APPENDIX 5

Journal of Planning & Environment Law

2004

Case Comment

Advertising hoarding - Town and Country Planning (Control of Advertisements) Regulations 1992

Subject: Planning

Keywords: Advertisement control; Burden of proof; Deemed consent

Legislation:

Town and Country Planning (Control of Advertisements) Regulations 1992 (SI 1992/666) Sch.3 Part 1 Class 13, Sch.3 Part 1 Class 14

Case:

R. (on the application of Maiden Outdoor Advertising Ltd) v Lambeth LBC [2003] EWHC 1224 (Admin); [2004] J.P.L. 820; [2003] 5 WLUK 261 (QBD (Admin))

***J.P.L. 820** The claim in this case concerned an advertising hoarding in Coldharbour Lane, Brixton. In 1956 an application for consent was made under the then regulations. The application was for proposed reconstruction of advertisement panels at 224 Coldharbour Lane and new panels on sites at 220 and 222 Coldharbour Lane. There were standard questions on the application form one of which was whether the advertisements would be illuminated, and the answer given was "no illumination". The consent was for a period of three years. The consent was granted by the London Borough of Lambeth (the Council) on April 10, 1956. The period of consent was for three years and there were included the standard conditions but no additional conditions.

In January 2002 the Council wrote a letter to the claimant which stated that it had reason to believe that the advertisement hoardings listed (including the hoarding in question) had been erected by the claimants, and indicated that the Council would be taking a series of measures, including criminal prosecution, to ensure removal of any or all of the advertisements shown to be unauthorised or which did not benefit from any type of express or deemed consent. It required that sufficient evidence be submitted within 28 days to show that each of the advertisements had been continually displayed since April 1, 1974, or benefited from an express ***J.P.L. 821** or deemed consent. It there was no response, or the response was unsatisfactory, then the advertisement would have to be removed within 28 days, and if not, immediate action would be taken. There was then correspondence between the claimant and the Council. On August 13, the Council wrote to the claimant stating that it now intended to seek removal of all illegal advertisements and requesting them to seek voluntary removal of all illegal hoardings for which they were responsible. If the claimant did not, the Council would serve notices under s.11 of the London Local Authorities Act 1995 (the 1995 Act). On October 4, the Council wrote another letter stating that it had reason to believe that the advertisement hoardings in question had been erected without the relevant consent and did not benefit from any type of deemed consent and that it was about to serve notice requiring their removal. There was an indication that if the claimant believed that they benefited from either express or deemed consent they must immediately provide all the evidence they had, including affidavits. The letter also pointed out that the burden of proof rested with the person responsible for the hoarding to show that it benefited from consent.

On October 15, the claimant replied and attached a copy of the 1956 consent. The Council responded that the consent had expired on April 30, 1959. The claimant's response was that the consent had expired but that it now enjoyed a Class 14 consent under Part 1 of Sch.3 of the Town and Country Planning (Control of Advertisements) Regulations 1992 (the Regulations). The Council further responded that all available evidence had to be submitted in order to satisfy the Council beyond reasonable doubt that the advertisement hoarding benefited from consent. On November 8, without waiting for any further evidence, the Council served the s.11 notices. The letter accompanying the notices purported to caution the claimant, indicating that the Council was now considering whether or not to prosecute for the offence of displaying an advertisement without consent.

5. Application succeeded. Section 11 notices quashed.

The following judgment was given.

1. **COLLINS J.:** The claim before me concerns an advertising hoarding in Coldharbour Lane in Brixton. It embraces numbers 220 to 224 Coldharbour Lane, which was a bomb site.

2. In January 2002, Lambeth wrote to the claimants asserting that they were responsible for a number of hoardings within the Borough, including the one in issue, that they were suspected of being unauthorised hoardings and that they would be removed by the Council if the claimants did not submit sufficient evidence to show that they were authorised.

