

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

12/01/2016

B e f o r e :

MR JUSTICE BLAKE

Between:

CHRISTOPHER COLLINS

Appellant

- and -

**SECRETARY OF STATE FOR
COMMUNITIES AND LOCAL
GOVERNMENT**

**First
Respondent**

HAMPSHIRE COUNTY COUNCIL

**Second
Respondent**

**Jack Parker (instructed by Clarke Willmott) for the Appellant
Zoë Leventhal (instructed by Government Legal Department) for the First Respondent
Hearing dates: 3 December 2015**

The Honourable Mr Justice Blake:

Introduction

1. This is an appeal brought with leave of HHJ Sycamore, sitting as a Deputy Judge of the High Court, against a decision of a planning inspector dated 5 March 2015.
2. The Inspector had before her appeals against two enforcement notices issued in July and August 2014 that she called A and B respectively. She amended both notices with the consent of the parties and then dismissed the appeal against the first notice but allowed the appeal against the second notice.
3. The appellant contends that the dismissal of the appeal against the first notice involved a material error of law and appeals on a point of law pursuant to s.289(1) Town and Country Planning Act 1990 (TCPA). He is a director of Landacre Group Holdings Limited that owns land at Church Copse, Greenwood Lane, Durley, Hampshire. The land is a disused sand quarry in which a small copse of mixed deciduous and coniferous trees have grown up; use of the land for woodland is authorised.

4. As a matter of planning history the appellant had sought a change of user to revive sand quarrying on the site before bringing in infill into the site and restoring it. That application was refused in 2012.
5. In 2014 the appellant and his company wanted to harvest the mature trees that had grown up on the land. Harvesting trees involved no change of use of the land for forestry purposes. However, in order to be able to harvest the trees and remove the timber the appellant needed to construct an access road into the site. He engaged a contractor to do this who decided that the access road should consist of hardcore by means of rubble that was acquired from another of the appellant's companies and brought onto the site.
6. In July 2014 a quantity of this rubble was imported onto the site and deposited in a heap. By September 2014 it had been used to make the foundation of an access road and hard standing.
7. The local planning authority, Hampshire County Council, was alerted to the hardcore being brought onto the site in July and this led to the issue of the first enforcement notice issued under s.171A (1)(a) TCPA on 25 July. In section three of this notice the breach of planning control alleged is :

“without planning permission, the change of use of land from woodland to (mixed use of woodland and) importation and disposal of waste.”
8. The words in brackets were added by agreed variation at the instigation of the local authority at the inquiry as it was common ground that the area of the deposit of the material was only a small part of the land, the rest of which continued to be used as woodland. There were photographs of the state of the land at the time of the service of the notice that showed a pile of rubble had been deposited on it.
9. There was evidence of further deposits on the land and development activity with respect to the construction of an access road. This led to the second notice being issued on 19 August 2014 where section three alleged a breach of planning control by reason of:

“without planning permission, change of use of the land from woodland to create a vehicular access for waste disposal”.
10. Section five of the 25 July notice specified what the local authority required the recipient to do to remedy the breach of planning control alleged:
 - A. Cease all importation of waste to the land
 - B. Remove any waste that has been imported on to the land
 - C. Restore the land to its previous condition.
11. The appellant appealed to the Inspector against both notices and contended under s. 174(2) (b) TCPA that ‘those matters have not occurred’. The Inspector rejected a second ground of appeal under s. 174 (2)(c) that if they had occurred, the matters did not constitute a breach of planning control.
12. The appellant's case at the inquiry was that he was not importing or disposing of waste at all, but was in the process of building an access road for which he had purchased the necessary raw materials. He pointed out that by reference to the local authority's statement of reasons, the context of the enforcement action was an erroneous assumption by the local authority that he was in effect trying to do part of what he had been refused permission to do in 2012, and that he was disposing of waste (i.e. the builder's rubble) by tipping it into the quarry.

