

CO/8296/2008

Neutral Citation Number: [2008] EWHC 2313 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 29th September 2008

B e f o r e:

MR JUSTICE WILKIE

Between:

THE QUEEN ON THE APPLICATION OF JEAN KENNEDY

Claimant

v

HEALTH AND SAFETY EXECUTIVE

Defendant

ABLE UK LIMITED

Interested Party

Computer-Aided Transcript of the Stenograph Notes of
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(Official Shorthand Writers to the Court)

Mr David Wolfe (instructed by Public Interest Lawyers) appeared on behalf of the **Claimant**
Mr Sam Grodzinski and Ms Eleni Mitrophanous (instructed by the Treasury Solicitor)
appeared on behalf of the **Defendant**
Mr G Clarke (instructed by Messrs Nabarro) appeared on behalf of the **Interested Party**

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

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1. MR JUSTICE WILKIE: Jean Kennedy is a resident of Hartlepool and has been for many years. She is also, happily, a survivor of cancer but, unhappily, a number of members of her family, also living in the Hartlepool area, have succumbed to that disease. It is her belief, and no doubt the belief of many others, that to some extent their illnesses have been contributed to by types of industry which have been either traditional to or have been brought into the Hartlepool area.
2. This claim by her, in which she seeks permission to judicially review the Health and Safety Executive, concerns the activities of Able UK Ltd, a shipyard which in recent years has developed an expertise in decommissioning and dismantling ships, often naval ships, within the structure of which are significant quantities of asbestos. They came to public notice a few years ago in relation to their wish to undertake that work for the United States Navy and I have been informed that certain statutory exemptions which are relevant to this application were granted in 2003.
3. The decision which is sought in this case to be challenged was a decision of the HSE on 17th June to grant an exemption to enable Able UK Ltd to import asbestos forming part of the Clemenceau, a French naval vessel. Able UK Ltd had sought to compete for the contract to perform that work on Clemenceau, a contract which was put up by the French Ministry of Defence and which had to be processed through the rigorous and complex procurement rules of the European Union. They succeeded in winning that contract and it is apparent that amongst their competitors were French shipyards based in Bordeaux, Cherbourg and Brest and a joint Belgian French recycling group. However, the fact that they succeeded in winning that contract did not necessarily mean that they would be permitted to perform it because the work involved is governed by the Health and Safety Control of Asbestos Regulations 2006, regulation 27(1) of which provides for the prohibition of the importation of asbestos in the following terms:

"... the importation into the United Kingdom of asbestos or of any product to which asbestos has intentionally been added is prohibited and any contravention of this paragraph shall be punishable under the Customs and Excise Management Act 1979(a) and not as a contravention of a health and safety regulation."

That prohibition and the criminal sanction for breach emphasises its importance. However, it is not an absolute prohibition because regulation 32 provides as follows:

"(1) Subject to paragraph (4), the Executive may, by a certificate in writing, exempt any person or class of persons or any product containing asbestos or class of such products from all or any of the requirements or prohibitions imposed by [amongst others regulation 27] and any such exemption may be granted subject to conditions and to a limit of time..."

Subregulation 4 provides:

"The Executive shall not grant any exemption under paragraph (1) ... unless having regard to the circumstances of the case and in particular

to—

(a) the conditions, if any, which it proposes to attach to the exemption;
and

(b) any other requirements imposed by or under any enactments which
apply to the case,

It is satisfied that the health or safety of persons who are likely to be
affected by the exemption will not be prejudiced in consequence of it."

