C3/2004/1230
C3/2004/1230(A)

Neutral Citation Number: [2004] EWCA Civ 1566
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE COLLINS)

Royal Courts of Justice
Strand
London, WC2

Tuesday, 9th November 2004

B E F O R E:

LORD JUSTICE PETER GIBSON
LORD JUSTICE BUXTON
LORD JUSTICE JACOB

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ECO-ENERGY (GB) LIMITED

Claimant/Appellant

-v-

(1) FIRST SECRETARY OF STATE
(2) SECRETARY OF STATE FOR TRANSPORT
(3) DURHAM COUNTY COUNCIL

Defendants/Respondents

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(Computer-Aided Transcript of the Palantype Notes of
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MR R JONES QC and **MR D MITCHELL** (instructed by Messrs Patwa Solicitors, Bearwood B67 5RA) appeared on behalf of the Appellant
MISS N LIEVEN (instructed by Treasury Solicitor, London SW1H 9JS) appeared on behalf of the First and Second Respondent
MR R McCRACKEN QC and **MR A CRAIG** (instructed by Durham County Council, County Hall, Durham DH1 5UL) appeared on behalf of the Third Respondent

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J U D G M E N T
(As approved by the Court)

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1. LORD JUSTICE PETER GIBSON: I will ask Lord Justice Buxton to give the first judgment.

2. LORD JUSTICE BUXTON: The appellant, Eco-Energy (GB) Ltd ("EE Ltd"), seeks to appeal to the High Court against a decision of the Secretary of State on a planning application, that application to the court being made under section 288 of the Town and Country Planning Act 1990. The application was struck out by Collins J because, in his view, EE Ltd was not a "person aggrieved" for the purposes of the statute. It is against that decision that the appeal is brought to this court.

3. The whole matter has a distinctly unusual history. Its origins are in plans to develop a substantial area of land, principally but not exclusively by the extraction from it of coal. A consortium, the Eco-Energy Group (and I will refer to that in those terms), was formed in order to develop that land. A member of the consortium, a Mr Robert Clarke, obtained options over the land from its owners in June 2001 and June 2003, enabling him to enter the land, make surveys on it and extract coal therefrom. It was Eco-Energy Group that made the application for planning permission that was necessary if those proposals were going to be carried forward. It was the Eco-Energy Group that appeared as the applicant at the public inquiry into the refusal by the Secretary of State of that planning permission.

4. That inquiry was held in May and June 2003. An inspector's decision, adopted by the Minister, adverse to the Eco-Energy Group was delivered on 22nd December 2003. The Eco-Energy Group seek (or whoever it is now who is the person complaining about the decision seeks) to make many complaints about the decision, indeed about the conduct, of the inspector. We are not in any way concerned with any of those matters and have not addressed them.

5. The decision having been delivered on 22nd December 2003 the time within which an application might be made to the High Court expired on 2nd February 2004, by the well-known provisions of section 288(3) of the 1990 Act.

6. On 24th January 2004 there was a transfer of Mr Clarke's option to EE Ltd. That transfer was made entirely orally: so it was agreed before the learned judge and it is agreed before us that at law Mr Clarke's option was not effectively transferred to EE Ltd. That was by reason of the provisions of the Law of Property (Miscellaneous Provisions) Act 1989, section 2. Nonetheless, the application to the court was made by EE Ltd on the last available day, 2nd February 2004.

7. The first question that arises is: who indeed can apply to the court under section 288? The judge considered, and there is before us, the case of Times Investment Ltd v Secretary of State for the Environment [1991] PLR 67. In my judgement, the upshot of that authority (which of course is binding on us) is that persons aggrieved under section 288 are either (1) the appellant in the planning process, or (2) someone who took a sufficiently active role in the planning process -- that is to say, probably a substantial objector, not just somebody who objected and did no more about it -- or (3) someone

who has a relevant interest in the land. It will apparent that EE Ltd can only qualify as a person aggrieved under the third category.

8. If EE Ltd were to be regarded as falling within that third category, that would extend the facts of the Times Investment case. There the applicant obtained ownership of the land, and did so before the decision under appeal was made. Here all that is in issue is an option, and it did not change hands, if indeed it changed hands at all (a matter to which I shall have to revert), until after the planning decision that EE Ltd seeks to appeal against.

9. For my part however, and without having heard substantial argument on the point, I would not reject the application simply on those grounds. Mr Clarke's option was entered into plainly with the planning process in mind, and it is not been suggested that he himself, if he had retained the option, would not be a person aggrieved. The late transfer does not mean that the new option holder does not have an interest in overturning planning decisions that limit the use he can now make of the land.

10. For those reasons, therefore, if the option were effective I would be minded to consider that the case fell under section 288 without, as I have said, hearing argument on that point. The trouble however is that as the judge understood it and was argued before him, and as I have already said, the option and the transfer of the option had not been effective. The judge said this at paragraph 33 of his judgment (admittedly when he was considering a slightly different point):

> "In my view there is no appeal properly in being. It cannot be said that a person who had no interest in the land, and still has no interest in the land, and who was not attending at the inquiry and was not taking any active interest in the appeal process, can suddenly step into the shoes of those who were properly to be regarded as applicants in order to seek to appeal to this court."

