No. 92/0271/Z2 & 92/0272/Z2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand

London WC2

Tuesday 19th October 1993

B e f o r e:

LORD JUSTICE McCOWAN

MR JUSTICE OGNALL

and

MR JUSTICE GAGE

- - - - - - - -

R E G I N A

- v-

ETTRICK TROUT CO. LTD.
and
WILLIAM BAXTER

- - - - - - - -

(Computer Aided Transcript of the Stenographic 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 BATES appeared on behalf of the APPELLANTS
MR N PLEMING QC appeared on behalf of THE CROWN

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JUDGMENT
(As Approved)
- - - - - - - -

Tuesday 19th October 1993.
JUDGMENT

LORD JUSTICE McCOWAN: On 4th December 1991 in the Crown Court at Southampton before Mr Recorder Hubbard QC, the appellants pleaded guilty (changing their plea following the Recorder's ruling) to contravening the conditions of a consent to discharge trade effluent (that being the third count of the indictment). It was ordered that count 1, causing trade effluent to be discharged into controlled water, and count 2, knowingly permitting trade effluent to be discharged into controlled waters, remain on the file.

The appellants appeal on a point of law direct to the Full Court.

These are the facts. The second appellant was director of and majority shareholder in the first appellant, which owned and operated a fish farm at Nursling Mill in Hampshire. It was agreed that effluent from the fish farm, being trade effluent within the meaning of the Water Act 1989, was discharged into the River Test, which was controlled waters within the meaning of the Act.

Over a 24 hour period on 2nd and 3rd April 1990, staff of the National Rivers Authority measured the trade effluent from the fish farm as 24.9 million gallons.

Count 3 charged contravention of the conditions of a consent to discharge trade effluent, contrary to section 107(6) of the Water Act 1989 which says:

"A person who contravenes this section or

the conditions of any consent given under this Chapter for the purposes of this section shall be guilty of an offence..."

The particulars of the offence in count 3 were these.

> "On a day or days unknown between the 1st April 1990 and the 4th April 1990 ETTRICK TROUT COMPANY LIMITED and WILLIAM BAXTER did contravene the conditions of a consent given under Part III, Chapter 1, of the Water Act 1989, for the discharge of effluent into the River Test at Nursling Mill, in the County of Hampshire, namely, that 'the volume of effluent discharged shall not exceed 46,000 cubic metres per day, ie approximately 10 million gallons per day in any period of 24 hours in that in the period of 24 hours from 0600 hours on the 2nd April 1990, the volume of effluent discharged exceeded the said amount."

Section 107 was subject to section 108, which provided a defence if the discharge was made "under and in accordance with (a) a consent given under this chapter..."

On 23rd January 1978, the Southern Water Authority (a predecessor of the National Rivers Authority) consented to the discharge of fish farm effluent at Nursling Mill subject to conditions as to the nature and composition of the discharge, and as to its volume, which was not to exceed 10 million gallons in any period of 24 hours. The consent was given under section 7 of the Rivers (Prevention of Pollution) Act 1951 (as amended by the 1961 Act), which was an Act "to make provisions for maintaining and restoring the wholesomeness of rivers..."

There was substantial legal argument before the Recorder after the appellants' arraignment before the jury, but in the absence of the jury.

The defence sought to make a collateral challenge

to this prosecution, and the prosecution submitted that they should not be permitted to do so.

The defence case was that the condition of the consent as to volume was invalid because it was not imposed for a permitted purpose, namely pollution control, but for another purpose, namely to limit the volume of water the appellants were permitted to extract, and because it was unnecessary, in that in fact there was no deterioration in the quality of the river downstream as a result of the effluent from the fish farm, and unreasonable, in that its effect was to prohibit property rights.

To establish these matters, the defence proposed to rely on a report prepared by an expert witness emanating from Aspinwall and Company dated November 1991. The defence accordingly maintained that the 1978 Consent Condition was invalid and bad in law, so that the appellants could not be convicted of an offence relating to its breach.

The prosecution submitted that such a defence was an abuse of the criminal trial procedure. If it were sought to challenge the validity of the condition, the proper procedure would be to seek judicial review in accordance with the procedures in Order 53 of the Rules of the Supreme Court.