The Inspector's decision

13. The inspector dealt with the appeals on ground (b) in respect of both notices as follows:
 12. The appellant disputes that the materials that have been brought onto the site are classified as waste, or that the site has been used for waste disposal. He maintains that the materials, which were purchased by the company operating the forestry operation on the site from another of the companies in which the appellant has an interest, were specifically intended to be used for the purpose of creating the access and ceased to be waste when they were brought onto the land. The information submitted by the appellant reports that the definition of waste given by the EA states that waste remains waste until it is fully recovered. This applies to waste used as aggregate or construction material in civil engineering operations, such as in this case.
 13. Full recovery can be achieved when such waste is incorporated into a road. The photographs submitted by the Council prior to the issue of the TSN show a pile of rubble on the site, containing large chunks of concrete. Further photographs show piles of earth brought onto the site prior to the issue of the first enforcement notice. Therefore, at the time the first enforcement notice was issued, the access and hard standing had not been constructed and, by the definition, full recovery had not occurred.
 14. Although I agree that it has since been demonstrated that the material was intended for a specific purpose, that it was suitable for this purpose and that there was a demand for it on this site, I have had no written evidence to confirm the appellant's view that it was not contaminated in any way prior to being spread. Government guidance on when waste ceases to be defined as such notes that it will remain waste until contamination is removed. It is therefore not certain that the imported material met this criterion. Taking all the above into account, I conclude that the materials brought into the site remained waste at the time, although that situation may now have changed. The enforcement notice was therefore correct to specify a breach of planning control comprising the importation and disposal of waste.
 15. Turning to the second notice, I accept the appellant's submission that the construction of the hard-standing and access were intended to facilitate the forestry operations on the site and not to enable further waste disposal to take place across it. Forestry operations were taking place at the time of the site visit and the appellant's agent confirmed that a license to fell trees on the site had been obtained. In these circumstances, the allegation that the vehicular access was constructed '*for waste disposal*' is incorrect.
 16. I consider that I am unable to correct this enforcement notice by removing this wording without injustice to the appellant. If the incorrect purpose had not been included, he maintains he could have made an appeal on ground (a) for the access for forestry purposes, but he had no reason to seek planning permission for the allegation as set out in the notice. Consequently, I conclude that the second enforcement notice is not able to be corrected, the allegation that an access for the purposes of waste disposal has been created is not correct and the appeal succeeds on the ground (b).
 17. However, there is no prior approval or planning permission for the access as constructed, whether or not the material from which it is constructed remains waste.

...
 20. However, the enforcement notice for Appeal A did specify the correct breach at the time it was issued, as I have found that the material brought onto the site was not fully recovered and was technically still classified as waste. This material has since been

incorporated into an unauthorised access way and might now no longer be regarded as waste, subject to the matter of possible contamination being resolved. If so, requirement B of the enforcement notice relating to the removal of waste would not require the removal of this material.

21. However, there is no planning permission in place for the original breach of planning control and it was not permitted development. Whilst the original breach might no longer be continuing, the enforcement notice was not incorrectly issued and the appeals on grounds (b) and (c) both fail.
22. This enforcement notice does not relate to the construction of the access which is nevertheless still unauthorised despite the quashing of the second enforcement notice. In order to regularise the situation and avoid possible further enforcement action the appellant would need to obtain retrospective planning permission for the development.

The Appeal

14. Although it was an issue below, the grounds of appeal do not contend that the Inspector was wrong in concluding that the materials brought on to the land were waste. I must therefore decide the appeal on the basis that it was waste within the meaning of both domestic planning control and the EU Waste Framework Directive, 2008/98/EC (the Directive) notwithstanding that there might have been an issue as to whether the appellant as the holder of the material was discarding it or intended or was required to discard it (see Article 3 (1) of the Directive).
15. Whilst the appellant accepts for the purpose of these proceedings that he may have imported waste, as the Inspector found, he disputes disposing of it on his land. The four grounds of appeal advanced contend;
 - i) The Inspector failed to consider whether the breach of planning control had occurred by the appellant disposing of waste on his land.
 - ii) If she considered the issue at all, she failed to apply her conclusions on the second notice as to what the appellant was doing and intended to achieve, to the issue in the first notice as to whether the appellant had disposed of the waste before the road was built.
 - iii) In any event any conclusion as to a breach of planning control by disposal of waste was irrational in the light of the words used in the notice and the unchallenged evidence as to what the appellant was intending to achieve and the local authority was intending to prevent.
 - iv) The Inspector failed to give any or any sufficient reasons for her conclusions on disposal of waste.

Conclusions: Grounds 1, 2 and 4

16. I reject the appellant's contentions on each of these grounds.
17. In my judgement, as to ground one, it is apparent that the Inspector did in terms consider whether there had been a disposal of waste in breach of planning control and expressly found at paragraph 14 of the decision letter (quoted above at [13]) that there had been.
18. As to ground two, there is no inconsistency between her findings on the second notice and the first. The second notice contended that the vehicular access created in the woods was for the purpose of waste disposal. Once she accepted the appellant's evidence that the purpose of the road was to remove timber by vehicle, she was entitled to conclude that creating a road for

waste disposal had not occurred. This did not necessarily mean that in the course of building the road the appellant had not disposed of waste by importing it onto the site and depositing it there.

