KENT COUNTY COUNCIL v. SECRETARY OF STATE FOR THE ENVIRONMENT AND ANOTHER

COURT OF APPEAL (Beldam, Swinton Thomas and Otton L.JJ.): April 29, 1997

Town and country planning—Site used for processing and deposit of waste from demolition of walls and buildings and breaking up of roads and paths—Enforcement notice—Whether breach of planning control—Application of Article 3 of 1988 General Development Order—Whether "article" in Article 3 included a building or part thereof, drives and paths

The second respondent company, M, owned a site which, at least from 1945, had been used for the processing and deposit of building and civil engineering waste from the demolition of walls and buildings and the breaking up of roads and paths. M had been granted a waste disposal licence by the appellant Council in 1977 under the Control of Pollution Act 1974. The Council had not suggested at that time that M required a specific planning consent to carry on their use of the site. In 1992, however, the Council issued an enforcement notice alleging a breach of planning control under section 171A(1)(a) of the Town and Country Planning Act 1990 in that M had made a change of use of the land by depositing and processing imported waste materials. M appealed against the enforcement notice, in particular on the ground set out in section 174(2)(c) of the 1990 Act, *i.e.* that the matters stated in the notice did not constitute a breach of planning control. They contended that planning permission had been granted for the existing use by Article 3 of the 1988 General Development Order in that permitted development there included the deposit of waste materials resulting from an industrial process on any land comprised in a site which was used for that purpose on July 1, 1948. "Industrial process" is there defined as a process for or incidental to the making of any article or the breaking up or demolition of any article. The Inspector concluded that the word "article" in Article 3 of the 1988 General Development Order did not exclude a building or parts thereof such as walls or doors, or even drives or paths. Further, the use of the word "demolition" would have been strange unless intended to relate to walls, buildings and the like. The matters alleged in the notice did not, therefore, constitute a breach of planning control. The Inspector's decision was upheld by deputy judge Mr Nigel McLeod, Q.C. On appeal to the Court of Appeal:

Held, dismissing the appeal, that the phrase "waste material resulting from a process for or incidental to the breaking up or demolition of any article" in Article 3 of the 1988 General Development Order was wide enough to cover the demolition of walls, buildings, etc. and the breaking up of roads, driveways and paths. It was not permissible to infer that Parliament intended words of such a general and wide meaning used in different contexts to have identical scope wherever they were used. The submission that the word "article" in the 1988 General Development Order was to be taken to have the same or an equivalent meaning as when used in the Factories Act 1961 was to be rejected. Further, the deputy judge was right to emphasise the word "demolition" which was normally used in respect of buildings and structures.

Cases referred to:

(1) *Findlay v. Miller Construction (Northern) Ltd* (1977) S.L.T. 8.

(2) *Longhurst v. Guildford, Godalming and District Water Board* [1963] A.C. 265; [1961] 3 W.L.R. 915; [1961] 3 All E.R. 545; 105 S.J. 866; 59 L.G.R. 565; [1961] R.V.R. 670, HL.

(3) *Sheffield City Council v. ADH Demolition Ltd* [1984] L.G.R. 177; (1984) J.P.L. 658.

Appeal by Kent County Council from a decision of Mr Nigel McLeod, Q.C. sitting as a deputy judge of the High Court on July 13, 1995. The learned judge thereby dismissed an appeal under section 289 of the Town and Country Planning Act 1990 from a decision of the Inspector, D. B. Atkinson, who had directed that an enforcement notice issued by the council to the second respondent, R. Marchant & Sons Limited, should be quashed. The ground of the appeal was that the learned judge was wrong to hold that building and civil engineering contractor's waste resulting from the demolition of buildings, roads, driveways and paths was waste material resulting from a process for or incidental to the demolition of an "article" within Article 3 of the General Development Order 1988. The facts are stated in the judgment of Beldam L.J.

Richard Glover for the appellant.
Natalie Lieven for the first respondent.
Keith Lindblom, Q.C. and *Philip Petchey* for the second respondent.

