*779 R. v Atlantic Recycling Ltd

No Substantial Judicial Treatment

Permission to Appeal

Result
Application refused

Court
Court of Appeal (Criminal Division)

Judgment Date
13 March 2024

Report Citation
[2024] EWCA Crim 325
[2024] Env. L.R. 29

Court of Appeal (Criminal Division)

Lady Carr (LCJ), Thornton and Griffiths JJ :

13 March 2024

Conditions; Environmental permits; Fire precautions; Interpretation; Non-compliance;

H1 *Environmental crime—environmental permitting—waste—failure to comply with permit conditions—offence under reg.38(2) of Environmental Permitting (England and Wales) Regulations 2016—breach of "written fire prevention plan"—interpretation of condition—whether compliance with fire prevention plan guidance an alternative means of compliance with condition—whether implied term to that effect—whether activities within scope of condition*

H2. The applicant (AR) had pleaded guilty to an offence of failing to comply with an environmental permit condition, contrary to reg.38(2) of the Environmental Permitting (England and Wales) Regulations 2016 . Particulars were that it had failed to comply with Condition 3.7.1 of its Environmental Permit by failing to manage and operate its waste processing activities in accordance with its "written fire prevention plan" using the current, relevant fire prevention plan guidance. Details of three specific failures were set out relating to the separation distances between waste piles, waste stack heights, and the size of quarantine area. Condition 3.7.1 and 3.7.2 provided:

> "3.7.1 The operator shall manage and operate the activities in accordance with the written fire prevention plan using the current, relevant fire prevention plan guidance.
> 3.7.2 The operator shall:
> (a) if notified by NRW that the activities could cause a fire risk, submit to NRW a fire prevention plan which identifies and minimises the risks of fire.
> (b) operate the activity in accordance with the fire prevention plan, from the date of submission, unless otherwise agreed in writing by NRW."

H3. AR submitted a written Fire Prevention Management Plan to Natural Resources Wales (NRW), which was accepted but when inspections took place six months later it was found to be in breach of the Plan. The applicant argued that, even if it was in breach of the Plan, it was nevertheless not in breach of Condition 3.7.1 because of "current relevant fire prevention plan guidance". The Guidance in question was that issued by NRW in 2016. AR contended that, for a criminal breach of Condition 3.7.1 to be established, it would have to be proved that: (1) the state ***780** of affairs at AR's site was inferior to the standard in the Guidance; and (2) there was an increase in risk to the environment from fire. AR also argued that the handling of the material in question was not, in law, "storage", because it was still undergoing recovery and that, if it was not storage, the measures in the Plan did not apply.

H4. Held , in refusing leave to appeal:

H5. (1) The first issue raised a question of the proper construction of Condition 3.7.1, an objective exercise, and then of the implication of terms. Those two concepts were not the same; interpretation was the precursor to implication. It was common ground that the purpose of the Condition was to ensure that the risk to the environment and human health from fire was appropriately controlled. The natural, obvious and ordinary meaning of the words was that the Plan would be applied, using the Guidance, not that the Guidance could be used instead of the Plan, or as a mean of circumventing criminal liability for breach of the Plan. The fact that the Guidance was mentioned in the Condition did not mean that it could be used to overwrite the clear and unambiguous requirement that "The operator shall manage and operate the activities in accordance with the written fire prevention plan". The Condition was that the Plan should be complied with, and the Guidance was to be used to that end; it was not a choice between one or the other.

H6. (2) That natural and ordinary meaning also accorded with both context and common sense for a number of reasons. The purpose of the Condition was to define how the Permit was to be operated. The use of the word of obligation "shall" made no sense if compliance with the provision of the Plan was intended to be optional. The regulatory regime was intended to deprive AR of the ability to make its own subjective judgments about compliance with fire risk management implementation; the potential criminal penalty meant that clarity of obligation could properly be taken as part of the purpose of the condition. The objective intention of the Condition was that risk should be managed by acting in accordance with the Plan. The Guidance was an aid to that, because activities would be managed and operated in accordance with the Plan using the Guidance. It was the Plan that used the Guidance. But if AR was in breach of the Plan, Condition 3.7.1 had not been complied with and the offence was made out without more. AR was not entitled to point by way of defence to a reduction of risk by other means, or to assert that there was no increase in risk. Those might be matters of mitigation, but they were outside the clear words of Condition 3.7.1. That construction was not to exclude the availability of superior or equivalent measure taking by AR. Those could be taken in addition but not instead of, or in place of, compliance with the Plan which provided obligations setting an irreducible minimum. It was therefore not arguable that the Recorder had been wrong to exclude such matters from the jury by reference to interpretation.

