entry for the purposes there set out, including the works contemplated by s.165. Moreover, ss. 154 and 168 of the WRA are couched in the permissive language of *powers* rather than *duties*, so suggesting that the EA is entitled but not obliged to proceed by way of its CPO or CWO powers. If this be right, then it is necessary to find a hook on which to hang the restriction for which the Appellants contend, precluding the use of s.172 for entry onto land or premises in the case of new works.

31. As is clear, the hook suggested by the Appellants is s.165(6) of the WRA. To dispose of it at once, it was common ground that no significance attached to the difference in language between s.165(6) – which refers to "land" – and s.172, which speaks of "premises".

32. At least at first blush, there is some attraction in Mr Edwards' submission: the WRA draws a clear distinction between "maintaining existing works", for which purpose entry onto land is not precluded by s.165(6) and undertaking *new works*, which falls squarely within the

s.165(6) prohibition. Moreover, questions of policy could be invoked to lend support to this argument. It is one thing to enter onto private land for the purpose of maintaining existing works; it is quite another to do so for the purpose (*inter alia*) of constructing new works, without the safeguards for the landowner contained in the CPO and CWO regimes – and moreover leaving open questions of some nicety as to the structures subsequently left on the landowners' land. Still further, I would not, for my part, be dismissive of the concern highlighted by Mr Edwards' submissions as to the tension between individual rights of property and the interests of society in general; striking the right balance in that area is important and not necessarily straightforward. Interference with private rights of property plainly requires careful justification.

33. All that said, Mr Edwards' submission faces the central difficulty that, unadorned, it proves too much. S.165 (1D) is not confined to a simple dichotomy between *maintenance* of existing works and the construction or repair of *new* works. As Briggs LJ observed in argument, there is an "undistributed middle"; thus s.165 (1D) (b), (c) and (f), deal with operating existing works, improving existing works and monitoring, investigating or surveying a location or a natural process.

34. At the oral hearing before us, Mr Edwards sought to deal with this difficulty by submitting that the wording "maintaining existing works" in s.165(6) must be read as extending to operating and improving existing works, within sub-sections (1D) (b) and (c). Quite apart from the inability of this construction to deal with sub-section (1D) (f), there is no reason why "maintenance" should be read as extending to operating existing works - and still less reason why it should include *improving* existing works, a matter conceptually distinct from maintenance.

35. With the aid of his further submissions, if I have understood them correctly, Mr Edwards shifted his ground somewhat:

i) S.165 (1D) (b) ("operate existing works") was to be treated as akin to maintenance and thus within the ambit of the power of entry furnished by s.165(6).

ii) S.165 (1D) (c) ("improve existing works") was not within the ambit of maintenance, so that the EA would require a CPO or CWO if it wished to enter on a landowners' property without consent for this purpose.

iii) S.165 (1D) (f) ("monitor, investigate or survey") was covered by the specific power of entry furnished under s.172 (2), namely to "carry out such inspections, measurements and tests".

36. I am unable to accept this modified submission.

i) First, it yields a very untidy solution, not at all foreshadowed in either s.165 (1)(a) or s.165 (6). S. 165(1)(a) deals apparently straightforwardly with all of sub-sections (1D) (a) – (f). S. 165 (6) singles out only the maintenance of existing works for separate treatment. By contrast, Mr Edwards is now contending for a variety of approaches for the individual sub-sections within s.165 (1D); that seems unlikely and indeed opportunistic.

ii) Secondly, this construction would require different meanings to be given to the same language in the two places where that language appears

in the same section. Thus, in sub-sections (1D)(a) and (b), "maintain existing works" must presumably have a different meaning from "operate existing works". The natural meaning of s. 165(6) is that it permits entry only for "maintaining existing works", i.e., language which applies only to sub-section (1D) (a). However, if Mr Edwards is right, then "maintaining existing works" in s.165(6) must have a broader meaning than "maintain existing works" in sub-section (1D)(a) and must extend to "operate existing works" within sub-section (1D)(b). Unless driven to it, I would be reluctant to accede to such a construction.

