



Neutral Citation Number: [2015] EWCA Civ 650

Case No: C1/2014/2254

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
PATTERSON J
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
CO/1228/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 26th June 2015

Before:

LADY JUSTICE ARDEN
LORD JUSTICE SULLIVAN
and
LORD JUSTICE FLOYD

Between:

THE QUEEN ON THE APPLICATION OF ROBERT POWELL	<u>Appellant</u>
- and -	
(1) THE BRIGHTON MARINA COMPANY LIMITED (2) WEST QUAY DEVELOPMENT COMPANY PARTNERSHIP LLP (3) THE MARINE MANAGEMENT ORGANISATION	<u>Respondents</u>
BRIGHTON AND HOVE CITY COUNCIL	<u>Interested Party</u>

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Richard Buxton (instructed by **Richard Buxton Environmental and Public Law**) for the
Appellant
Richard Drabble QC and Daniel Kolinsky QC (instructed by **Addleshaw Goddard LLP**) for
the **First and Second Respondents**
Sasha Blackmore (instructed by **Browne Jacobson LLP**) for the **Third Respondent**
The Interested Party was not represented and did not appear.

Hearing dates: 16TH & 17TH June 2015

Judgment
As Approved by the Court

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Lord Justice Sullivan:

Introduction

1. This is an appeal against the Order dated 27th June 2014 of Patterson J refusing the Appellant's application for permission to apply for judicial review of: (i) the decision dated 19th December 2013 of the Marine Management Organisation ("MMO") to grant a consent under section 24 of the Brighton Marina Act 1968 ("the Act") for Phase I of the Outer Harbour development at Brighton Marina ("the development"); and (ii) the actions of the First and Second Respondents in commencing Phase I of the development on 16th January 2014, and thereafter in proceeding with it.

Background

2. The background to the claim for judicial review is set out in paragraphs 4-16 of Patterson J's judgment [2014] EWHC 2136 (Admin).

The Act

3. The Act is "An Act to authorise the Brighton Marina Company to construct works; and for other purposes." The recitals explain the need for the Act, as follows:

"And whereas the sport of yachting, cruising and boating is expanding and is likely to continue to expand around the south east of England and it would be of public and local advantage to increase the existing facilities therefore at Brighton:

And whereas the county borough of Brighton and its environs constitute an important holiday and residential centre and it would be of public and local advantage to expand the existing facilities for the accommodation and enjoyment of tourists and visitors and of residents on the sea front in the said county borough:

And whereas it is expedient that the Company should be authorised to construct the marina and the recreational, residential and other facilities and the road and harbour works described in this Act and to reclaim land from the sea, as by this Act provided:"

4. Section 4 is the definitions section. The definitions include the following definition of "the works"

"the works" means the works authorised by section 5 (Power to construct works) of this Act and any works constructed under section 6 (General power to make subsidiary works) and section 7 (Subsidiary works on foreshore) of this Act for or in connection with or subsidiary to any of those works and includes those works as extended, enlarged, altered, replaced or

relaid under subsection (2) of the said section 5 and “work” shall be construed accordingly.”

5. The power to construct the works is conferred by section 5(1):

“5 (1) Subject to the provisions of this Act the Company may make and maintain in the lines and situations and upon the lands delineated on the deposited plans and described in the deposited book of reference, and according to the levels shown on the deposited sections the following works, that is to say:-
...”

Works Nos. 1-14 are then described. Works Nos. 1-3 are three breakwaters. Works Nos. 6 and 7 are described as follows:

“Work No. 6 A pier or breakwater commencing at a point 390 yards measured in an east-south-easterly direction from the commencement of Work No 1 and terminating at a point 220 yards measured in a southerly direction from the point of commencement;

Work No. 7 A reclamation embankment commencing by a junction with Work No. 1 at a point 195 yards measured in a southerly direction from the commencement of that work, extending in an easterly direction and terminating by a junction with Work No. 6 at a point 30 yards measured in a southerly direction from the commencement of that work.”

6. Subsections 5(2) and (3) provide:

“(2) The Company may within the limits of deviation for the said works extend, enlarge, alter, replace or relay the same.

