IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST

CASE NO: CO/1610/93

Royal Courts of Justice
Strand
London WC2

Friday 21st October 1994

B e f o r e:

MR JUSTICE HARRISON

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REGINA

-v-

THE BRITISH COAL CORPORATION

Ex parte IBSTOCK BUILDING PRODUCTS LIMITED

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(Computer Aided Transcript of the Stenograph Notes of John Larking, Chancery House, Chancery Lane, London WC2
Telephone No: 071 404 7464
Official Shorthand Writers to the Court)

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MR J HOBSON (instructed by Messrs Marron Dodds, Leicester) appeared on behalf of the Applicant.

MR T CORNER (instructed by Messrs Nabarro Nathanson, London W1) appeared on behalf of the Respondent.

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J U D G M E N T

(As Approved by the Court)

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Friday 21st October 1994

MR JUSTICE HARRISON: This is an application for judicial review of what was described in Form 86A as the continuing refusal of the respondent, the British Coal Corporation, to disclose information in its possession relating to the alleged dumping of naval munitions in 1947 down mineshafts beneath the applicant's land known, as Ibstock Brick Works. The real information that was required by the applicant was the identity of the person who had informed British Coal that the dumping had occurred. On 21st June 1993 leave was granted by Macpherson J to enable the applicant to apply for an Order of Mandamus requiring British Coal to supply that information to the applicant. On 7th July 1993 British Coal disclosed the identity of the informant to the applicant. The applicant has thereby obtained the information which it needed. As a result, the sole issue before the court is who should pay for the costs of this action?

The applicant company says that it should be entitled to its costs because British Coal had previously refused to supply the name of the informant and that they only did so after leave to move for judicial review had been obtained. The respondent contends that the action should not have been brought. They seek an order that the costs of the action should be paid by the applicant. They base that

contention on The Environmental Information Regulations 1992. Whilst they do not accept that the Regulations apply to British Coal, they do not pursue that contention, simply to assist in shortening the length of this hearing. They do, however, contend that they are not obliged under the Regulations to disclose the information sought for four reasons, to which I will return.

The applicant contends that it was entitled to be notified of the British Coal's informant because it was information relating to the environment within the meaning of the Regulations. Thus it can be seen that the regrettable situation has arisen where it is necessary to consider the points that would have arisen on the substantive hearing solely to decide the question of costs.

The factual background is that the applicant excavates clay at its brick works at Ibstock in Leicestershire. The site contains one worked quarry (North Quarry) and one operational quarry (South Quarry). They employ about 250 - 300 people at South Quarry and there are residential developments about a 140 metres away. Some way beneath the quarry there are two mineshafts and a ventilation shaft which have been disused since about 1932 but which belong to British Coal because they form part of the Leicestershire coalfield.

It would seem that the excavation in the South Quarry is nearing its end because the applicant

proposed to fill the quarry with waste and restore and landscape the site. They appealed to the County Council in June 1991 for planning permission for their landfill proposal. Following non-determination by the County Council, they applied to the Secretary of State for the Environment and a public inquiry was fixed for June 1993. There had, however, been negotiations between the applicant and the County Council and it appeared to the applicant that there was a better chance of obtaining planning permission if the proposal included the restoration of the North Quarry as well. They therefore made a more extensive planning application to include the North Quarry in November 1992. By agreement the public inquiry relating to the first application was adjourned, pending determination of the second application.

There was an extensive consultation exercise on the first application, which included consulting British Coal. There was no mention by British Coal on that occasion about the dumping of naval munitions down the mineshaft. However, they did mention it when they were consulted on the second application. In a letter of 15th February 1993 to the Council they said that a member of the public had told their Group Surveyor and Minerals Manager that sometime in about 1947 a lorry driver had told that member of the public that he was carrying naval ordnance to the Ibstock mineshafts for disposal.