H7. (3) For the same reasons, the argument based on implication rather than interpretation could not succeed. Implication of terms into a public document, which had criminal sanctions, required "great restraint" (*Trump International Golf Club v Scottish Ministers*). The usual test was necessity. To imply that Condition 3.7.1 did not require AR to operate in accordance with the Plan would be to do violence to the clear language of the provision and the common sense of the intention behind it. It was not necessary. Nor was there is anything unusual in the outcome to which these conclusions lead. Criminal liability was not being imposed by reference to a document solely within the control and purview of the operator ***781** itself. It was clear from the evidence that NRW had direct input into the contents of the conditions of the Permit. For those reasons, the issue was unarguable.

H8. (4) AR's second argument was that no distinction between storage and recovery, or storage and processing, was

drawn in Condition 3.7.1. The words "storage", "recovery" and "processing" did not appear there at all. The word in Condition 3.7.1 was "activities". The definition of "activities" in the Permit was not limited in the way that AR required. The meaning of "activities" was defined by reference to a Schedule that included storage pending other operations, which was the very category which AR sought to exclude from the Condition. That issue was also unarguable.

H9 Cases referred to:

Neal Soil Suppliers Ltd v Natural Resources Wales (No.2) [2017] EWCA Crim 645
Trump International Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 74; [2016] 1 W.L.R. 85; 2016 S.C. (U.K.S.C.) 25

H10 Legislation referred to:

Electricity Act 1989 s.36
Environmental Permitting (England and Wales) Regulations 2016 (SI 2016/1154) reg.38

H11 Representation

S. Hockman KC and D. Hercock , instructed by Dolmans Solicitors, appeared on behalf the appellant.

JUDGMENT

The Lady Carr of Walton-on-the-Hill, LCJ:

Introduction

1. This is a renewed application for leave to appeal against conviction, following refusal by the single judge.

2. On 30 January 2023 the applicant ("Atlantic") pleaded guilty to an offence of failing to comply with an environmental permit condition, contrary to regulation 38(2) of the Environmental Permitting (England and Wales) Regulations 2016 ("the 2016 Regulations"). Regulation 38(2) makes it an offence for a person to fail to comply with or to contravene an environmental permit condition.

3. The particulars of the offence on the indictment are that Atlantic failed to comply with Condition 3.7.1 of Environmental Permit EPR/PP3993VS ("the Permit") by failing to manage and operate its activities in accordance with its written fire prevention plan using the current, relevant fire prevention plan guidance. Details of three specific failures were set out relating to the separation distances between waste piles, waste stack heights, and the size of quarantine area.

4. The guilty plea was entered following legal rulings by Mr Recorder Rouch on 23 January 2023. At the time of entering its guilty plea, Atlantic expressly reserved the right to seek leave to appeal against conviction based upon a challenge to these rulings. Sentencing has been adjourned pending the outcome of this application and any appeal. ***782**

The Facts

5. The Permit was granted to Atlantic by Natural Resources Wales ("NRW") under statutory powers. It allowed Atlantic to operate waste processing activities at Atlantic Eco Park in Cardiff.

6. Condition 3.7.1 and 3.7.2 of the Permit provided as follows:

> "3.7.1 The operator shall manage and operate the activities in accordance with the written fire prevention plan using the current, relevant fire prevention plan guidance.
>
> 3.7.2 The operator shall:
> (a) if notified by NRW that the activities could cause a fire risk, submit to NRW a fire prevention plan which identifies and minimises the risks of fire.
> (b) operate the activity in accordance with the fire prevention plan, from the date of submission, unless otherwise agreed in writing by NRW."