(3) The Company may by means of Works Nos. 1, 3, 7 and 8 and of that part of Work No. 6 which extends from the termination of Work No. 7 to the commencement of Work No. 8, enclose, in and reclaim from the foreshore and bed of the sea so much of the foreshore and bed of the sea as lies between Works No. 1 and 3 and is situate within the limit of deviation of Works Nos. 7 and 8 and landward of those works.”

7. Section 23 deals with the period within which the works must be completed:

“(1) If the works authorised by section 5 (Power to construct works) of this Act are not completed before 1st October 1979, then on that day the powers by this Act granted to the Company for making and completing those works shall cease, except as to so much thereof as is then completed.

(2) On the application of the Company the Minister may by order extend the period referred to in subsection (1) of this section.

(3) An order, under subsection (2), of this section shall be subject to special parliamentary procedure.”

8. Section 24(1) provides that:

“(1) A tidal work shall not be constructed, altered, extended, enlarged, replaced or relaid except in accordance with plans and sections approved by the Board of Trade and subject to any conditions and restriction imposed by the Board before the work is begun.”

A “tidal work” means so much of any work authorised by the Act that is “on, under or over tidal waters or tidal land below the level of high water”: subsection 4(1).

9. The only other section which is directly relevant for present purposes is section 40 which gives the Company power to develop works and lands:

“(1) Subject to the provisions of this Act the Company may lay out and develop any lands to which this section applies (or any part of Works Nos. 1 to 9 inclusive) by the erection thereon of buildings and other structures and works, including without prejudice to the generality of the foregoing, car parks (either over or underground), filling stations, hotels, restaurants, club premises, offices, theatres, cinemas, casinos, dance halls, ice rinks, playgrounds, boatyards, bowling alleys, shops, houses, flat and other residential accommodation and in connection with such development may construct, sewer, pave, flag, channel and kerb streets, bridges, and ways:

Provided that any development authorised by this section shall not by virtue only of this section be deemed for the purposes of the Town and Country Planning General Development Orders, 1963 to 1965 and any enactment amending or replacing the same, to be carried out in pursuance of an Act which designated specifically both the nature of the development and the land upon which it may be carried out.

(2) The lands to which this section applies are those parts of the foreshore, the bed of the sea and other lands which lie between Works 1 and 3 and are situate within the limits of deviation of Works 7 and 8 and landward of those works (but excluding any part of Undercliff Walk).”

10. The Act contains four sections (sections 56-59) for the protection of the (then) County Borough of Brighton, which the Corporation may waive if it chooses to do so: see section 55. The four sections include section 58 under which the Corporation has to give its consent to any “authorised works.” If the plans relate to “a proposed extension, enlargement or alteration of an existing work proposed in the exercise of the powers conferred by subsection (2) of section 5” the Corporation can, in effect treat an application for approval as though it was a planning application and refuse to

grant approval, or grant approval subject to conditions, accordingly: see section 58(2)(c).

11. Section 59 imposes restrictions upon the exercise of certain powers by the Company. Section 59(1) provides that:

“The Company shall not construct or erect, to the south of the cliff face, any work, building or structure to a greater height than the height, at the time of such construction or erection, of that part of the cliff face which lies immediately to the north thereof.”

This height limitation has been waived by the Corporation in relation to the development. The Company is given power to sell or lease its undertaking by section 52, and power to mortgage it by section 53. Section 59(1)(c) prohibits the Company from exercising those powers without the Corporation’s approval.

Phase I

12. In paragraph 73 of the judgment Patterson J referred to the second witness statement of Mr. Goodall on behalf of the First and Second Respondents in which, with the assistance of photographs, he described the Phase I works as follows:

“...[T]he existing pier is being extended so as to produce a platform on which buildings F1 and F2 will eventually be located. Within the extended pier will be located the underground car park. The extended pier will continue to serve at all times existing the breakwater function.

Phase 1....comprises an extended pier (in which will be located an underground car park) on which will be located Buildings F1 and F2 which will accommodate one hundred and ninety two residential units, of which twenty will be affordable homes, with food and drink units at ground floor level.