This information was of obvious concern both to

the applicant and to the County Council because it had a direct effect on consideration of the second planning application which the County Council still had to determine. The County Council sought more information about this matter from British Coal, including the name of the informant. In a letter of 25th March 1993 British Coal said that the information had been received in their office on 15th March 1993 and that the informant gave an account of how the operation took place at night at "Ibstock pit near the brickworks" and the ordnance was "unloaded into the mineshaft system". Subsequently, requests by the County Council and by the applicant for the name of the informant were refused by British Coal. The Ministry of Defence was consulted but they had no records of the dumping of the munitions. British Coal, perhaps understandably, would not drill into the shafts to investigate whether the munitions were there because they said it would be dangerous to do so.

The name of British Coal's informant was therefore of importance to the applicant because it needed to evaluate the weight to be attached to the allegation. It directly affected its proposed landfill development, the consideration of which, by the County Council, was being held up pending investigation of this aspect.

Today, an affidavit was lodged by the respondent, sworn by Mr Macpherson, a partner in the firm of solicitors representing the respondent, deposing to

the fact that, initially, the respondent did not think it proper to disclose the name of the informant. They did, however, write to the Ministry of Defence, who replied by letter of 8th June 1993 stating that it was most unlikely that explosives or ammunition would have been dumped in a mineshaft, but that if any material had been dumped in a mineshaft, it would only have been harmless items. Copies of that letter were sent to the County Council and to the applicant.

On 7th July 1993, Mr Macpherson sent to the applicant a letter from their informant containing the information the respondent had been given. That letter revealed the name of the informant to be Dr Farley. Mr Macpherson indicated that Dr Farley had given his consent to disclosure of his identity on 2nd July 1993. Dr Farley's letter described how the dumping of the redundant naval ordnance in the mineshafts had been carried out secretly at night with muffled engines and wheels.

I turn, first, to the submissions that have been made relating to the applicability of the Environmental Information Regulations 1992. I am told that this is the first time that the question of interpretation of the Regulations has been considered by the courts, albeit that it is in the context of an application relating to costs.

The first issue is whether the identity of the informant is information relating to the environment within the meaning of Regulation 2. Regulation 2(1)(a)

provides:

"These regulations apply to any information which -

(a) relates to the environment."

Regulation 2(2) provides:

"For the purposes of these regulations information relates to the environment if, and only if, it relates to any of the following, that is to say -

(a) the state of any... land

(b) any activities ... which adversely affect anything mentioned in sub-paragraph (a) above or are likely adversely to affect anything so mentioned."

Regulation 2(4), states that:

"'Information' includes anything contained in any records."

It is accepted by both parties that the presence of munitions in the mineshafts is information relating to the state of the land within Regulation 2(2). The point in dispute is whether the name of the informant is information relating to the state of the land. Mr Hobson submits that the source of the information is part of the information because it is required so that an assessment can be made of the credibility and weight to be accorded to that information. He stressed the word "any" information in Regulation 2(1). He said that a broad interpretation should be given to

the words in Regulation 2 in order to give effect to the purpose of EEC Council Directive 90/313. He also referred to Article 2 of that Directive, which defines information relating to the environment as meaning:

"Any information in written ... form on the state of ... land."

Mr Corner, on behalf of the respondent, contended for a narrow interpretation of the Regulation. He stressed that the provisions of Regulation 2(2) are exclusive, rather than inclusive. He submitted that the Regulation applies to information which itself relates to the state of the land, not to matters which may lead to such information. He said that the name of the informant did not relate to the state of the land.

Whilst I acknowledge that this is an arguable point, I prefer the broader interpretation of Regulation 2. The source of the information relating to the dumping of the munitions can be said to "relate to" the state of the land because it directly affects the quality of that information. It is necessary to know the source of the information in order to assess the credibility of the information and to assess how much weight can be attached to it. The purpose of the legislation, it seems to me, is to provide for freedom of access to information on the environment. It would be strange if the legislature had intended that only the bare information itself should be disclosed,

without it being possible to ascertain whether it was right, wrong or indifferent. Any questions of confidentiality that may arise from such an interpretation of the Regulation are safeguarded by Regulation 4. I therefore conclude that the source of the information which relates to the state of the land is capable of being information which "relates to" the state of the land.