3. The powers to be used were those given by s.11 of the London Local Authorities Act 1995. This reads, so far as material, under the heading Unauthorised advertisement hoardings et cetera:

"(1) This section applies to a hoarding or other structure used, or designed or adapted for use, for the display of advertisements including a moveable structure, fitments used to support a hoarding or other structure and a structure which itself is an advertisement, other than such a structure for ***J.P.L. 823*** which deemed or express consent has been granted under the Act of 1990 or regulations made thereunder or for which no such consent for such use is required or which was erected before 1st April 1990".

4. Subsection (2) enables the Council to serve a notice on any person appearing to them to be responsible for the erection or maintenance of the hoarding. The notice, by subs.(3) must require the removal of the hoarding within a period of not less than 21 days and must inform the individual required to remove the hoarding that if the notice is not complied with, the Council may enter the land, remove the hoarding and dispose of it and its fitments and recover expenses incurred in so doing.

5. This is a power which enables an authority to remove an asset of an individual without compensation and there is no right of appeal.

6. The Act of 1990, referred to in s.11(1), is the Town and Country Planning Act 1990. This enables regulations to be made controlling the display of advertisements. The relevant section is s.220 and (1) provides:

"Regulations under this Act shall make provisions for restricting or regulating the display of advertisements so far as appears to the Secretary of State to be expedient in the interests of amenity or public safety".

7. Before leaving the Act of 1990, I should refer to s.336, which is the interpretation section, and which interprets "advertisement" as meaning,

"any word, letter, model, sign, placard, board, notice, [awning, blind], device or representation, whether illuminated or not, in the nature of, and employed wholly or partly for the purposes of, advertisement, announcement or direction, and (without prejudice to the previous provisions of this definition), includes any hoarding or similar structure used, [or designed] or adapted for use [and anything else principally used, or designed or adapted principally for use], for the display of advertisements, and references to the display of advertisements shall be construed accordingly".

8. As is clear, that is an all embracing definition and would include, for example, any road sign or, as appears from an exclusion within the regulations, even a railway signal.

9. The regulations made under s.220 are the Town and Country Planning (Control of Advertisements) Regulations 1992, SI 1992/666. The interpretation, so far as material, refers specifically to illuminated advertisement and defines it as meaning:

"an advertisement which is designed or adapted to be illuminated by artificial lighting, directly or by reflection, and which is so illuminated. That definition may be relevant when considering some of the arguments raised in this case."

10. Regulation 4 provides that the powers under the regulations must be exercised in the interests of amenity and public safety. That reflects what is contained in s.220(1) of the Act.

11. 4(1), so far as material, reads:

"A local planning authority shall exercise their powers under these Regulations only in the interests of

such advertisement.

(2) No advertisement may be displayed under this class except on a site which has been continually used for the purpose since the expiry of the express consent".

20. I turn now to consider the history of the advertisements on this site.

21. In 1956, a firm called W R Churchill Limited--I am not sure whether they were the owners of the site or not, but it matters not--applied for consent under the then regulations made under the Town and Country Planning Act 1947, being the Town and Country Planning (Control of Advertisement) Regulations 1948, number 1613.

22. The application was for proposed reconstruction of advertisement panels at 224 Coldharbour Lane and new panels on sites at 220 and 222 Coldharbour Lane, SE5.

23. There were standard questions on the application form one of which was whether the advertisements would be illuminated, and the answer given was "no illuminations". The consent was requested, for a period of three years. There was submitted with the application a drawing which indicated the nature of the advertisement hoarding that was to be erected and its dimensions and position on the site. Essentially, what was applied for was a hoarding running parallel to Coldharbour Lane of about 70 feet or so, which at that time was to contain three separate advertisements. In addition, there was, running at right angles against the building at the end of the site furthest from the junction with Loughborough Road, a further advertisement of approximately 20 feet in length.

24. The consent was granted by the Borough of Lambeth, then the relevant authority, on April 10, 1956. So far as material, that consent reads:

"The Borough Council, in pursuance of powers under the above mentioned Regulations [that is the 1948 regulations] delegated to it by the London County Council hereby consents to the advertisement referred to in the under mentioned schedule (in accordance with the plans submitted) for the period and subject to the conditions specified in the under mentioned schedule".