Whilst it will replicate the important function of the pre-existing pier as the western breakwater, members of the public will be able to walk along the improved landscape pier, which will be an animated place from morning to late evening as a result of the residential unit occupiers accessing their buildings from the pier, and due to the ground floor food and drink units within Buildings F1 and F2. These will have good views of the waterfront and the boating berths within the marina. A public amenity space and the yacht club will also be located within Building F2, and of course the new RNLI boathouse will be accessed at the end of the pier.”

13. In his third witness statement produced for this appeal, Mr. Goodall amplified that description by reference to two drawings:

“As can be seen from the drawings the Phase 1 Development will be fully connected to, and reliant upon, the existing pier and quay for support. The access ramp is built over and supported by the quay. In particular:

- (a) it comprises a three sided extension connected to and built over the existing West Quay forming the underground car park;
- (b) the podium structure and buildings above the car park are connected to and supported by the existing West Quay; and
- (c) the only entrance to the new buildings are over and through the existing quay wall.

Upon completion, the Phase 1 Development will provide all of the facilities normally associated with a quay or pier in terms of a landing place for boats, leisure activity and residential amenity. The works are clearly an extension of the pre-existing pier.”

The Appellant’s submissions

14. Before Patterson J and in the Appellant’s Skeleton Argument in this appeal it was submitted on behalf of the Appellant that:
 - (1) The power conferred by subsection 5(2) to “extend, enlarge, alter, replace or relay” the works authorised by subsection 5(1) was subject to the time limit imposed by subsection 23(1), so that any extension, enlargement or alteration of the works, including Work No. 6 had to be completed by 1st October 1979 (“time limit”).
 - (2) The Phase I works were the construction of a new, separate structure, and were not properly described as the extension, enlargement or alteration of Work No. 6 (“extension, enlargement or alteration”).
 - (3) Section 40 impliedly prohibited the Company from laying out and developing any land outside the geographical limits described in subsection (2) of that section, so that if the First and Second Respondents wished to carry out any development of the kind described in subsection 40(1) outside those limits it would have to obtain a further Act of Parliament. A declaration was sought that the section 40 powers “were intended to be exhaustive, subject to further Parliamentary authority.” (“Section 40”).

Discussion

Time Limit

15. The Act authorises the construction of works which are intended to be permanent (as permanent as any man-made structure can be). The works will be in situ for very many years after 1st October 1979. It is a particular feature of this Act, unlike other Private Acts authorising the construction of works such as railways or canals, that

these works will be constructed in a very hostile environment – the sea. Once completed, the works will have to be maintained, but there may well come a time when maintenance will not suffice, and they will have to be replaced. As the years pass, changing demands or new techniques may result in the need to extend, enlarge or alter the works.

16. I therefore endorse the judge's conclusion in paragraph 71 of her judgment that the activities described in subsection 5(2) – replacement, extension, enlargement or alteration – are all activities which will be undertaken after, sometimes long after, the works have been completed. I also endorse her conclusion that the lack of a power to replace, extend, enlarge or alter these permanent works after 1st October 1979 “would stymie the clear statutory purpose of bringing to Brighton the expansion of facilities for the accommodation and employment of tourists, visitors and residents.”
17. As the judge said in paragraph 71 of her judgment, both the language used in subsection 5(2) and the underlying statutory purpose (see paragraph 3 above) point in the same direction: if the works have been completed by 1st October 1979, there is a continuing power to extend, enlarge, alter, replace or relay them. The exercise of that power is subject to a number of controls: approval under section 24 if the extension etc. is a tidal work; the Corporation's consent under section 58; and planning permission (section 22 of the Act brought the whole of the marina within the borough of Brighton, enabling the Corporation to exercise, inter alia, its powers as a local planning authority over any operations to extend, enlarge or alter the works).