7. In January 2019, Atlantic submitted a written Fire Prevention Management Plan to NRW, which was accepted ("the Plan"). But, when inspections took place by NRW in July 2019, Atlantic was found to be in breach of the Plan. That was the basis of the prosecution.

8. Before the Recorder, Atlantic argued that, even if it was in breach of the Plan, which was the "written fire prevention plan" for the purposes of Condition 3.7.1, it was nevertheless not in breach of Condition 3.7.1 because of "current relevant fire prevention plan guidance". The guidance in question was that issued by NRW in 2016 as "Fire Prevention and Waste Mitigation Plan Guidance – Waste Management – Guidance Note 16 (D/77)" ("the Guidance"). Atlantic argued that, for a criminal breach of Condition 3.7.1 to be established, it would have to be proved that:

> "1. The state of affairs at [Atlantic's] site was inferior to the standard in the [Guidance]; and
>
> 2. There was an increase in risk to the environment from fire."

This was issue 1.

9. Atlantic also argued that the material in question was not, in law, storage, because it was still undergoing recovery. It relied on *Neal Soil Suppliers Ltd v Natural Resources Wales (No.2) [2017] EWCA Crim 645* ("Neal Soil Suppliers"). The defence submitted that, if it was not storage, the measures in the Plan did not apply. This was issue 2.

Rulings

10. The Recorder heard legal argument on both issues, and ruled against the defence. Both those rulings are the subject of the present challenge.

11. On issue 1, the Recorder said this:

> "In my view the condition in the permit at 3.7.1 is clear. 'The operator shall (my underlining) manage and operate the activities in accordance with a written fire prevention plan using the current, relevant fire prevention plan guidance.' The word 'shall' is mandatory and is unambiguous. … ***783**
>
> The [FPMP] … accorded with the standard required. … If it was adhered to it could not be suggested there was a breach. I do not agree that [Atlantic's] FPMP was simply a recognition that [Atlantic] will meet the standard of NRW's guidance …
>
> If [Atlantic] wished to alter aspects of the FPMP due to a belief that they could still comply with the minimum standard, they could seek to do that … If a company decides to self-regulate and operate without updating their FPMP then there is no certainty and no written evaluation of the situation …
>
> …
>
> The potential criminal liability flows from a failure to comply with an agreed standard for the site and which by virtue of being written down in the agreed FPMP is observable and enforceable. In my view there is nothing striking about a criminal sanction flowing from such a failure to comply.
>
> For the reasons set out, I disagree with the notion that an objective test and proof of risk should be read into the condition and be part of the elements of the offence. Consequently, in my view it is a factual issue, if the jury is sure that [Atlantic] has not complied with the FPMP in the ways alleged then the offence would be proven … Accordingly, I rule that the prosecution does not have to prove that (a) the state of affairs at [Atlantic's] site was inferior to the standard in the FMPM; and (b) there was an increase in risk to the environment from fire."

12. On issue 2, the Recorder said:

> "In my judgment the key consideration is the terms of the condition itself. Condition 3.7.1 states: 'the operator will manage and operate the activities in accordance with a written fire prevention plan using the current, relevant fire prevention plan guidance'. The condition is clearly referring to 'activities' and therefore covers all activities permitted by the Permit, including both storage and recovery … I do not find that the prosecution must prove that the subject matter was in storage."

The Grounds of Appeal

13. The Grounds of Appeal essentially reiterate the arguments advanced for Atlantic before the Recorder, and maintain that the Recorder should have ruled in favour of the defence on each issue. Mr Stephen Hockman KC for Atlantic, who did not appear below, has taken us helpfully through the relevant documents and a detailed chronology. He emphasises,

amongst other things, the broad purpose behind Condition 3.7.1, and – the critical importance, as he submits it to be, of the Guidance. He has taken us to passages which suggest that the Guidance had to be adhered to. It was ultimately the Guidance, in his submission, that mattered. The Plan carried with it implicitly the proposition that superior or alternative measures would be acceptable in terms of fire prevention steps.

14. In support of the application for leave to appeal on issue 1, Mr Hockman submits that, on a correct construction of and approach to Condition 3.7.1, an operator can only be liable for failing to comply with it not only if it is in breach of the Plan, but it can also be proved (1) that the state of affairs on site was inferior to the standard in the Guidance; and (2) that the breaches caused an increase in risk to ***784** the environment from fire. This require an objective standard to be applied, submits Mr Hockman.