BELDAM L.J. Kent County Council appeal from the decision of Mr Nigel McLeod, Q.C. sitting as a deputy judge of the High Court on July 13, 1995 by which he dismissed the council's appeal under section 289 of the Town and Country Planning Act from the decision of Mr D. B. Atkinson who had directed that an enforcement notice issued by the council to R. Marchant & Sons Limited should be quashed. The question raised for the court in the appeal is whether building and civil engineering contractor's waste resulting from the demolition of walls, buildings, etc. and the breaking up of roads, driveways and paths is waste material resulting from a process for or incidental to the demolition of an article or articles in the context of article 3 of the GDO of 1988.

R. Marchant & Sons Ltd ("the company") are owners and occupiers of a parcel of land with the ordnance survey no. 4876 at Riverhill, near Sevenoaks in Kent. The site lies within an area of outstanding natural beauty at the top of Greensand Ridge and opposite parkland. At least since 1945 (and probably since 1930) the site has been used for the extraction of Chart stone and grinding gravels and for the processing and deposit of waste consisting mainly of building and civil engineering contractor's waste from the demolition of walls and buildings and the breaking up of roads and paths.

The site extends to approximately 7½ hectares. On August 12, 1977 the council, as a waste disposal authority, granted the company a waste disposal site licence under section 10 of the Control of Pollution Act 1974. The council did not then suggest that the company required a specific planning consent to continue to carry on their use of the site. However, on May 13, 1992 the Council issued an enforcement notice alleging a breach of planning control under section 171A(1)(a) of the Town and Country Planning Act 1990 at the company's site at St Julian's Road, Riverhill, shown on the ordnance survey plan attached. It alleged that, without planning permission, the company had made a change of use of the land by depositing and processing imported waste materials. Such an activity was taking place in an inappropriate location in a rural area and was incompatible with countryside conservation policy. The notice required the company to stop importing, depositing and processing waste material and to reinstate the site within six months. The company appealed against the enforcement notice, in particular on the grounds set out in section 174(2)(c) of the Act, namely that the matters stated in the notice, if they occurred, did not constitute a breach of planning control.

Under section 57(1) of the Town and Country Planning Act 1990, planning permission is required for the making of any material change in the use of land, and by section 55(3)(b) of the Act, the deposit of waste materials on land involves a material change in its use, even if the land is part of a site already used for that purpose if: (1) the superficial area of the deposit is extended; or (2) the height of the deposit is extended and exceeds the level of the land adjoining the site.

It was not alleged that the company's operations extended the area or height of the deposit, and copy photographs were put before and scrutinised by the inspector. The company contended that planning permission had been granted for the existing use of the site by Article 3 of the Town and Country Planning and General Development Order 1988. Within the class of permitted development under that order is the deposit of waste materials resulting from an industrial process on any land comprised in a site which was used for that purpose on July 1, 1948, whether or not the superficial area or the height of the deposit is extended as a result. Industrial process is, so far as relevant to this case, defined to mean:

> ... a process for or incidental to ...
> (a) the making of any article ...
> (b) the ... breaking up or demolition of any article ...

The Secretary of State appointed Mr D. B. Atkinson, a Member of the Institute of Chartered Engineers, as inspector to determine the appeal. He held the inquiry on September 21 and 22, 1993 and it extended to December 14 to 17, 1993. After concluding that the deposit and the processing of inert waste had taken place on the appeal site at least since 1945 and probably even before 1930, he recorded that:

> There was no disagreement between the parties that the inert waste the company imports, processes and deposits on the site is mainly building and civil engineering contractor's waste resulting from the demolition of walls, buildings etc and the breaking up of roads, driveways, and paths.

The council had argued that the word "article" could not be taken to include a building or a wall, whereas the company had urged him that the word "article" was intended to be given as broad a scope as possible within the definition. The inspector considered that the word "article" could not be taken to exclude a building or parts of a building, such, for example, as walls or doors, or even other structures such as drives or paths. Furthermore, he considered that the word "demolition" would have been a strange word for the draftsman of the GDO to use, unless it was intended to relate to walls, buildings and the like. Accordingly he concluded that the appeal succeeded because the matters alleged in the notice did not constitute a breach of planning control.