11. Seeing the force of that, on appeal to this court it is sought to raise a case quite different from that which was ventilated before the judge. What is now said is that Eco-Energy Ltd has, not a legal interest in the land, but an equitable interest arising under an estoppel or constructive trust. That is put in this way, at paragraph 11 of the appellant's skeleton:

> "Whilst it was conceded that Mr Clarke had not at law assigned the options to [EE Ltd], in the circumstances Mr Clarke's oral assignment of the options is binding upon him by reason of an equitable estoppel/constructive trust."

12. There is then set out familiar passages from the judgment of Lord Denning in Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd [1982] 1 QB 84 and Oliver J (as he then was) in Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] 1 QB 133. The pleader then asserts (I say pleader because this in effect a notice of appeal) in paragraph 15:

> "To allow Mr Clarke to go back on his agreement to assign would be both unfair and just to [EE Ltd]."

13. Mr McCracken QC, for Durham County Council, objected to this point being raised at all. He pointed out that it was completely different from, indeed effectively inconsistent with, the case that had been put at trial. He took us to paragraph 9 of the judgment where the judge said this:

> "9. The point taken by Mr McCracken on behalf of the defendant is that [EE Ltd] is a separate legal entity. Although it is said that Mr Clarke's options have been transferred to [EE Ltd], in reality there is no transfer which has effect in law because there is nothing in writing. Mr Giles [counsel who appeared below and who has not appeared before us] does not dispute that and cannot, therefore, base his claim on the assertion that there has been a valid transfer of the interest in the land in order to give the necessary standing to [EE Ltd].
>
> 10. Rather, he submits that he is able to rely on the transfer of the benefit of the application for planning permission and that the expression 'person aggrieved' in the statutory provision is wide enough and has been construed as wide enough to include the company as it now is."

That latter argument is one to which shall have to return.

14. In my judgement, Mr McCracken was justified in taking the objection he did. He did not object solely on grounds of novelty, nor indeed on the ground that he was not in a position to meet the point. But he did point out that if any suggestion whatsoever had been made of this argument before the learned judge, and if it had not in effect been conceded before the learned judge that there had been no valid transfer of the interest in the land at all, whether at law or at equity, then he would have wished to explore the relationship between Mr Clarke and EE Ltd in order to see what indeed was the basis of the assertion that it would be unconscionable for Mr Clarke to go back on whatever it was he had agreed.

15. There is force in that latter point. There is no clear evidence before us, and certainly was not before the judge, of what exactly was the nature of this transaction. It has now been confirmed before us (which apparently was always accepted to be the case) that Mr Clarke is the sole shareholder of EE Ltd. How he perceived this transaction with his own company, and what circumstances would have made it inequitable, in the sense used in the authorities, for him to reverse the transaction that he thought he had made is something that cannot be taken on the nod. It clearly would require investigation in the very unusual circumstances in which the point is put forward. I for my part do not think it would be appropriate or satisfactory to presume in this court a matter that had not been investigated in terms of evidence in the court below. I therefore would not allow this point to be taken.

16. In addition to that, I would go so far to say that I do not consider that any injustice is being done to anybody by that view because, having carefully considered the written

argument advanced in favour of this contention, I am quite satisfied that it is wholly unsustainable. The authorities relied on have their whole being in, and take their meaning from, a situation of conflict or negotiation between the two parties between whom the estoppel is said to arise. No one has ever suggested that such an estoppel could arise between the owner of a company and the company itself. That is simply not the legal structure for which this doctrine was conceived by the very distinguished judges to whom I have made reference.

17. That left the appeal, not entirely, but (as Mr Richard Jones QC, very fairly accepted) somewhat, bereft of substance. There were two points left which he put before us and which I should now consider.

18. The first was the claim, already referred to by the learned judge, in paragraph 20 of the skeleton argument in these terms:

> "In January 2004, the Eco-Energy Group orally assigned their respective interests in the burden and benefits of the planning application to Mr Clarke, and at the same time Mr Clarke assigned the entirety of the interest in the planning application to [EE Ltd]."

19. The skeleton argument pointed out, rightly, that there was no requirement for that assignment to be in writing. It had, it was claimed, effectively made EE Ltd through the conduit pipe of Mr Clarke a "person aggrieved" in respect of the section 288 proceedings, or rather in respect of the decision on the planning application, because they had succeeded to Eco-Energy Group's status as the proposer of the planning application.

20. I cannot agree that that argument is open to the appellant. Because it was clear that it was not open, it was not necessary further to explore what exactly it was that these people did between themselves in January 2004; as to which the evidence was singularly lacking in the detail that would have been required had this point to be seriously considered. The reason why the point is not open to the appellant is that the rights of the Eco-Energy Group as an applicant for planning permission had in January 2004 created it a potential applicant to the court, not as a person aggrieved in the wider sense, but as the actual person who had appealed under section 78 of the Act.