The prosecution relied on Quietlynn v Plymouth City Council [1988] QB 114. In that case a local authority refused a licence to a company to operate a sex shop. It continued to do so and was convicted in the Magistrates' Court. The Crown Court allowed its appeal on the ground that the refusal of the licence was

invalid because the local authority had failed to comply with the procedural requirements by considering objections made more than 28 days after the application. The Divisional Court held that it was for the local authority to determine whether to grant a licence, and any question as to the validity of its decision should be determine by the High Court in proceedings for judicial review. Unless and until it was struck down in such proceedings, the decision of the local authority was presumed to be valid, unless it was invalid on its face. Accordingly, on a prosecution neither the Magistrates' Court nor the Crown Court had jurisdiction to consider its validity. None of the cases referred to the Court contained anything to suggest that challenges to the decisions of local authorities were permissible in criminal proceedings. If a bona fide challenge as to the validity of a decision was raised, the proceedings should be adjourned to enable an application to be made for judicial review.

Counsel for the prosecution conceded that some doubts as to whether the QuietLynn case had gone too far were expressed by the Divisional Court in R v Reading Crown Court ex parte Hutchinson [1988] QB 384. In two cases, defendants had challenged the validity of bye-laws under which they were charged. In one case the Justices, and in the other the Crown Court, considering themselves bound by QuietLynn, held that they had no jurisdiction to enquire into the validity of a bye-law (unless it was invalid on its face), and the cases were adjourned so the matters could be determined on judicial review. The Divisional Court held that QuietLynn should

not be interpreted to apply to bye-laws. It had been established over many years that a defendant charged with contravention of a bye-law had the right to challenge the validity of that bye-law, by way of defence. The procedure for judicial review had not removed that right, nor was it an abuse of process or contrary to public policy for such a defence to be raised. The Court considered that although QuietLynn was undoubtedly justified on its facts, its principle did not have such wide application as might appear from some of the reasoning in the case.

Counsel for the prosecution (who there, as here, was Mr Pleming) submitted that there was a clear distinction between challenging the validity of a decision, such as that in the present case (to impose certain conditions on a consent) or that in QuietLynn, which should not be permitted in criminal proceedings, and challenging the validity of a bye-law, which it was established was permissible to raise as a defence in criminal proceedings. Apart from the long standing basis of the latter, there was the fact that there was no opportunity to challenge the validity of a bye-law unless and until the person was prosecuted under it. He might not have known of its existence until he was prosecuted under it.

For the defence the submission was made that the Act under which the consent conditions were imposed was concerned with the purity and quality of water, and the prevention of pollution. The basis of the collateral challenge was that the condition as to volume in the discharge consent was unnecessary, as it did not affect

the wholesomeness of the river. Such a challenge had always been allowed in criminal cases involving administrative decisions under planning legislation. Counsel did not accept the prosecution argument that there was a distinction between planning decisions, enforcement notices, stop notices and bye-laws on the one hand, and a condition under consent on the other. It did not matter that the invalidity did not appear on its face, and had to be established as a matter of fact, perhaps by expert evidence.

Defence counsel (who was Mr Bates and who has also appeared before us) said that the defence position was supported by R v Reading Crown Court ex parte Hutchinson. He did not agree with the prosecution that the principle there was limited to bye-laws (although the case itself dealt with bye-laws) and that it was distinguishable from QuietLynn on that basis.

In that case, Lloyd LJ agreed that the Quietlynn decision was correct on its facts the defendant's case being especially unmeritorious but had difficulty with some of the Court's reasoning. He said:

> "If the validity of a decision of a local authority is an essential element in the proof of the crime alleged, then I can see no reason why it should not be challenged in the Magistrates' Court or the Crown Court..."

A court, submitted Mr Bates, had no jurisdiction to enforce a bad bye-law or a bad enforcement notice, or a bad condition, and had to enquire into their validity, if invalidity was raised by way of defence. If the decision of the river authority, in granting a discharge consent with a condition that was invalid, was unlawful,

then the present prosecution must fail. The question as to whether the condition was necessary for the purpose of preventing pollution was one of fact, and suitable for the jury to decide, after hearing all the evidence.

To that argument, before the Recorder, Mr Pleming replied that the case was in a totally different category from bye-laws, enforcement notices, stop notices and the like, which formed the basis of the prosecution, and so could be challenged, because one could not proceed on the basis of a bad law. The challenge was not to the source of the prosecution, but to an administrative decision made many years previously. It was challenged not because it was bad on its face or because it was outside the statutory framework, but on the basis of expert evidence which amounted, in fact, to a question of opinion made with the benefit of hindsight and relying on facts coming into existence after the decision had been made.

As regards the suggestion that the challenged condition should be severed, leaving the consent in operation, this would result in a consent to an unlimited volume of discharge. It was clear from the statutory framework that some volumetric control was not only permissible but of central importance. The only sensible way of pursuing a collateral challenge of this sort was judicial review.