25. The schedule against Address and particulars of advertisement, provides:

"220 to 224 Coldharbour Lane: an advertisement hoarding approximately 90 feet by 15 feet panelled to take four 20 by 10 foot posters erected on a bomb site with a garden layout".

26. In accordance with deposited plans, the period of consent was from May 1, 1956 until April 30, 1959, and there were included the standard conditions, but no additional conditions. The standard conditions have no materiality to the issues which are before me.

27. The 1948 regulations were very similar, so far as material, to their successors, the 1992 regulations. The equivalent of Regulation 13 of the 1992 regulations, which is the one which permits conditions to be imposed, is Regulation 17 of the 1948 regulations.

28. Paragraph 1 of that provides in similar terms to para.1 of Regulation 13 of the 1992 regulations that:

"Consent may be granted subject to the standard conditions and to such additional conditions, if any, as they think fit".

There is a proviso which read.

"Provided that where the application relates to the display in accordance with the provisions of ***J.P.L. 826*** reg.12 [which gives deemed consent to various specified advertisements] of an advertisement of a specified class, the authority shall not refuse consent or impose a condition more restrictive in effect than any provision of reg.12 unless they are satisfied that such refusal or condition is required to prevent or remedy a substantial injury to the amenity of the locality or a danger to members of the public".

29. The only significance of that is that in Regulation 12 in one of the classes which it permits as a deemed consent, there is a reference to illuminations. I do not think it is necessary to go into any more detail.

30. Paragraph (2) of Regulation 17, so far as material, reads:

"Without prejudice to the generality of the foregoing paragraph, and subject always to the provisions

"This is only the most recent such case [I interpolate "such case' being an argument as to whether claim was properly brought as judicial review, or as a private law action], for over the last decade or so there has been a stream of litigation on this subject, much of it proceeding to the House of Lords. The cases raise and depend upon the most sophisticated arguments, such as the distinction and difference between what is described as "public' as opposed to "private' law, whether rights are of a "private' or "public' nature, whether "private' rights depend upon the exercise of public obligations and so on; as well as seeking to decide, in the context of legislation which does not make the position clear, whether or not Parliament did or did not intend to limit or exclude rights that might otherwise exist under common law. The cost of this litigation, borne privately or through taxation, must be immense, with often the lawyers the only people to gain.

Such litigation brings the law and our legal system into disrepute; and to my mind correctly so. It reinforces the view held by the ordinary person that the law and our legal systems are slow, expensive and unsatisfactory. In this day and age it is surely possible to devise procedures which avoid this form of satellite litigation, while safeguarding both the private rights of individuals and companies and the position and responsibilities of public authorities".

42. It seems to me that where there is a dispute as to the ability of a London Borough to make use of s.11, the appropriate course would be for an application for judicial review to be made, and if it becomes apparent that there is indeed the need to resolve an issue of fact--for example, a need to consider whether there has been continual use where there is a dispute about it, an application can be made to the court and the court can decide whether there is a need for the matter to be dealt with as if it were a writ action and for that issue to be the subject of live evidence, or whether in the circumstances the matter can be dealt with without such a need.

43. But the whole of what is in issue can then be dealt with in one and the same proceedings. The powers under the relevant CPR are wider than perhaps they used to be under the Old order 53 in this regard and the court has full power to ensure that the appropriate means of dealing with each issue can be identified.

J.P.L. 828 44. Going back to the history, Lambeth, it appears, is waging something of a campaign against a considerable number of advertisement hoardings in the Borough. In January 2002, the Council wrote a letter to the claimants, which is headed for some reason "without prejudice: Re: Advertisements in the London Borough of Lambeth". It stated that the planning authority had reason to believe that the advertisement hoardings and displays listed below in Lambeth had been erected by the claimants, and indicated that the authority would be taking a series of measures, including criminal prosecution, to ensure the removal of any or all of the advertisements shown to be unauthorised or which did not benefit from any type of express or deemed consent.