19. As to ground four, the inspector did explain her reasons for the conclusion that the deposit of waste was a disposal. I accept the submissions of Miss Leventhal, for the Secretary of State, that reading paragraphs 12 to 14 together with the reference to deposit in paragraph 8, it is clear that the Inspector reasoned as follows:
 - i) The appellant had imported waste on to the land and deposited it there.
 - ii) Waste remains waste until it is recovered.
 - iii) The deposit was in existence at the time of the enforcement notice and so the waste had not been recovered into something else at this time.
 - iv) Depositing unrecovered waste on land was a form of disposal of it whatever the ultimate intention may have been.
20. In my judgement, this process of reasoning meets the test set by *South Bucks District Council v Porter (No 2)* [2004] UKHL 33 [2004] 1 WLR 1953 at [36]:
 - i) It sufficiently explains to the appellant why it was considered that he was disposing of waste even if that is not what he intended to do or thought he had done.
 - ii) The reasoning refers to guidance documents produced by both sides in the hearing. It is clear from one of those documents, the Environment Agency's Guidance of August 2012 on 'The legal definition of waste and its application', that the law on which guidance is being given is set out in the Directive. The concepts of waste, disposal and recovery are all set out in the Directive and reflected in turn the guidance that was intended as a commentary on the Directive for interested parties.
 - iii) Article 3 (19) of the Directive provides that:

“‘disposal’ means any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy. Annex I sets out a non-exhaustive list of disposal operations”.

Annex 1 DI states that disposal operations include

“deposit into or onto land (eg landfill, etc)”.
 - iv) Further s.55 (3) (b) Town and Country Planning Act 1990 provides that:

‘for the avoidance of doubt...the deposit of ..waste materials on land involves a material change in its use, notwithstanding that the land is comprised in a site already used for that purpose if– ..., (ii) the area or height of the deposit is extended’
 - v) The parties all had professional assistance at the inquiry and some familiarity with planning law and other relevant legal terms can be assumed from their respective submissions. The inspector was writing a decision for the parties and need not reproduce all the legal materials underlying the rival submissions in order to explain her decision.

Conclusions: Ground 3 unlawful conclusion on breach of planning control by disposing of waste

21. The appellant's prime case is that the enforcement notice is a self-contained document that needs to be understood by the person to whom it is sent, both with respect to the statement as to what he has done to give rise to enforcement action for breach of planning control and what he must do to avoid penal liability for breach of the notice.
22. Mr Parker, for the appellant, relies on the words of Lord Justice Upjohn in *Miller-Mead v Minister of Housing and Local Government* [1963] QB 196 at 224:

“...I protest in strong terms against looking at any document except the enforcement notice. This is a most important document, and the subject, who is being told he is doing something contrary to planning permission and that he must remedy it, is entitled to say that he must find out from within the four corners of the document exactly what he is required to do or abstain from doing. For this is the prelude to a possible penal procedure”.
23. He points out that ‘disposal’ is an ordinary English word that can be summarised as ‘get rid of’. This is reflected in the dictionary definition as well as G.3.64 of the Environment Agency Guidance:

“Disposal operations are primarily aimed at getting rid of waste...If the ultimate aim of the operation is to get rid of the waste, there is a clear intent to discard”.
24. For good measure, even if, contrary to his principal argument, the technicalities of the Waste Framework Directive could be said to inform the recipient of the enforcement order as to the ambit of its terms, Mr Parker contends that the words in brackets in Annex 1 D1 (quoted above at [20] (iii): (‘e.g. landfill etc’), suggest that deposit is only a form of disposal where that is the ultimate purpose of the deposit.
25. In any event, Mr Parker submits that both the local authority and the appellant were at one in understanding what the allegation of disposal was, namely tipping the waste onto the land for landfill or similar durable purpose that could be said to be a form of ‘getting rid’ of the materials. This was the activity that was said to be the change of use of land from woodland to (mixed use of woodland and) importation **and disposal of waste.**” (my emphasis)
26. However, the inspector rightly found that the appellant did not want to get rid of the materials that he had purchased for the purpose of building an access road and hard standing. The short time that the materials were in a heap on the land before being transformed into the hard core of the road was not a ‘getting rid’ of them or a tipping them on to land, which is what the planning authority thought to be the case. There had accordingly been no change of use of land for disposal of waste on the land for the purposes of the enforcement notice, whatever the ambit of the words of the Directive might be.
27. I have concluded there is substance in the appellant's case on this point. It is supported by setting the enforcement notice within the context of the statutory scheme. In brief:
 - i) Section 172 (1) TCPA entitles the local authority to issue a notice where it appears to them (a) there has been a breach of planning control (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and any other material considerations.
 - ii) There is a substantial difference between tipping waste into a former quarry as landfill and depositing it temporarily on the land before using it all in a process which, when complete, will no longer be waste, subject to the issue of whether the waste included contaminated materials.