21. It is agreed before us by Mr Jones, and properly so, that the Eco-Energy Group cannot have assigned to Mr Clarke or to EE Ltd or to anyone else its right to apply to the High Court. That must stay in the hands of the Eco-Energy Group, because that right springs out of the factual involvement of the Eco-Energy Group in the planning process. I therefore consider it quite clear that one cannot create someone as a person aggrieved by purporting to give him rights in the planning application, which has already been determined and is in respect of which someone else (that is to say, the Eco-Energy Group) retains the right to appeal to the court. I do not consider that in any meaningful sense by these assignments Mr Clarke or EE Ltd succeeded to anything. Even if they did, their position falls far outside any position that should be regarded as making them a person aggrieved under section 288.

22. The last application was to substitute Mr Clarke as the claimant to the claim; that is to say, as the claimant in proceedings before Collins J and in this court. That, it will be appreciated, is a completely different matter from that which I have already dealt with.

23. There is a threshold difficulty about that claim which is that if Mr Clarke appears now, or should have appeared before us Collins J as the party, he would be miles out of time for bringing any complaint under section 288. As Miss Natalie Lieven, who appeared on behalf of the Secretary of State, pointed out to us, such a move would undermine the very strong scheme of section 288, which places emphasis on finality. True it is that on the facts of this case Mr Clarke could suggest that he was simply succeeding to a claim originally made, wrongly, by EE Ltd. But not only is it important under section 288 that applications be made rapidly, but also it is important that the persons affected by planning permissions should know who it is they are dealing with. I would not in any event, in a section 288 case, be minded to permit such a substitution.

24. Mr Jones argued that, whatever had been the situation in the past, such a step was now open to him, and the court should as an exercise of its discretion allow it to be taken, under Rule 19.5 of the Civil Procedure Rules. There are a series of reasons why that argument is ill-founded.

25. First, Rule 19.5(1) states that:

> "This rule applies to a change of parties after the end of a period of limitation under -
>
> (a) the Limitation Act 1980;
>
> (b) ... or
>
> (c) any other enactment which allows such a change, or under which such a change is allowed."

The Town and Country Planning Act, section 288, clearly does not impose a period of limitation under the Limitation Act, nor is it an enactment that falls within the ambit of Civil Procedure Rule 19.5(1)(c). In order to seek to argue that in fact it did so fall, Mr Jones took us to the recent decision of this court in Parsons v George [2004] 3 All ER 633, and to the judgment in particular of Dyson LJ at paragraph 36, where he suggested that a fairly wide view should be taken of the expression "any other enactment ... under which such a change is allowed." I would not wish, and it is not necessary here, to explore the limits of Dyson LJ's observations, or whether in fact, with great respect, I wholly agree with them. It is plain that on any view, however leniently Rule 19.5(1)(c) is interpreted, section 288 does not fall within it.

26. Not only are there the considerations already deployed, but also Miss Lieven drew our attention to the well-known case of Smith v East Elloe Rural District Council [1956] AC 736. There the House of Lords held as, in my judgement correctly, set out in the headnote of that report that once the section 288 period had expired, the court had no jurisdiction to question the validity of a planning application.

27. That view of course binds us. If the court has lost jurisdiction in respect of a matter, not only is this not a section that falls under section 19.5(1)(c), but also and in any event the court is deprived of any ability to give further consideration of the proceedings. That was the view taken by Hobhouse LJ in respect of a limitation period under the Hague Rules in Payabi v Armstel Shipping Corp [1992] QB 907. I respectfully agree. For that reason, as well as for the reason that section 288 does not fall under section 19.5(1)(c), the Civil Procedure Rules, paragraph 19.5, do not apply to this case.

28. Even if I am wrong about that, any attempt to apply paragraph 19.5(3) to this case falls down. First of all, looking at paragraph 19.5(3)(a) it is simply not the case that EE Ltd was "named in the appeal in mistake for Mr Clarke". There was no mistake about the person of EE Ltd. The mistake (if any) was about the capacity of EE Ltd to bring the proceedings. There is very clear authority that that is not the type of mistake that falls under section 19.5(3)(a).

29. Secondly, Mr Jones sought to interest us in paragraph 19.5(3)(b):

> "the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant ..."

I would not deny that there are certain mysteries about that paragraph, which fortunately it is not necessary to plumb in the course of this judgment. What is clear in this case is that the assertion is not that the claim cannot be properly carried on by or against the original party (that is to say, EE Ltd) unless Mr Clarke is substituted. The argument is that the claim cannot be carried on at all unless Mr Clarke is substituted. That is sufficient to take the case outside the wording of paragraph 19.5(3)(b).

30. Finally, in any event paragraph 19.5 is a matter for the discretion of the court. It will be apparent that even if that I had that discretion, which I do not, I would not be minded to exercise it in favour of the appellant.

31. For those reasons, therefore, I would dismiss this appeal.

32. LORD JUSTICE JACOB: I agree.

33. LORD JUSTICE PETER GIBSON: I also agree.

ORDER: Appeal dismissed with costs assessed in the sum of £12,925; if that sum is not paid within 28 days, Durham County Council to liberty to return to court to seek an order against Mr Robert Clark.

(Order not part of approved judgment)