45. It required that sufficient evidence be submitted to the planning authority within 28 days to show that each of the advertisements listed below had been continually displayed since April 1, 1974, or benefited from an express or deemed consent.

46. If there was no response, or the response was unsatisfactory, then the advertisement would have to be removed within 28 days, and if it was not, immediate action would be taken.

47. There was a list of what was described as a list of some of the advertisement displays bearing the claimant's identification in the Borough. There were some 50 or so listed. One of them was the one with which we are concerned. Following that there was correspondence with the Council. On August 13, Lambeth wrote to the claimants stating that the Planning Enforcement Team now intended to seek the removal of all illegal advertisement displays and hoardings and requesting them to seek voluntary removal of all illegal hoardings for which they were responsible, and if they did not, there would be s.11 notices. There were then threats and indications as to what Lambeth would do and a demand for cooperation.

48. That letter was replied to towards the end of the month. I do not think it necessary to go into the details of the reply. Perhaps they can be guessed at.

49. Then on October 4, Lambeth wrote another letter and in it they said this:

"The Planning Authority has reason to believe that the following advertisement hoardings have been erected without the relevant advertisement consent and do not benefit from any type of deemed consent and to this effect we are about to serve notice requiring their removal. The advertisement hoardings are considered to be contrary to our approved development plan policies and would

58. They indicated that the LPA would not normally accept assertions in the absence of convincing supporting documentary evidence and it was the responsibility of the claimants to prove that the advertisements were lawful. Then it purported to caution them in the last paragraph, indicating that the LPA was now considering whether or not to prosecute for the offence of displaying an advertisement without consent, and continued:

"I would be grateful to receive any comment that you may wish to make in this respect, especially if you did not know it was displayed, it was displayed without your consent or you believe that you have authority to display the advertisements. I do, however, advise you to take ***J.P.L. 830*** legal advice before contacting me because, although you do not have to say anything, it may harm your defence if you do not mention now something which you later rely on in court. Anything you do say may be given in evidence".

59. I suppose one could think of a more inappropriate way of dealing with the issue than that adopted by Lambeth through its Enforcement Officer. Mr Lowe accepted, as he had to, that there had been a slightly overzealous attempt to enforce the provisions of s.11. That is a very good example of litotes.

60. It seems to me, as I say, that Lambeth got virtually everything one could think of wrong. There is no power to demand affidavits. It was quite wrong and inappropriate to suggest that the statements from those involved with the company effectively would not be considered because they were not independent. The suggestion that there was a burden, let alone a requirement to prove beyond reasonable doubt, that there was no deemed consent is clearly wrong. Questions of burden of proof do not arise in this context.

61. What the authority has to do is to consider all the evidence before it, and that includes the material that it has on the register that it is required by the regulations to keep of any applications for consent and any matters peculiarly within their own knowledge in relation to this site, together with any material put before them by the claimant, and having considered that material, they have to decide on the balance of probabilities whether the evidence means that the factual situation required by s.11(1), namely that there is no express or deemed consent, exists.

62. As I say, to suggest there is any burden in the way they did on the claimants is clearly wrong and the caution, or purported caution, at the end of the last letter frankly beggars belief. It is a perfect example of how not to behave by a local authority. What Lambeth could and should have done in general terms was to consider the material that it had in its own records and to indicate, if that was the case, that it appeared that no express or deemed consent existed, and to state that the Borough intended to take action.

63. The claimants should then have been given a reasonable time to produce evidence to show that consent existed. It was open to Lambeth to have notified the claimants that little or no weight would be attached to mere assertion and that it would be of assistance if any documentation which established the continuity and the existence of these hoardings over the relevant period existed. As I say, Lambeth should have considered all that material and decided whether the situation was such as entitled them to serve a notice under s.11.

64. There have been produced before me, somewhat late in the day, what are described as Procedure Notes for s.11 notices. I do not need to set them out in detail. Suffice it to say that if the procedure set out in these notes had been followed, there would almost certainly have been no reason to complain about the manner in which Lambeth had dealt with this matter. I do not know why the procedure set out was not followed. All I can do is to express the hope that nothing such as happened in this case will ever happen again.