15. Thus, whilst Atlantic does not deny the specific breaches of the Plan, as particularised in the indictment, it does maintain that it was not guilty because (1) it adopted different measures which met or exceeded the minimum standards in the Guidance by other means, and/or (2) there was no increase in fire risk. Mr Hockman submits that it cannot be right that if equivalent or potentially better measures were in place than those specified in the Plan, and there was no increase in fire risk, there was nevertheless a breach of criminal law. The Recorder was wrong, in his submission, to exclude these questions from the jury's deliberations.

16. Reliance is placed on the guidance from the Supreme Court in *Trump International Golf Club v Scottish Ministers [2015] UKSC 74; [2016] 1 W.L.R. 5* ("Trump International"). There the Court addressed the interpretation of words in a condition in a public document (in that case, a consent under section 36 of the Electricity Act 1989). Reference is made in particular to the dicta of Lord Hodge at [34] and [35], Lord Mance at [42] and [44], and Lord Carnwath at [57] and [63], pointing in Mr Hockman's submission, to a construction that would be both objective and consistent with overall purpose; it would have regard to the other documents incorporated into Condition 3.7.1 by reference (in this case including the Guidance), one could proceed to imply terms which must have been intended. In addition, Mr Hockman submits that if more than one interpretation is possible, it must be the interpretation most favourable to Atlantic that cannot be excluded in a criminal case such as this.

17. As an aid to construction, it is said that the statutory purpose of the Regulations was to control fire risk, Condition 3.7.1 must be taken to be directed to that end. The purpose is a broad one, not a narrow one. The question of whether a standard was met, or a fire risk increased, is essential context to a determination of whether or not a breach of Condition 3.7.1 has occurred.

18. Criticism is also made of the Recorder's reference in his ruling to the purposes of certainty or at least clarity in the measures committed to in the Plan. That was, submits Mr Hockman, far too narrow a focus.

19. On Issue 2, Atlantic's case remains that the sections of the Plan alleged to have been breached were concerned only with the storage of waste. Atlantic disputes that the material was in storage, and submits that should be an issue of fact for the prosecution to prove before a jury. The material in question was, on Atlantic's case, still undergoing recovery. Processing had begun, but there was further processing still to be carried out. As a matter of law, such material was not in storage. Reliance is again placed on *Neal Soil Suppliers* at [46] where Lloyd Jones LJ (as he then was) indicated that storage and recovery were two distinct concepts.

20. Mr Hockman invites us to read the Plan again in conjunction with the Guidance, which itself refers to storage only. The Guidance also refers to guidance from the Waste Industry Safety and Health Forum ("WISH"), which refers to "wastes in treatment" as being outside scope. The submission is that, given that the relevant guidance is concerned with waste in storage, the requirements imposed on an operator (such as Condition 3.7.1) can only relate to waste which is, in law, in storage. This was therefore an issue which needed to be included in the prosecution case and again the Recorder was wrong to exclude it from a jury deliberation. ***785**

Discussion

21. Issue 1 raises a question of the proper construction of Condition 3.7.1 – an objective exercise – and then of the implication of terms. These two concepts are not the same. As was said in Trump International at [35], interpretation is the precursor to implication. As for interpretation, as was stated by Lord Hodge in Trump International at [34]:

> "When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference … or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent."

At [33] Lord Hodge described the scope for the use of extrinsic materials in the interpretation of a public document as being "limited".

22. As set out above, Condition 3.7.1 of the Plan said:

> "The operator shall manage and operate the activities in accordance with the written fire prevention plan using the current, relevant fire prevention plan guidance." (Emphasis added)

23. It is common ground that the purpose of this Condition is to ensure that the risk to the environment and human health from fire is appropriately controlled.

24. In our judgment, the natural, obvious and ordinary meaning of these words is that the Plan will be applied, using the Guidance, not that the Guidance can be used instead of the Plan. Or as a mean of circumventing criminal liability for

breach of the Plan. The fact that the Guidance is mentioned in the Condition does not mean that it can be used to overwrite the clear and unambiguous requirement that "The operator shall manage and operate the activities in accordance with the written fire prevention plan". The Condition is that the Plan should be complied with, and the Guidance is to be used to that end; it is not a choice between one or the other.