4. The decision by the Health and Safety Executive to grant the exemption sought followed a full statutory procedure and it is no part of the applicant's case that the Health and Safety Executive acted unlawfully in being satisfied that the health or safety of persons likely to be affected by the exemption would not be prejudiced in consequence of its being granted. I have been shown the outcome of the consultation exercise which was conducted by the Health and Safety Executive in relation to this application and it is clear that the application received a significant amount of support from, in particular, the TUC, the General Municipal and Boilermakers Union, Hartlepool Borough Council and an organisation called One North East. A number of members of the public resident in Hartlepool were in opposition, as was an umbrella organisation of residents known as Friends of Hartlepool. The claimant was one of the individuals who objected and her objection concerned, amongst other things, that the UK should not take asbestos from other parts of the world and that it was an unfair burden on Hartlepool which she considered had suffered from its industrial past. It is also of significance that Friends of the Earth and Greenpeace, who were invited to respond, chose to make no reply. The North East Assembly and the relevant ports authority were neutral on the subject.
5. The main basis of this claim concerns the way in which the Health and Safety Executive began its procedures. The HSE has a policy document entitled *Granting Exemptions to Health and Safety Legislation*. In its introduction it says that the procedure describes the generic process to be followed when an exemption from complying with Health and Safety Legislation is requested of the HSE. The purpose of the document is to provide a "'default' procedure to be followed when considering the issue of exemptions of a type for which no specific instruction or guidance exists". Thus it is important to realise that this document is essentially procedural in nature and it sets out a series of steps, nine in number, which the Health and Safety Executive will follow in considering applications for the grant of extensions.
6. It starts off, however, by setting out the policy. The policy reads as follows, insofar as it is relevant:

"HSE **cannot** grant exemptions unless satisfied:

- that all express conditions on the exercise of the power of exemption have been complied with, **and**
- granting the exemption would be consistent with Parliament's purpose in

the legislation."

The relevant legislation is the regulations to which I have referred and, in particular, regulations 27 and 32. It then goes on:

"In addition, it is HSE's policy only to grant exemptions where [so far as is relevant]

- there are no reasonably practicable alternative ways of complying with the statutory provision concerned,

...

and it would be in the overall public interest to do so."

Again, it is of significance that it is not claimed by the claimant that the HSE has acted unlawfully in concluding that it would be in the overall public interest to grant this exemption, no doubt having regard to the outcome of the consultation process.

7. Having set out the policy in the introduction, the HSE then sets out in some detail the various steps which have to be conducted. Step 1 is described as an "initial screen" and that includes the following.

"Examine the circumstances of the application to see whether there may be a prima facie case for an exemption, which will include considering:

- have they shown that there are no reasonably practicable alternatives available that comply with the existing law?"

If the answer to that question is no, then the policy goes on to say that the HSE should refuse the exemption application and inform the applicant in writing of the reasons.

8. In my judgment, it is perfectly plain that Step 1, being an initial screening step, has been introduced in order to knock out any applications for a grant of exemption where either an exemption is unnecessary or where it should not be granted. If the applicant has not shown that there are no reasonably practicable alternatives available other than undertaking activities which involve the importation of asbestos, then it is sensible that the HSE should cut short its processes and refuse to grant the exemption in those circumstances. In my judgment, the only sensible way of reading that particular step and the policy to which it gives expression is one which relates to the particular application in question and the arrangements which are reasonably practicable to be made by the individual applicant. Mr Wolfe argues for an alternative construction which, in my judgment, is unrealistic and would effectively cut across the European Union procurement procedures to which UK companies should be free to have access.
9. The HSE, consistently with step 1, applied its mind to the question whether the applicant had shown that there were no reasonably practicable alternatives which complied with the existing law open to the applicant. They answered that question in

the affirmative in an email from the principal inspector dated 27th February 2008, in which he said this:

"An initial screening has taken place and there appears to be a prima facie case for an exemption. The reasons for this include

(1) There are no reasonably practicable alternatives that comply with existing law. The asbestos is part of the fabric and fittings of the vessel and the contract is to dismantle and recycle the whole vessel. The contract was won in open competition in compliance with EU contract law."

10. The HSE came to that view, at least in part, based on its collective experience built up over a long period of time that asbestos is used on, and inside the structural steelwork such as bulkheads, in large and complex naval ships of this age and therefore formed an integral part of the fabric and fittings of the vessel. It was not possible to remove all asbestos from such a vessel without first having undertaken significant dismantling work which would render the vessel unseaworthy. Accordingly, as the activity in question was the importation of the Clemenceau by sea for the purpose of decommissioning and dismantling, it was not in the judgment of the HSE reasonably practicable for that work to be undertaken without an exemption being granted, provided the relevant statutory conditions for the granting of such an extension arose, which they concluded they did.
11. What Mr Wolfe has put forward as the alternative construction for that preliminary step is that the HSE should have considered whether the work of decommissioning and dismantling the Clemenceau involving work on asbestos could practicably be carried out anywhere else by anyone, including parties other than the applicant. No doubt the answer to that question would almost invariably be that it was reasonably practicable in those terms. The question posed in the policy would only be capable of being answered "yes" if the United Kingdom company either were the only practitioner in the field or all the other possibilities were so far flung globally as not to be reasonably practicable. In my judgment that construction does not provide a realistic approach to what, in any event, was an initial screening exercise to knock out those cases where no question of an exemption being granted could arise, thereby saving the HSE the trouble and expense of undertaking the relevant steps in the procedure.
12. The high point of Mr Wolfe's case is to be found in a letter dated 20th March 2008 from Mr Gillies setting out a number of questions of Able to which he wished answers. Question 6 reads as follows:

"Information, if known, relating to the capability of the country of origin to undertake this work within that country. You may wish to put this into the context of your potential contract conditions. For example, whether subject to EU contract law and in compliance with all EU directives."

13. This application for permission has been dealt with as an oral consideration of a paper application and, therefore, in advance of any evidence being filed by the HSE. Counsel

for the HSE has informed me on instructions that the enquiry in that letter was by way of an enquiry for background information to inform him in his substantive decision taking. It seems to me that it was, on any view, a rather inopportune question to be raised at that subsequent stage. Certainly Mr Wolfe uses it as a lever to suggest that his construction of step 1 is the correct one because, he says, the question whether someone in the country of origin could undertake the work rather suggests that the scope of the initial enquiry should be wider than, in my judgment, it requires, namely that it is limited to what it is reasonably practical for the applicant to achieve rather than whether the applicant should be involved in the business of doing that sort of work at all because someone somewhere else can undertake the work. Whilst this letter, posing this question, does raise a question mark as to whether the construction put forward by HSE for step 1 is the correct one, in my judgment, considering it properly, the construction argued for by HSE is plainly correct and the question posed on 20th March 2008 is a somewhat eccentric question posed by someone who was not thinking of the forensic consequences.

14. Mr Wolfe has a second string to his bow, which is that in any event the grant of the exception should have been limited to permitting only that asbestos which could not be removed safely from the Clemenceau prior to its being imported into the United Kingdom. He seeks to support that argument by reference to regulation 31, which provides that where, under an exemption granted pursuant to regulation 32, asbestos is used in a work process or is produced by a work process, the employer shall ensure that the quantity of asbestos and materials containing asbestos at the premises where the work is carried out is reduced to as low a level as is reasonably practicable.
15. Leaving aside the question of the conditions which have been imposed by the HSE on the work and leaving aside their substantive consideration of the health and safety issues, I am told, and again this is without direct evidence but on instructions, that it does appear to be the case that the rather long and unhappy history of the French Ministry of Defence seeking to have this vessel decommissioned and dismantled did involve at one stage a certain amount of reasonably accessible asbestos being removed. Certainly there is no evidence before me that the HSE has in breach of regulation 31 granted an exemption which does not require or permit the amount of asbestos produced to be kept as low as is reasonably practicable. As I have indicated, the main thrust of the argument has been about the screening policy and there is no evidence before this court to suggest that there has been any arguable breach of regulation 31 or any failure adequately to consider it. In my judgment, therefore, although I can perfectly sympathise with Mrs Kennedy as to why it is that she is sufficiently concerned to object and to seek judicial review, the arguments put forward on her behalf are unarguable and, after fairly full consideration, I refuse permission.
16. MR WOLFE: My Lord, can I just raise one semi-procedural matter, which is -- well, two matters. First of all, can I have an order for legal aid taxation?
17. MR JUSTICE WILKIE: Yes.

18. MR WOLFE: The slightly larger matter is this: I do not trouble my Lord -- well, I formally trouble my Lord with an application for permission to appeal against my Lord but I do not expect to make any progress with it --
19. MR JUSTICE WILKIE: Well, if you need to make the application you make it but I think you should try to interest the Court of Appeal in it.
20. MR WOLFE: I suspected my Lord would say that but, in order to do that, at least have the opportunity to do that within the time scales which are here in play, can I ask my Lord to order an extradited transcript of my Lord's judgment, which was relatively full and will no doubt assist the Court of Appeal and otherwise would not be available on anything like the necessary timescale.
21. MR JUSTICE WILKIE: Yes. Obviously I will order expedition of the transcript.
22. MR WOLFE: I think, my Lord, that is partly a matter for the transcript writers but it is also partly a matter for my Lord in turning up the draft.
23. MR JUSTICE WILKIE: Well, I will bear that in mind when I get the draft. Thank you.