65. However, although, very properly, when the proceedings were lodged, reliance was placed upon these defects in the procedure, as things have turned out, the only issues now depend upon the construction of the relevant Classes 14 and 13. I put them in that order because it is convenient in the circumstances to deal with Class 14 first.

66. The first step is to construe the consent which was actually granted. A consent such as this runs with the land and therefore, in accordance with authority which deals with planning permissions, unless the consent contains an ambiguity on its face, generally it is only permissible to look at the consent itself and ***J.P.L. 831*** any document expressly referred to in it in order to construe its precise terms. There is ample authority to that effect. The one in the bundle before me is *Slough Borough Council v Secretary of State for the Environment* [1995] J.P.L. 1128. That proposition is so well known that it is not necessary for me to refer specifically to any parts of it.

against illumination. It did not do so. At any time since 1989, it would have been open to the Council to have served a notice under what is now Regulation 8 of the 1992 Regulations--it was the same Regulation in 1948--requiring discontinuance on the basis that there was a substantial detriment to amenity or a danger created by the addition of illumination. In fact, nothing was done for 13 years. The advertisement has stayed there. One must assume that there has been no concern by anyone. I certainly have no evidence of any such concern about the presence of that advertisement over those 13 years in an illuminated form. Of course, it is not necessary for the Council to take any action, even if people complain to it, but the inertia of the Council over 13 years is at least a factor which suggests that there has been no real concern about the illumination.

75. That being so, it is strictly unnecessary for me to consider whether, in addition or in the alternative, there is a deemed consent under Class 13. However, I have heard argument about it and I should give my views.

76. The question in relation to class 13 is whether there has been a substantial alteration in the manner of the use of the site for the display of advertisements because of the illumination in 1989. Mr Lowe submits essentially that any illumination is a substantial alteration. It is not necessary to assess whether there has been any site-specific substantial alteration. As a general proposition, illumination must be a substantial alteration in the manner of use of the site.

77. There is no question but that illumination is capable of amounting to a substantial alteration in the manner of the use of the site. Indeed, it may be that, as a general rule, it is likely that illumination will have that effect. An obvious example is an advertisement in a residential area where illumination may affect the ability to sleep of those who live nearby, by light being reflected; or flashing lights, if that is the nature of the illumination, may well be said to represent a substantial alteration in the manner.

78. It is to be noted that the Department of the Environment, Transport and the Regions issued a document in 1999 headed "Modernising Planning Outdoor Advertisement Control Consultation Paper", and in relation to Class 13, it noted that confusion had arisen as to whether the deemed consent applied to the advertisement or the site, which is not altogether surprising from the language of the class. ***J.P.L. 833*** It was said that it was going to change the title of Class 13 to Advertisements Displayed on the Same Site for the Past Ten Years, and to add to the description:

"Reference in this Class to the display of advertisements shall be construed as reference also to the use of the site".

Whether that removes the confusion is perhaps for others to determine, if ever such a provision is enacted.

In para.4.25.7, it continues:

"The facts of a particular site will always need to be considered ..."

Pausing there, that does not accord with the approach that has been submitted to me as the correct approach on behalf of Lambeth.

79. Going back to 4.25.7, it continues:

"... but, as a general proposition, the replacement of a static non-illuminated board lawfully displayed by virtue of Class 13 with a non-illuminated "Primavision' or "Ultravision' (trionic advertisements) display, is capable of being within the scope of the deemed consent provisions provided that conditions (1) and (2) are met. The Department's reason for taking this view is that regular change of advertisements displayed by these units is directly comparable to the frequent change of posters displayed on static boards: so there is no material change. The introduction of illumination, however, will usually mean that the new display cannot benefit from Clause 13".

Then 4.25.9:

"Proposed action. For the avoidance of any future doubt the Department proposes to include a condition making clear that introduction of illumination represents a material change thus excluding any such proposed display from Class 13".