His decision was upheld by the deputy judge in a clear and concise judgment in which he too considered that it was difficult to see what "demolition" could refer to if not to demolition of a building or something similar. He said it was clear from its context that the word "article" was used to cover varied activities of the kind set out in the GDO definition and therefore the draftsman must have intended a wide meaning. Accordingly, he found that there was no error in law in the inspector's decision and dismissed the appeal.

In support of the appeal, Mr Glover argued that the word "article" is an ordinary English word, easily understood, and it would not in ordinary parlance be used to describe a building, or a wall, or roads, paths, etc. He referred us to the *Shorter Oxford English Dictionary* (4th edition) where it was stated (among other meanings) that "article" meant a particular item or a particular material thing (of a specified class); a commodity; a piece of goods or property. He argued that, in the context of the general development order, the waste deposited on the company's land did not come from an industrial process, because "article" was not used in a way appropriate to include land or realty. Further he argued that the word "article" is used in a similar context in the Factories Act 1961. Section 175 of the Act defines the word "factory" (as relevant to this argument):

> (1) ... the expression factory means any premises in which or within the close or curtilage or precincts of which persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:
>
> (a) the making of any article ... or
>
> (b) ... the breaking up or demolition of any article.

Mr Glover argues that walls, buildings, roads, etc. are not the result of any process of manufacture or breaking up or demolition of any article in a factory, and consequently the draftsman, when he came to the general development order and adapted the same language, obviously intended that the waste which might result from a building operation or from works of engineering construction were not to be included in the word "article" in that order. Mr Glover pointed to section 127 of the Factories Act which applies only certain provisions of the Act to building operations and works of engineering construction and which enables special regulations to be made by the minister under section 50 and section 51.

He referred us to the decision of Sheriff Macvicar, Q.C. in *Findlay and anr v. Miller Construction (Northern) Ltd* (1977) *Scots Law Times* 8. In an action brought by personal representatives of an apprentice tiler who had been killed in the course of erecting an office block on a building site, the pursuers had argued that the building on the building site was a factory within the meaning of section 175(1)(a) of the Act. Of this argument the Sheriff said:

> It would take a great deal of persuasion to make me adopt such a strained and unnatural construction of the word article, and I am wholly unconvinced by this submission. The word "article" is not defined either in s.175, or in the next succeeded definition of the Act, but it is quite clear from a reading of s.175 as a whole, where the word occurs frequently, that a sharp distinction is drawn between articles and the premises in which they are made, or have various processes applied to them...
>
> Nobody, as it seems to me, would ever, in ordinary speech, refer to a building site as a factory, and I was not referred to any case in which it has been held to be one.

After referring to an observation of Lord Reid in *Longhurst v. Guildford, Godalming and District Water Board* [1963] A.C. 265 in which Lord Reid had said that the word "article" itself appeared to him to be capable of meaning anything corporeal, the Sheriff went on:

> That may well be correct, but I think it unlikely that Lord Reid intended

> to include within the phrase "anything corporeal" heritable subjects in course of construction.

In the general development order the words "a process for or incidental to the breaking up or demolition of any article" are in my view intended to be a general collective phrase taking colour from the purpose they are intended to serve and the context in which they appear. Their purpose in the Factories Act 1961 is to define the activities carried on by persons employed in manual labour, which place the occupier of the factory premises under statutory duties designed to protect those who carry on work in the factories from injury or disease.

The same phrase used in the general development order in connection with planning permission is designed to define processes which produce waste material commonly deposited on land and used for that purpose. Thus the word "article" in the general development order may indicate different characteristics and different origins from those of an article referred to in the Factories Act. It is not in my view permissible to infer that parliament intended words of such a general and wide meaning used in different contexts to have identical scope wherever they were used. That the words are capable of having a wide meaning is, in my view, clear from the observations of Lord Reid in *Longhurst*, when at page 273 he said:

> The word "article" has many different meanings or shades of meaning and therefore the context in which it occurs is of crucial importance.

Mr Lindblom expressed the same concept when he said that the analogy with the factory legislation is unsound because the context is different, for the Factories Act creates duties in relation to factories, whereas the general development order creates rights in relation to the depositing of waste on particular areas or sites.