- iii) If the local authority considered that it was expedient to take enforcement action against importing and depositing waste pending its re-use, it could and should have said so in its notice and identified this as the specific activity that breached planning control.
 - iv) S. 173 (1) (a) requires the notice to state what the breach of planning control is and 173(2) adds that it is sufficient if the person receiving the notice knows what those matters are. The requirements of the notice must be plain to the recipient, who cannot be assumed to have an expert knowledge of EU waste law, what he had done in breach of planning control.
 - v) In order to assess whether there is a breach of planning control, whether it is expedient to take enforcement action against it and what specific requirements are appropriate and proportionate to address the breach, the activity said to constitute a breach has to be specified with some degree of particularity. A reference in the notice to the broad, technically complex and imprecise words of the Directive will not be enough.
 - vi) The evidence before the Inspector indicated that the local authority's case on breach of planning control was disposal by tipping of the waste as a final activity and not depositing it temporarily with a view to recovering it.
 - vii) A notice alleging temporary deposit of waste as a form of disposal might have alerted the appellant to other responses to it in the notice of appeal: that is to say he could have raised a s.174(2)(a) ground that planning permission for the deposit ought to be granted for that purpose, or a (2)(f) ground that the enforcement requirements to address the breach contended for were excessive, or a (2)(g) ground that a longer period should be provided to enable him to complete the construction of the road and thus terminate any breach of planning control by removing the waste by converting it from a deposit of rubbish into hardcore on an access road.
 - viii) The appellant was not intending to dispose of rubble by tipping it and would not have sought planning permission for that purpose. His case was that he was not disposing of waste by tipping it at all and issues of proportionality of the remedial measures did not accordingly arise.
28. It is not necessary in this judgement to explore the ambit of the term 'disposal' in the Directive. There may be cases where a temporary deposit of waste that remains in place for a period before it is recovered can amount to a disposal. However, having regard to the terms of the enforcement notice read in the context of the planning history and the reasons for enforcement action given by the local authority at the inquiry, this was not the activity that was being alleged had taken place in breach of planning control.
29. I accordingly conclude that there has been misdirection by the Inspector as to the form of disposal referred to in the enforcement notice in this case.
30. Miss Leventhal advanced three further submissions in her written and oral argument:
- i) The reasoning in *Miller-Mead* supported the proposition that there was greater flexibility and less need for precision in the narrative preamble to an enforcement notice (here section three). What was important was that the occupier of the land should know precisely what he had to do to remedy the breach, and the language of section five of the notice was clear and did not use broad or technical language.
 - ii) If there was any error by the Inspector in her consideration of disposal, there was no prejudice to the appellant in having the enforcement notice remain in place because there had been an admitted importation of waste in breach of planning control. If the waste

was now fully recovered by inclusion into the access road, it was no longer waste and could be said to have been removed in accordance with limb 5 (b) of the notice.

- iii) Here the Inspector was correct to point out that planning permission for an access road was needed as it was ‘development’ within the meaning of s.55(1) of the TCPA although not a change of use. It was open to the appellant to apply for planning permission and if he did so it was implausible that a rational local authority would ever seek to enforce the notice.
31. I cannot accept any of these submissions.
32. As to the first, I agree with Mr Parker’s reading of the judgements in *Miller-Mead*. Both Lord Denning and Lord Upjohn pointed out that an overbroad enforcement notice is not a nullity if amendments can be made to the enforcement notice to reflect the facts found at the inquiry. The power to amend a notice can be exercised as long as there is no injustice to the appellant. A notice that is issued on the basis of the local authority’s assessment of what was going on may need to be modified in the light of the fact finding at the inquiry. However, if the notice turns out to be inaccurate in some material way at the inquiry and no amendment is made to it, then it should be quashed as it does not meet the requirements of the statute: see *R (on the application of) Essex County Council v Secretary of State for Communities and Local Government and others* [2009] EWHC 3841 (Admin) per David Elvin QC DHCJ at [46] and [47].
33. In my judgment, there is clear prejudice in leaving in place an enforcement notice that has been issued and maintained on a material misunderstanding of the breach of planning control that has occurred and which is the subject of enforcement. Even if a notice requiring action to prevent further importation of waste on to the site might be legitimate, the requirement of section 5 C of the notice that the appellant restore the land to its previous condition, is not connected to such a breach. It would require the appellant to dig up and remove the access road, even if the hard core foundation was no longer waste as it had (or might well have) been recovered. Mr Parker points out the enforcement notice continues in force after action has been taken to comply with it and puts the landowner and any successor in title at risk of criminal prosecution for breach of requirements issued on a wrong basis. It is equally unsatisfactory for the Secretary of State to submit that the appellant could restrain an over-zealous planning authority from enforcing the notice by judicial review proceedings. The need to take such proceedings to avoid criminal liability is itself prejudice.
34. I recognise that the road itself requires planning permission and was constructed without it. It may be that the local authority would wish to take enforcement action in respect of it, in which case it needs to issue an appropriate enforcement notice. However, the notice under consideration in this appeal was not directed at building a road, but the disposal of waste.