Extend enlarge or alter

18. It is common ground that the works listed in section 5(1) of the Act were completed in 1977. It follows (see paragraphs 15-17 above) that the Company is now entitled to extend, enlarge or alter the “pier or breakwater” which was constructed as Work No. 6. Sections 5 and 40 must be read together. The former permits the construction of the marina, the latter permits the construction of the recreational, residential and other facilities referred to in the preamble to the Act (see paragraph 3 above).
19. The power conferred by subsection 40(1) to develop “any part of Works Nos. 1 to 9 inclusive” by the erection thereon of buildings and other structures and works, including underground car parks, residential accommodation and restaurants, applies to Work No. 6 as extended, enlarged or altered under subsection 5(2): see the definition of “works” in subsection 4(1) (paragraph 4 above).
20. In three witness statements on behalf of the Appellant, Professor Watts, a Chartered Architect who supervised the building of Work No. 6 in the 1970's, emphasised that it was built as a breakwater, and was therefore designed to resist the lateral forces of the sea, and was not designed to take any superimposed load. In other words, it would not be possible to build the 8-11 storey residential blocks F1 and F2 referred to in Mr. Goodall's evidence (see paragraph 12 above) on top of Work No. 6. If that was done, the tall buildings would act as a “sail” which in an 11-12 storm force wind from the southwest would cause Work No. 6 to rotate about its base and overturn.
21. While there is no reason to doubt this evidence, it is, with respect, beside the point, because properly construed (see paragraphs 18 and 19 above) the Act permits the breakwater which was constructed in the 1970's now to be extended, enlarged, altered

or replaced provided the end result continues to fall within both the description of a “pier or breakwater” (cf Works No. 1-3 which are described only as breakwaters) and the limits of deviation; and provided also that any necessary approvals under sections 24 and 58, and planning permission have been obtained.

22. There was no challenge to the judge’s conclusion (see paragraph 79 of the judgment) that the end product of the Phase I works falls within the description of a pier. Work No. 6 has been extended, enlarged and altered so as to produce a structure that while it continues to function as a breakwater, is also a pier upon which the kind of mixed use development described in subsection 40(1) is being erected. I accept the submission of Mr. Drabble QC on behalf of the First and Second Respondents that Phase I of the development is authorised by sections 5(2) and 40(1) of the Act.

Section 40

23. During the course of his oral submissions it became clear that Mr. Buxton was not submitting that section 40 contained an implied prohibition upon carrying out any development of the kind described in subsection 40(1) outside the geographical limits described in that section, so that it would be necessary for the Company to obtain a further Act of Parliament if it wished to carry out development outside those limits.

24. By the end of the hearing it was common ground between the parties that:

(a) while section 40 did not permit the Company to carry out any development of the kind described in subsection 40(1) outside the geographical limits described in that section, neither did it prohibit the Company from carrying out such development outside those limits;

(b) if the Company wished to lawfully develop land outside those limits it would have to obtain authorisation (if and insofar as any authorisation was required) under the relevant statutory code;

(c) while authorisation from Parliament by way of the Private Bill procedure would have been the only option in 1968, there was now power to grant authorisation (if it was required) under the Marine and Coastal Access Act 2009 (“the 2009 Act”) and/or the Harbours Act 1964 as amended (“the 1964 Act”).

25. I have no doubt that this is the correct interpretation of section 40. It defines the extent of the development that is permitted by the Act. Further development is not impliedly prohibited (cf the express prohibitions in section 59 referred to in paragraph 11 above), but if statutory authorisation for that development is required it will have to be obtained under some other enactment.

26. Mr. Drabble accepted that parts of Phase II of the development were not authorised by the Act and that if authorisation under the 2009 Act and/or the 1964 Act was required it would have to be obtained (an application for a marine licence under section 66 of the 2009 Act in respect of part of Phase II of the development has been made to the MMO). It emerged during the course of the parties’ submissions that the real issue between the Appellant and the First and Second Respondents was whether the carrying out of any part of Phase II of the development would amount to an unlawful interference with the public right of navigation. It was common ground that we could

not resolve that issue, which would require consideration of matters of fact and degree, in this appeal.

Conclusion

27. For the reasons set out above I would dismiss this appeal and refuse to grant permission to apply for judicial review.

Lord Justice Floyd:

28. I agree.

Lady Justice Arden:

29. I also agree.