The second issue is whether the name of the informant is exempted from disclosure under Regulation 4(2)(a). Regulation 4(1) provides:

"Nothing in these regulations shall -

(a) require the disclosure of any information which is capable of being treated as confidential; or

(b) authorise or require the disclosure of any information which must be so treated."

Regulation 4(2) provides:

"For the purposes of these Regulations information is to be capable of being treated as confidential if, and only if, it is -

(a) information relating to matters affecting international relations, national defence or public security."

Mr Corner submitted that the information relating to the dumping of naval ordnance secretly by night down the mineshafts, involving as it does, ammunition for the Navy, is information relating to matters affecting national defence or public security within the meaning of Regulation 4(2)(a). Mr Hobson stressed

that, for the information to come within that provision, the information has to relate to a matter which actually affects national defence or public security, not which is merely capable of affecting it.

It is noteworthy that Mr Corner's submission is based on the information relating to the dumping of the munitions, rather than to the identity of the informant. However, dealing with it on that basis, there is no evidence in this case that the dumping of the munitions in the mineshafts in about 1947 is a matter which affects national defence or public security now in 1994. Indeed, such evidence as there is, is to the contrary, in that when the Ministry of Defence were consulted on this matter in April 1993, they did not take any point on national defence or public security. I therefore conclude that the information in this case is not exempted by Regulation 4(2)(a).

The third issue is whether the name of the informant is exempted from disclosure under Regulation 4(2)(b), which provides as follows:

> "For the purposes of these Regulations information is to be capable of being treated as confidential if, and only if, it is -
>
> (b) information relating to, or to anything which is or has been the subject-matter of, any legal or other proceedings (whether actual or prospective).

Regulation 4(5) defines "legal or other proceedings" as including:

"The proceedings at any local or other public inquiry."

Mr Hobson submits that Regulation 4(2)(b)should be interpreted as applying only to legal proceedings in respect of the matter to which the information relates, that is to say, legal proceedings relating to the dumping of munitions in the mineshafts. He referred to Article 3(2) of the Directive in support of that contention. To hold otherwise, he said, would be to nullify the effect of the Directive and of the Regulations wherever there was a planning application which might lead to an appeal. Alternatively, he said, if the Regulation does apply to a planning appeal, it is not applicable when only a planning application was being considered.

Mr Corner submitted that the plain words of Regulation 4(5) include a public inquiry within the definition of 'legal proceedings' and that there is a prospective public inquiry where a planning application is submitted, because there does not have to be any certainty that there would be an appeal.

I must confess to having some difficulty with this point because, on the face of it, Regulation 4(5) does appear to include a public inquiry for a planning appeal, whereas one of the plain purposes of the planning inquiry is to determine the effect of a development on the environment. It is therefore a situation where one would think that the Regulations

would be intended to bite. Be that as it may, I do not have to decide that point because the circumstances of this case relate only to a planning application. Regulation 4(2)(b) applies to "prospective" legal proceedings, but in my view the mere existence of a planning application does not mean that there is a prospective appeal. The application may be granted or it may be refused without an appeal. In this case the application still remained to be determined. In those circumstances, I do not consider that it can be said that there were "prospective" legal proceedings within the meaning of Regulation 4(2)(b).

The fourth issue is whether the name of the informant is exempted from disclosure by Regulation 4(3)(b) which reads as follows:

> "For the purposes of these Regulations information must be treated as confidential if, and only if, in the case of any request made to a relevant person under regulation 3 above -
>
> (b) the information is personal information contained in records held in relation to an individual who has not given his consent to its disclosure.".

Mr Corner submitted that the identity of Dr Farley comes within the terms of that Regulation and that Dr Farley did not give his consent to the disclosure of his identity until 2nd July 1993, namely, after the date of the commencement of these proceedings. Mr Hobson submitted that the letter written by Dr Farley is not information that can be said to be contained in

records held in relation to an individual within the meaning of the Regulation.