I would reject the submission that the word "article", where it appears in the general development order, is to be taken as having the same or an equivalent meaning to the word "article" where it appears in the definition of a factory. Mr Glover accepted in the course of argument that, for example, individual bricks could be regarded as articles, and that concrete could be made into an article. I do not think a brick ceases to be an article because it is incorporated with other bricks and mortar into a wall, nor do I think that concrete when laid in a path can be regarded as having a different characteristic when it is made into a reinforced concrete lintel.

In my view, the deputy judge was right to place emphasis on the word "demolition" as well as on the word "article". The word "demolition" would normally be used in respect of buildings and structures. I consider Mr Glover's suggested interpretation does place too much emphasis on isolating the word "article" and defining it by analogy to the context of the word in the Factories Act. I would construe the phrase "waste material resulting from a process for or incidental to the breaking up or demolition of any article" as being wide enough to cover the demolition of walls, buildings, etc. and the breaking up of roads, driveways and paths.

One consequence of the acceptance of Mr Glover's argument would be that rights to deposit waste demolition of buildings, etc. would be treated differently to other rights which have already been acquired. No reason was suggested why this should be so. Further, I can see no reason why the GDO should draw a distinction between, for example, the deposit of waste which

was the result of breaking up or demolishing fixtures such as basins, baths and tiles, and waste which is the result of the demolition of the fabric of the building.

For those reasons, it seems to me that the decision of the deputy judge was right, and I would dismiss this appeal. In the circumstances it is unnecessary to deal with the submission made by Miss Lieven in the alternative to her main submission which was to uphold the decision of the deputy judge, that even if the inspector had been wrong to find that there was an industrial process on the site of the original demolition, that there was nevertheless an industrial process when the waste was brought on to the company's site, and was processed there. For the reasons I have indicated, however, in my opinion this appeal should be dismissed.

SWINTON-THOMAS L.J. I agree.

OTTON L.J. I agree. I have come to the conclusion that the analogy with the factory legislation is less helpful than I might originally have been persuaded. In *Sheffield City Council v. ADH Demolition Ltd* [1984] L.G.R. 177 the Divisional Court had to consider the construction of section 1 of the Clean Air Act 1968 which provides:

> (1) Subject to the following provisions of this section, dark smoke shall not be emitted from any industrial or trade premises and if, on any day, dark smoke is so emitted the occupier of the premises ...
> (5) In this section "industrial or trade premises" means premises used for any industrial or trade purposes or premises not so used on which matter is burnt in connection with any industrial or trade process.

The Divisional Court held, reversing the decision of the magistrates, that "the demolition site" came within the meaning of the word "premises" in section 1(5) and that the operation of demolishing a building was a process within the ordinary definition of that word being a continuous or regular action or operation as a building operation within the meaning of the Factories Act 1961, and a trade process. Accordingly, the contractor's activities brought them within breach of section 1(1).

Griffiths L.J. (as he then was) at page 181 said:

> The real point in this case is whether or not the activities of the demolition contractors are caught by the provisions of section 1 ... The justices came to the conclusion that the demolition contractors did not fall within the provisions of section 1. Their reason was that "premises" in section 1 referred to buildings and did not cover open spaces left as a result of the demolition activities.

Later at page 183 he said:

> It appears to me that it is a natural use of language to refer to the demolition of buildings as a process of demolition, or a demolition process. We have cited to us the definition of "process" in the *Shorter Oxford English Dictionary* [reference given] which reads: "A continuous and regular action or succession of actions, taking place or carried on in a definite manner; a continuous (natural or artificial) operation or series of operations." It seems to me that the definition is quite sufficient

> to cover the operation of demolishing a building. Accordingly, in my judgment, this emission of smoke was caught by the provisions of section 1...

Thus the operation of demolishing a building has been accepted as a process within the ordinary meaning of the word. I am persuaded that the general development order calls for a construction which accords with common sense so as to include a process which is the most common usage of the word demolition, namely "the destruction of a building or other thing".

Accordingly, I agree with the conclusion of my Lords.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors—the County Solicitor, Kent County Council; the Treasury Solicitor; Knocker & Foskett, Kent.

Reporter—David Stott.