The Recorder's ruling on those submissions was shortly stated. Looking at the transcript of the proceedings before him, on the final page at letter C he said:

"I find principally on two grounds that the defence in

this particular case are not permitted to mount a collateral challenge. The first is because the consent discharge order which they seek to challenge is not the primary legislation which creates this offence and this particular case is therefore, in my judgment, distinguished from R v Reading Crown Court ex parte Hutchinson and Another. Secondly the invalidity claimed does not appear on the face of the document, namely the consent discharge order. Such invalidity that is claimed is based on an expert's assessment some 13 years on as to what was in the mind of the then appropriate water authority when they came to impose this consent discharge order and its terms. So for those two primary reasons, I reject the submission of the defence that they are entitled as a matter of law to mount a collateral challenge to the consent discharge order or its terms."

For the appellants it is accepted here, as in the court below, that they could not assert that the condition was bad on its face. Again, there has been no suggestion that the condition was "patently unreasonable". It could only be shown to be unreasonable or otherwise invalid by evidence.

The basic point made on behalf of the appellants is that there is no difference in principle between a bye-law and a condition and therefore, as with a bye-law, a defendant is entitled to show, by way of defence to a charge alleging a breach of condition, that the condition was invalid, or unnecessary, or unreasonable.

Mr Bates relies on a number of cases, particularly R v Reading Crown Court ex parte Hutchinson (1988) 1 QB 384, A-G's Reference No. 2 of 1988 (1989) 3 WLR 397, and R v Oxford Crown Court ex parte Smith [1990] 154 Local Government Review 458.

For the respondents, on the other hand, it is submitted that there is a proper distinction to be made between a bye-law and a condition. The former can be challenged because the prosecution cannot be allowed to

proceed on the basis of a bad law. That, it is said, is quite different from challenging an administrative decision. Reliance for the respondents is placed principally on Quietlynn v Plymouth City Council (1988) 1 QB 114, and Bugg v Director of Public Prosecutions (1993) 2 WLR 628.

This court finds itself unable to say that in no case could the validity of a condition be challenged by way of defence to a criminal prosecution. Each case must be looked at on its own facts. In our judgment it is not a simple question of whether what is under challenge is a bye-law or a condition.

Mr Bates drew our attention to the analysis made by Woolf LJ (as he then was) in the case of Bugg, the analysis of the difference between procedural and substantive invalidity. To understand his analysis it is necessary to look at a number of passages in his judgment, the first beginning at page 646 E. Woolf LJ is there speaking of developments in the principles governing the jurisdiction of courts to entertain challenges to the validity of official action. He said:

> "These developments are, in our judgment, of importance when considering the proper role of a criminal court where a defendant who is charged with breaching a byelaw seeks to challenge the validity of that byelaw. It is possible to identify at least two different situations in which this will arise. The first is where the byelaw is on its face invalid because either it is outwith the power pursuant to which it was made because, for example, it seeks to deal with matters outside the scope of the enabling legislation, or it is patently unreasonable. This can be described as substantive invalidity.
>
> The second situation is where there is what can be described as procedural invalidity because there has been non-compliance with a procedural requirement with regard to the making of that byelaw. This can be due to the manner in which the byelaw was made; for example, if there was a failure to consult. When the byelaw itself is alleged to be substantively invalid because of

Wednesbury unreasonableness (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223), for present purposes what has to be attacked is not the decision to make the byelaw but the byelaw itself. That decision would have to be the subject of judicial review."

At page 647 D he continued:

"In the case of substantive invalidity, it is a matter of law whether, for example, a byelaw is unreasonable in operation, or is outwith the authorising power. No evidence is required; the court can decide the issue by looking at the terms of the primary legislation and the subordinate legislation which is alleged to be invalid. The situation is different with procedural invalidity. Evidence will be required, for example, as to what happened during the course of the making of the byelaw in order to see whether or not it has been validly made."

At page 651 D he gives the reason why, in the case of procedural invalidity, the criminal court cannot enquire in the matter:

"The reason is it is not part of the jurisdiction of the criminal courts to carry out such an investigation and they are not properly equipped to do so."

Then at page 652 E he turned to the issue as to burden of proof and said:

"Having drawn the distinction between substantive and procedural invalidity, the question of burden of proof resolves itself. In the case of substantive invalidity, no issue as to the evidential burden of proof should arise on attack upon the validity of a byelaw. The prosecution has to produce the byelaw in evidence and when this has been done, the byelaw, together with the enabling legislation, would provide a defendant with all that he needs. So far as procedural validity is concerned, the court at a criminal trial is not required to make a determination and so there again is no problem. However, we do accept that there may be cases within a grey area. We have particularly in mind cases where it is suggested that there has been an abuse of power because of mala fides on the part of the byelaw maker. In the case of bad faith, there may be an issue which the criminal court can determine and if so, evidence will be required."