I have no doubt that Regulation 4(3)(b) is not applicable to the circumstances of this case. The Regulation applies to personal information contained in records held in relation to an individual. The name of Dr Farley as the writer of a letter, held by the respondent, dealing with the dumping of munitions is not, in my view, personal information contained in records held by them relating to Dr Farley.

For all those reasons, I therefore conclude that the respondent was obliged to give the identity of their informant. Even if that had not been so, far as I am aware, no reason was given by the respondent for not disclosing the name of their informant at the relevant time. No doubt the lack of justification put forward by the respondent would have contributed to the applicant's decision to commence proceedings. As a responsible corporation, one would have expected British Coal to have given the information in the potentially serious circumstances of this case, unless they put forward some reason for not doing so, even if the reason was that they were not obliged to do so. Their refusal to give the information without giving any reason led the applicant to commence judicial review proceedings. In my view, they were justified in doing so in those circumstances and that is confirmed by the fact that leave to move was granted. It was not until leave was granted that British Coal gave the

information that had been requested. Even if I were wrong on the issues arising under the Regulations, those are matters which would entitle the court to exercise its discretion so as to award costs against the respondent. My decision, therefore, is that the applicants should have their costs.

I will now hear any submissions that there may, or may not be, relating to the scope of that decision and, indeed, relating to any order that should be made relating to the disposal of the application itself.

MR HOBSON: In my submission, in view of the fact that information was provided of a sort, the appropriate order would be no order on the application for judicial review, save that the respondent pays the applicant's costs of these proceedings. I apprehend that it is unnecessary to go beyond that.

MR JUSTICE HARRISON: If I say, "no order on the application", I am just wondering where that leaves us?

MR HOBSON: Obviously, we want there to be finality.

MR JUSTICE HARRISON: Could you just give me a moment? I think the Associate is about to offer assistance.

MR HOBSON: Yes, my Lord.

MR JUSTICE HARRISON: Mr Hobson, you may have heard what the Associate just said.

MR HOBSON: My Lord, yes. I think you were advised that you can make an order saying "no order".

MR JUSTICE HARRISON: It is slightly unusual, but I am told it does lead to finality in the proceedings.

MR HOBSON: I would agree with the Associate that your Lordship can do that. I think I recall I have encountered it. For example, in situations where local authorities are involved, they may be homeless persons cases, where a local authority agree they will

give the matter further consideration and so the court will not make an Order of Mandamus formally against a local authority on that basis. Therefore, no order is made on the understanding they will nevertheless take the necessary further steps they would. I have experienced such a situation on judicial review, where the applicant succeeds and no order is made.

MR JUSTICE HARRISON: It just occurs to me in that sort of situation, where they could come back again if the local authority failed.

MR HOBSON: My Lord, there is a danger of speculating and giving examples, so perhaps I withdraw the example and say simply I agree with the Associate's suggestion that you can make no order, save that the costs are paid by the respondent.

MR JUSTICE HARRISON: Mr Corner, do you have any submissions to make?

MR CORNER: My Lord, I would suggest that the more straightforward course would be to allow the application with costs.

MR JUSTICE HARRISON: That then would be making an Order of Mandamus in circumstances where there is no need for it, because the information has already been provided.

MR CORNER: My Lord, I take the point. I am, however, anxious to retain to myself any rights of appeal. My Lord, as I stand here, I am not certain that if no order is made on the application, that simply an order is made for costs, that such an appeal will lie. I think it would, but I am not certain, which is why I ask formally for an order to be made, granting the application.

MR JUSTICE HARRISON: It looks as if Mr Hobson is coming in with another suggestion. Would you mind if I just hear what he has to say?

MR CORNER: No, my Lord.

MR HOBSON: I have looked to see what the relief sought was and I see that we seek mandamus and an injunction. We would be very happy to have an order made in our favour, but it does seem to me to be unnecessary in the circumstances. Alternatively, one could amend the relief sought, if your Lordship would agree and my

learned friend would consent; instead for the court to make a declaration in terms of your Lordship's judgment that we were entitled to the information. That would be an order that the court could make. We were entitled to that information and also could be provided for so that would be a final decision in the matter, if the court would make a declaration that the respondent was required to make available to the applicant. It is a compromised suggestion my Lord, off the cuff, but I hope it may resolve the impasse.