80. It seems to me that, as things stand, it is necessary to consider in relation to any particular site whether the provision of illumination does amount to a substantial alteration in the manner of the use of the site. It may or it may not, and that will depend upon the effect of the illumination in any

91. Mr Holgate submits that what is being done in order to achieve that is to write the condition into the description. One must look at the description first and that simply refers to an advertisement displayed on site which was used for the display of advertisements without express consent on April 1, 1974 and has been so used continually since that date.

92. The fact is that the site is one which has been continually used for the display of an advertisement since April 1, 1974. The breach of the condition may enable action to be taken, but if the condition ***J.P.L. 835*** ceases to be breached, there is no reason why the deemed consent should not continue to run. That, he submits, is to provide a fair construction of Class 13 because it means that an offending party can put the position back by removing what offended.

93. One must bear in mind that a person responsible for an advertisement hoarding may well reasonably believe that he is not going outside his deemed consent by, for example, introducing a form of illumination. The Department itself, in the consultation paper to which I have referred, recognised that there was a doubt about the matter and I have no reason to believe that the claimants have acted otherwise than reasonably. Indeed as, we know, no one has suggested that there were doing anything wrong for some 13 years before Lambeth suddenly wrote to them telling them that they were. In those circumstances, I have no hesitation in accepting the construction that Mr Holgate places upon this. That being so, it seems to me that, when considering whether they should exercise their discretion to take action under s.11, the authority should first require the removal of the offending matter -- in this case, the illumination -- and certainly should have regard in any event, in considering whether to use s.11, to the fact that it would be possible to remove the illumination, or whatever the offending matter was, and thus revive the deemed consent. I say that because, as I have indicated, s.11 is an all or nothing and will mean the removal in its entirety of the advertisement hoarding.

94. The only other matter which I need mention, although I reach no decision upon it, is the contention that there has not been a lawful delegation by Lambeth in the decision to issue the enforcement notice.

95. I, as I say, need make no final decision on that. It is a matter that arose very late in the day and I am conscious that all material relevant to it is not necessarily before me. Mr Holgate wishes to leave that open in case this matter goes further. He is entitled to that and I need say no more about it.

96. In all the circumstances, I take the view that this application must succeed and the s.11 notices must be quashed.

Comment. The power to serve notices under s.11 of the London Local Authorities Act 1995 is a useful addition to the otherwise weak armoury of local planning authorities for dealing with unlawful advertisements. Whilst the display of an advertisement without any required consent is a criminal offence, the available penalties have been small. The Anti-Social Behaviour Act 2003 raises the maximum penalty for an offence under s.224 of the Town and Country Planning Act 1990 from a £1,000 fine to a £2,500 fine. That is still a fraction of the revenue gained in a short period from such sites.

However, s.11 contains no mechanism for resolving disputes as to whether a particular advertisement is lawful. The advertiser or landowner has two legal counter-attacks open to him: judicial review; or a trespass action under Pt 8 CPR claiming that the council have no power to enter the land and remove the hoarding because the notice is unlawful. Both routes have been used to challenge section 11 notices: for an example of a judicial review see *R(CB Advertising) v London Borough of Hounslow* [2002] J.P.L. 867. Obsession with determining which is the correct route would, as was said in *British Steel,* bring the "legal system into disrepute". As the time period for compliance is short, any proceedings will seek an interim injunction in the absence of an undertaking not to remove the hoarding. The most orderly way to achieve this is by using the urgency procedure in judicial review proceedings.

Whether the hoarding fell within s.11(1) is a matter that goes to jurisdiction: the local planning authority have no power to issue the notice if it does not. The power is not related to hoardings that "appear" to the authority to be unlawful. Consequently the Court has to determine whether the hoarding falls within s.11(1).

The substantive issues were decided on the Class 14 deemed consent, with Collins J.'s comments on Class 13 being obiter. The issue under both Classes being the addition of bars to illuminate the hoardings in 1989. It appears from the summary of the facts in the judgment that the hoardings (with their illumination) fell outside s.11(1) for an additional reason: they were erected before April 1, 1990.