In the submission of Mr Bates, the present is a case of substantive invalidity where evidence is required to establish it, and can be called for that purpose. He says, as we understand him, that this case

falls within Woolf LJ's grey area. We examined that contention. If a decision-maker were to make a decision for a wrongful purpose, not through oversight or incompetence, but with deliberation, well knowing that the purpose was wrong, he might well be characterised as acting with mala fides, but if this were the allegation it would be necessary to put it in plain terms, and at no stage, in this case, has that been done. Accordingly, in our judgment, what is in issue here is in Bugg terms procedural invalidity, where evidence would be required as to what happened during the course of the decision to impose the condition, and the challenge to that decision would have to be by way of judicial review.

Mr Bates's argument before the Recorder was that he should allow him to call his expert evidence before the jury, and that it should be for the jury to decide the questions of improper purpose, unreasonableness and lack of necessity. The Recorder intimated in argument that it would not be easy to make these issues intelligible to the jury. Looking at the transcript at page 32 B the Recorder says:

> "Mr Bates, I am not criticising you but just to inject a measure of reality into this argument: if you are right then how on earth can this jury or any jury sensibly consider the issues in your expert's report?"

At page 40 A Mr Bates said to him:

> "Your Honour, does, I am afraid, have to understand the difference between a Class 1A River classification and a Class 1B.
>
> MR RECORDER HUBBARD: Try me.
>
> MR BATES: Perhaps we are concerned with biological oxygen demand and if your Honour just looks at 1A 'good

quality' under 'quality criteria' (ii):

> 'Criteria for a Class 1A River is biological oxygen demand not greater than 3 micrograms per litre.'

Without going into a detailed exposition of biochemical oxygen demand, that is in effect the amount of oxygen in the river that can support life. If effluent goes into the River and because of the breakdown of bacteria, the bacteria eats it up; they use oxygen."

The Recorder continued to express some puzzlement and Mr Bates said:

> "Our respective experts will get it right.
>
> MR RECORDER HUBBARD: Unfortunately, Mr Bates, they are not the ones who have to try it."

We entirely sympathise with the Recorder's reaction. A jury trial on those issues would, in our judgment, have been a thoroughly unsuitable method of resolving them.

Mr Bates seems now to agree with that view, since he told us that he has now resiled from the position he adopted before the Recorder. He now submits that the right course would be for the Recorder to hear the evidence and make the decision, in the absence of the jury, both on fact and law. What, in those circumstances, would be the value of having a jury at all? He submits, however, that this new posture is in line with R v Goldstein (1983) 1 WLR 151. There, the House of Lords held, dismissing the appeal, that the question of the meaning and effect of Articles 30 and 36 was a question of law within the meaning of section 3(1) of the European Communities Act 1972 and that accordingly, in a criminal trial, it was a question for the judge and not for the jury. However, their Lordships did not dissent from the judgment of the Court

of Appeal given by Lord Lane CJ which is reported at (1982) 1 WLR 804. At page 810 D Lord Lane said:

> "We agree that apart from obvious exceptions such as decisions as to the admissibility of evidence which for clear reasons have to be made in the absence of the jury, all matters going to the issues raised by the indictment must be dealt with in the presence of the jury and by evidence given in the presence of the jury. As these two cases Rex v Dunne and Rex v Reynolds, amply demonstrate, this includes questions as to the credibility of the evidence called to prove the allegations in the indictment."

He went on at page 814 E to say:

> "But we do not base our decision primarily upon that point. The answer does not rest solely upon the meaning of the words which we have just read in section 3(1). Any conclusion other than that which we have indicated would, in our judgment, be contrary to principle. The facts deposed to by the three witnesses called live before the judge to deal with the Citizens' Band radios, and giving evidence relating to the nature and effect of those pieces of apparatus, were not facts upon which the guilt or innocence of the appellant depended, which facts are plainly for the jury to determine. They were facts which determined the existence or non-existence of the very power of the court to hear the case at all. They went to the existence of the offence.
>
> It seems to us in those circumstances it was not for the jury to decide whether the crime existed or not, but for the court itself. This is so whether the facts are admitted or not. If they are not admitted, then the evidence, as happened here, must be adduced before the judge who will decide what is established and what is not, draw the proper influences and will come to his conclusion accordingly.
>
> If the contention of the appellant were correct, it would have been improper to put him in charge of the jury at all. There was no criminal offence which existed to which he could be required to plead guilty or not guilty. Therefore the decision is one which has to be taken by the court and not by the jury."