MR JUSTICE HARRISON: Let us see if it has.

MR CORNER: My Lord, I am grateful for the side wind. My Lord, I think it does resolve the impasse. I think that would be a fair and reasonable order. The only reason the skeleton arguments say that costs is the only issue here is because of the fact that in the Act that which was asked for had been performed. My Lord, I would be content with that.

MR JUSTICE HARRISON: I do not see any objection to it. I must confess that I think that in the previous proposal any rights that you have of appeal would have been safeguarded.

MR CORNER: I think so, my Lord, but I was not absolutely sure.

MR JUSTICE HARRISON: If this is a course which is agreeable to both sides I see no objection to it. Therefore I will give leave to amend the Form 86A to include a prayer for relief for a declaration that the respondent was obliged to make available to the applicant all the information in its possession relating to the alleged dumping of naval munitions down the mineshafts including the identity of the person who informed the respondent that the dumping had occurred and grant a declaration in those terms. You will have noticed that the words I have used are almost identical to those used in relation to the Order of Mandamus that was requested. I grant a declaration in those terms. The applicants will have their costs.

MR HOBSON: I am much obliged, my Lord.

MR CORNER: My Lord, I do stand and ask for leave to appeal in the circumstances. My Lord, I, more or less, put the grounds which I do, for such leave, when we spoke a little earlier before the luncheon adjournment. I do say that the declaration you have granted raises

important issues on the construction of these Regulations, my Lord, particularly in view of the fact that this is the first time, so far as either my learned friend or myself are aware, that these matters have come before the scrutiny of the court. My Lord, they are not small matters. They are matters which, I suggest, go to the heart of the ambit of these Regulations. Therefore, on that basis, I do ask for leave to appeal.

MR HOBSON: My Lord, I oppose my learned friend's application for the two reasons that I mentioned this morning. First, this is an academic matter, now being, in practical terms, solely concerned with costs. Secondly, in any case, it appears that even though it may be helpful to have the Court of Appeal's guidance as to the construction of these Regulations, they would be unable to give complete guidance in the circumstances of this case, as an important matter was excluded from argument before your Lordship. My learned friend's concession is the applicability of the Regulations to a body like British Coal. I would add to those two points a third point which has arisen from your Lordship's judgment and that is quite apart from the issue of the construction of the Regulations. Your Lordship has indicated how discretion would be exercised in this case. That is another reason, bearing those other factors in mind, why this is an inappropriate case to go any further.

MR CORNER: Might I respond very briefly, my Lord?

MR JUSTICE HARRISON: Yes, Mr Corner.

MR CORNER: First, I do not accept that the mere fact that the only live issue today was costs should preclude the court granting leave. You have granted a declaration on the basis of a firm conclusion as to the interpretation of the Regulations. My Lord, I would say that is a highly important matter.

Secondly, my Lord, so far as the Court of Appeal not being able to determine all matters that might possibly be relevant as between British Coal and my learned friend's clients are concerned, if, on appeal to the Court of Appeal, the concession for the purpose of these proceedings has been obtained, then, yes the Court of Appeal would not have been determining a matter which relates to the application of the Regulations for British Coal, but it would be determining some pretty important and fundamental matters of general application and interpretation of the Regulations.

Thirdly, my Lord, so far as the discretion point is concerned, I am not sure that I entirely follow the point. In order for a declaration in the terms

referred to to be granted, I would apprehend that it has been necessary for your Lordship to come to a view as to the meaning of the Regulations. My Lord, I am not, of course, seeking to re-enter your Lordship's judgment because you have given it. But in order to declare that we were obliged to give up the information, my Lord, I do not understand to be pertinent to the fact that British Coal did not give reasons for disclosing it. We were either obliged to give it or we were not. I do not accept my learned friend's third point as a reason to give leave.

MR JUSTICE HARRISON: Mr Corner, I am not satisfied that this is a suitable case to grant leave. If you wish to take it further, you must apply to the Court of Appeal.

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