25. This natural and ordinary meaning of the words also accords with both context and common sense for a number of reasons. First, the purpose of the Condition is to define how the Permit is to be operated. The use of the word of obligation "shall" makes no sense if compliance with the provision of the Plan is intended to be optional.

26. Secondly, the regulatory regime is intended to deprive Atlantic of the ability to make its own subjective judgments about compliance with fire risk management implementation. The potential criminal penalty means that clarity of obligation can properly be taken as part of the purpose of the condition. ***786**

27. Thirdly, the objective intention of Condition 3.7.1 is that risk should be managed by acting in accordance with the Plan. The Guidance is an aid to that, because activities would be managed and operated in accordance with the Plan using the Guidance. It is the Plan that uses the Guidance. But if Atlantic is in breach of the Plan, as particularised in the indictment, Condition 3.7.1 has not been complied with and the offence is made out without more. Atlantic is not entitled to point by way of defence to a reduction of risk by other means, or to assert that there was no increase in risk. As the single judge observed, these might be matters of mitigation, but they are outside the clear words of Condition 3.7.1.

28. Fourthly, this construction is not to exclude the availability of superior or equivalent measure taking by Atlantic. Such measures can be taken as well. The point is that they cannot be taken instead of, or in place of, compliance with the Plan which provides obligations setting an irreducible minimum.

29. In our judgment, it is therefore not arguable that the Recorder was wrong to exclude the matters the subject of issue 1 from the jury by reference to interpretation.

30. For the same reasons, the argument based on implication rather than interpretation cannot succeed. Implication of terms into a public document, which has criminal sanctions, requires "great restraint": see *Trump International* at [33]. The usual test, as Lord Mance indicated at [42] of *Trump International* , is necessity. To imply that Condition 3.7.1 did not require Atlantic to operate in accordance with the Plan would be to do violence to the clear language of the provision and the common sense of the intention behind it. It is not necessary.

31. Nor do we accept that there is anything unusual in the outcome to which our conclusions lead. Criminal liability is not being imposed by reference to a document solely within the control and purview of the operator itself. It is clear from the evidence to which our attention has been drawn that NRW, as one would expect, has direct input into the contents of the conditions of the Permit.

32. For all these reasons, which are essentially the same as those identified by the Recorder and the single judge, we consider issue 1 to be unarguable.

33. We turn to issue 2. The flaw in Atlantic's argument is that no distinction between storage and recovery, or storage and processing, is drawn in Condition 3.7.1. The words "storage", "recovery" and "processing" do not appear there at all. The word in Condition 3.7.1 is "activities".

34. The definition of "activities" in the Permit is not limited in the way that Atlantic requires. Condition 2.1.1 says:

> "The operator is only authorised to carry out the activities specified in schedule 1 table S1.1 (the 'activities')."

35. The meaning of "activities" in the Permit is therefore defined by reference to Schedule 1 table S1.1. Schedule 1 table S1.1 includes storage pending other operations, which is the very category which issue 2 seeks to exclude from the Condition: see D15 ("Storage pending any of the operations number D1 to D14") and R13 ("Storage of wastes pending any of the operations number R1 to R12"), one or both of which is applied to every single one of the Schedule 1 operations.

36. In *Neal Soil Suppliers* , storage was not covered. In this case, it is. The dicta in *Neal Soil Suppliers* as to the distinction between recovery and storage are not on point.

37. All this means that, in our judgment, again for essentially the same reasons as those of the Recorder and single judge, issue 2 is also unarguable. ***787**

Conclusion

38. Whilst what are elaborate arguments advanced in support of the application have been well presented, they collapse in the face of the obvious construction of an unambiguous condition and common sense. There may be cases where the relationship between a plan and relevant guidance raises issues deserving of attention on full appeal. But this is not one of them.

39. There is no sustainable argument for an appeal. Accordingly, we refuse leave, but not without repeating our gratitude to both counsel for their endeavours. ***788**