Application to re-open proceedings

35. A draft of this judgment was provided to counsel with a view to assistance with corrections prior to hand down. This elicited a response from counsel for the Secretary of State that I should receive further submissions either orally or in writing as there was a contradiction between the court’s conclusions on ground three and ground four; this meant that there was a state of uncertainty as to what was required from the Secretary of State. I gave directions for written submissions from both parties as it seemed worth investigating whether there was such an error as alleged and if so it would be consistent with the over-riding objective to save costs by addressing it at this stage rather than requiring recourse to the Court of Appeal. I am grateful to both sides for the prompt and succinct written submissions received. Having considered them I do not propose to convene an oral hearing or amend the result of the terms of the judgement above, although it is common ground that I have jurisdiction to do so.

36. Ms. Leventhal submits that there is an error of principle in concluding that the inspector's decision was irrational on ground three and yet was a proper direction on the law for the purpose of ground four. She contends that the underlying basis for the court's conclusion that the inspector's decision on the notice was defective, is because the appellant did not appreciate that he was importing and disposing of waste.
37. This last submission is not the basis of the court's reasoning on ground three. The appeal proceeded on the basis that the inspector was entitled to find that the building materials imported onto the site were waste; the issue was whether she was entitled to find that he was disposing of the waste in breach of planning control as alleged in the notice. The law states that the terms of the notice must be clear and capable of being understood by the person to whom they are directed without recourse to external information such as the law on waste disposal within the meaning of the Directive.
38. The judgement on ground three is based on the proposition that the Inspector erred in treating a notice alleging importation of waste with a view to discarding it in the quarry (first notice) and building a road in order to discard it in the quarry (second notice) as valid where on the true facts the waste was imported to construct a road for woodland purposes and on completion of the construction the waste would be recovered and would no longer constitute waste. This has nothing to do with the appellant's misapprehension as to the status of the material he brought on to the land. For similar reasons, to conclude on ground four that the Inspector's process of reasoning is sufficiently apparent from the terms of the decision letter to meet the *South Bucks* test is not the same as saying that the Inspector's reasoning was correct when applied to the facts of the case.
39. In those circumstances, there is no need to re-open the debate to further consider the meaning of either waste or discarding within the Directive (see *OSS Group v Environment Agency* [2008] Env LR 8. My judgement is not predicated on a proposition that storing rubble in order to build a road is incapable of being a form of discarding of material, but simply that this was not the form of disposal or the breach of planning control alleged in the notice and the notice needed to be clear about what it was alleging.
40. For the reasons given in the original judgement as amplified above, in response to Ms Leventhal's further submissions, I adhere to the conclusion that the Inspector's decision is flawed. Accordingly the appeal should be allowed and the matter remitted to the Secretary of State for further consideration of the appeal against the first planning notice. I anticipate that the issue will be whether the notice could be amended without unfairness to the appellant to identify the correct form of disposal in breach of planning control and if so whether in response to such a variation an application for planning permission to use the waste to build the access road and /or variation of the conditions to extend the time for removal of the waste by transforming it into a road.
41. Ms. Leventhal contended in her skeleton argument and oral submissions at the hearing and maintains by her supplementary written submissions that even if the Inspector was in error on the question of the form of disposal of waste there was no prejudice to the appellant because use of the waste to build the road (if there was no contamination) could amount to recovery and removal of the waste. I recognise that the potential future planning consequences if no relief is given are complex and that different answers have been given by the Secretary of State to the court's question as to the continued impact of Condition C (removal of the road). It may be that the matter is not so clear cut as is set out at [33] above that I had understood to be common ground by then end of the oral argument. However, given the complexity of the issue, I am not persuaded that relief should be refused because there is no prejudice, and the planning consequences are to be considered in the re-determination of this appeal by whatever means is considered suitable as opposed to being a reason why there should be no relief granted on the appeal.

42. I accordingly allow the appeal and remit the matter to the Secretary of State for further consideration.