iii) Thirdly, as to improving existing works (sub-section (1D)(c)), this argument requires the EA to be obliged, not simply entitled, to utilise its CPO or CWO powers. While the argument at least recognises that improving existing works is something different from maintaining existing works (and to such extent is stronger than the submissions advanced orally before us), its deployment here serves to beg the question.

iv) Fourthly, this treatment of sub-section (1D) (f) ("monitor, investigate or survey") as falling under s.172 (2) involves both the equating of different statutory language and a recognition that s.172 *is* available to confer a power of entry on the EA in respect of an activity where entry is otherwise precluded by s.165(6). As it seems to me, the difference in language between s. 172(1) and s.172(2), does not justify the different treatment accorded to these sub-sections by Mr Edwards – not least given the linkage between the two sub-sections contained in the closing words of s.172(2) with its reference to the purposes mentioned in s.172(1).

37. It is fair to say that Mr Kolinsky's submissions were not without their own difficulties. In particular, Mr Kolinsky's explanation of the purpose of s.165 (6) leaves something to be desired; the formalities attached to such

notice provisions as are contained in s.172 are hardly onerous and thus provide but a weak foundation for the suggested purpose underlying s.165(6).

38. Nonetheless, overall, I have a clear preference for the EA's construction of s.165(6) and s.172.

i) First, all the various formulations of Mr Edwards' submissions suffer from the weaknesses already outlined.

ii) Secondly, I am not persuaded that the permissive language of ss. 154 and 168 is to be converted into obligatory language requiring the EA to use its CPO or CWO powers in the case of new works. I am unable to accept Mr Edwards' submission that this renders the CPO or CWO powers otiose. They are available for use, in a proper case, when the EA decides to deploy them. By contrast, if Mr Edwards' submission was well-founded then, at the least, the EA would be significantly circumscribed in the performance of its powers of flood risk management work.

iii) Thirdly, as highlighted by the Judge (at [23] of the judgment), the Appellants' case means that *any* new works – no matter how minor – provided only that they deprived landowners of the smallest parcel of land, would oblige the EA to proceed by way of its CPO or CWO powers. Such an outcome appears improbable and casts further doubt on the Appellants' proposed construction.

iv) Fourthly, the natural construction of s.172 of the WRA is that it confers an independent and general power of entry. Nothing said by the

Appellants has persuaded me otherwise. Put another way, I am not persuaded that s.165(6) supplies a sufficient hook on which to attach a restriction to the statutory language.

v) Fifthly, I acknowledge that this conclusion constrains the ability of those affected to challenge the *merits* – as distinct from the *legality* – of the EA's proposals and process. This consideration does not dissuade me, both because I am satisfied that that is the balance struck by the legislature and because, in any event, there remains opportunity for challenge on public law grounds, albeit not an open-ended challenge on the merits.

OVERALL CONCLUSIONS

39. For the reasons given, I would answer the question posed at the outset of this judgment as follows: in the case of new works involving entry onto land or premises, absent consent from the landowner, the EA is not confined by s.165(6) of the WRA to its CPO or CWO powers under s.154 or s.168 of the WRA; the EA is instead entitled to exercise the powers of entry conferred by s.172.

40. I should add this. Having considered the Appellants' case in depth, I have no real hesitation in concluding that the appeal from the judgment of Haddon-Cave J must fail. That said and as, I hope, is apparent from this judgment, there was rather more to Mr Edwards' submissions than might first appear from the ruling and judgment given below. For my part, I would therefore have been of the view that DJ Woollard ought to have agreed to state a case – notwithstanding my conclusion on the appeal.

41. I would be grateful for the assistance of counsel in drawing up an order to reflect these conclusions.

Lord Justice Briggs:

42. I agree.

Lady Justice Gloster:

43. I also agree.