In any event this is not what Mr Bates asked the judge to do. We find it difficult to understand how he can say that the Recorder got it wrong. In effect he is saying that the Recorder got it right in refusing his application to call the evidence before the jury. Where then, we ask rhetorically, is the wrong decision on a

question of law which would cause us to allow the appeal?

We turn to consider what was the nature of the evidence he wanted to call. A couple of quotations from the expert's report will serve to illustrate its defect.

In the introduction, paragraph 1.6 this appears:

"The objective of this report is to provide an opinion on whether the original flow conditions set on the discharge consent in 1978 were justified to protect water quality in the river downstream of the discharge."

In paragraph 5.1 this appears:

"The consent for Ettrick Trout Farm was issued in 1978.
The data used for the calculation of consent conditions would most likely have been..."

And then they are set out, it is unnecessary to read them.

At 5.2 the report continued:

"Regrettably none of these data are available for us to recalculate the consent and check its validity."

Mr Pleming characterised that report as "ex post facto opinion evidence expressed with the benefit of hindsight". The Recorder said of it, as we have seen:

"Such invalidity that is claimed is based on an expert's assessment some 13 years on as to what was in the mind of the then appropriate water authority when they came to impose this consent discharge order and its terms."

Mr Bates himself said of it in this court:

"I accept that the evidence of the expert was deficient, but I submit that I should be permitted to call further evidence which has been obtained."

In our judgment, the evidence as it stood was inadmissible and the Recorder was right to refuse to allow it to be called before the jury. If he had heard it in the absence of the jury we are satisfied that he would have arrived at the same result. Moreover, this

court was not prepared to accede to the appellants' request, made nearly two years later, to be allowed to call some further evidence.

Lastly, we consider abuse of process. Mr Bates told us that his clients did not acquire the Fish Farm at Nursling until 1981, too late, he said, to seek judicial review in respect of the imposition of the challenged condition in 1978. It must be assumed, however, that they knew of the condition when they acquired it. In 1987 there was a review of the conditions. Section 37(1) of the Control of Pollution Act 1974, imposed on the water authority, which had given a consent, a duty to review from time to time that consent and any conditions to which it was subject and might then revoke or modify the conditions.

We must look, therefore, at a Notice of 9th July 1987. This is sent under the Control of Pollution Act 1974. This Notice reads:

> "Take notice that the Southern Water Authority in the exercising of powers conferred on them by section 37 of the Control of Pollution Act 1974 have reviewed the conditions previously imposed by the Southern Water Authority in a consent granted to the Trustees of Rebecca Mill Family Trust on 23rd January 1978 to discharge a fish farm effluent through an outlet at grid reference SU 3562 1519 and upon such review the Southern Water Authority have decided that the said conditions shall be made in the manner and to the extent described in the shedule adhered to."

That schedule begins:

> "The condition relating to the dissolved oxygen content of the effluent is hereby revoked and the following condition substituted therefore."

It is unnecessary to read it. It obviously has no relevance to the present dispute. Note 2 on that Notice is relevant, it says:

"Any question as to the reasonableness of the terms of any consent or notice shall be determined by the Secretary of State for the Environment."

That power was in fact given to the Secretary of State by section 39(1) of the 1974 Act. It is not surprising that no mention is to be found in that notice of the volume of effluent that may be discharged. Mr Bates concedes that no representation was made at that time as to volume, nor was the Secretary of State asked to determine the reasonableness of the condition as to volume, nor was judicial review sought of the reviewed decision, as it could have been in due time. And when, early in the argument before the Recorder, Mr Pleming for the prosecution suggested that the case could be adjourned so that the defendants made application for judicial review, and the Recorder showed a warm interest in that suggestion, Mr Bates unhesitatingly refused the invitation.

In all those circumstances we consider that Mr Pleming is justified in submitting, (1) that the appellants have suffered no injustice and, (2) that the issue of a collateral challenge was an attempt to by-pass Order 53 of the Rules of the Supreme Court and the statutory appellate procedure and was, therefore, an abuse of process. For all those reasons this appeal must be dismissed.

MR PLEMING: Will your Lordships dismiss the appeal with costs for the prosecution?

LORD JUSTICE McCOWAN: Can you resist that?

MR BATES: My Lord, I do not think I can.

LORD JUSTICE McCOWAN: Thank you very much.