APPENDIX 6



Status: Positive or Neutral Judicial Treatment

# The Queen on the Application of Clear Channel UK Limited v London Borough of Southwark

Case No: C1/2007/0141

Court of Appeal (Civil Division)

13 December 2007

**[2007] EWCA Civ 1328**

**2007 WL 4266147**

Before: Lord Justice Waller Lord Justice Moore-Bick and Sir John Chadwick

Date: 13/12/2007; Hearing date: 9 July 2007

On Appeal from the High Court of Justice Queen's Bench Division, Administrative Court (His Honour Judge Gilbart QC)

CO/ 6445/2005

## Representation

Mr Andrew Fraser-Urquhart (instructed by Grant Saw ) for the Appellant.

Mr Richard Langham (instructed by Strategic Director, Legal & Democratic Services ) for the Respondent.

## Judgment

Sir John Chadwick:

1 This is an appeal from an order made on 8 December 2006 by His Honour Judge Gilbart QC, sitting a Deputy Judge of the High Court in the Administrative Court, in proceedings for judicial review of a decision of the London Borough of Southwark ("the Council") to issue notices pursuant to section 11 of the London Local Authorities Act 1995 , requiring removal of advertisement hoardings erected by the appellant, Clear Channel UK Limited, at St George's Circus, London SE1 or its predecessor. The principal issue before the judge was whether those hoardings fell within class 14 of schedule 3 to the Town and Country Planning (Control of Advertisement) Regulations 1992 (SI 1992/666).

## The statutory provisions

2 Section 11(1) of the London Local Authorities 1995 Act is in these terms, so far as material:

> "11
>
> (1) This section applies to a hoarding or other structure used, or designed or adapted for use, for the display of advertisements including ... a structure which itself is an advertisement, other than such a structure for which deemed or express consent has been granted under the [ Town and Country Planning Act 1990 ] or regulations made thereunder ... or which was erected before 1st April 1990"

A London borough council in whose area there is a hoarding or structure to which section 11

been continually used for the purpose since the expiry of the express consent."

In that context "site" takes its meaning from regulation 2(1) :

> "'site' means any land or building, other than an advertisement, on which an advertisement is displayed."

It is important to keep in mind that, as I have said, in the context of the 1992 Regulations "advertisement" includes a hoarding used or designed for the display of advertisements. A "site" is the parcel of land on which the hoarding is erected. The hoarding is not itself the site: it is an advertisement on the site.

## The facts

6 The judge set out the facts at paragraphs [15] to [20] of his judgment, [2006] EWHC 3325 (Admin). As he said, they were not contested. He described the site as "an area of land on a quadrant on the outer circumference of St George's Circus and Borough Road", having a frontage of some 75 metres in length. He noted that there had been an express consent in respect of the site, granted on 23 October 1991. That had followed an earlier consent in 1989, to which the judge did find it necessary to make specific reference. The 1991 consent had permitted "the retention of seven advertisement hoardings to boundary wall: north east quadrant, St George's Circus". He described the effect of the 1991 consent in more detail at paragraph [16] of his judgment.

> "[16] It permitted the retention of a display along the back of the pavement, consisting of two panels of 10 feet high by 20 feet wide, raised about four feet off the ground, and five panels, 10 feet high and 40 feet wide, also raised up by about four feet. These advertisements were mounted on a slatted fence, which ran underneath them and between them where gaps occurred. Running from Blackfriars Road round to Borough Road, the layouts of hoardings and gaps were to be: Hoarding 1; gap; hoardings 2 and 3, next to each other; gap; hoardings 4 and 5; gap; hoardings 6 and 7."

The position altered on 15th February 1992. The then owner made alterations to the hoardings. As a result of those alterations there were, thereafter, eight hoardings, raised about five feet in height. It was said that the new hoardings made use of the existing "steels" or structure of the original hoardings.

7 The judge explained that, in 1998, the Council's officers had considered whether the eight hoardings then on site enjoyed deemed consent under class 14. On 16 February 1998 the Council wrote to the then owner in these terms:

> "... It is recognised that this general area contains signs and hoardings, most of which have Planning Permission, albeit temporary permission. The Council in its attempts to regenerate this area is concerned that these signs and hoardings may be adversely affecting the amenity of this area.
>
> Given the extensive nature of your hoardings in this locality it is considered that there may be a need to modify the existing situation in respect of the expanse of the hoardings and the general amenity of this site.
>
> It is understood that previous Planning Permissions have been obtained in respect of these hoardings for limited periods of time. As the last Planning Permission dated 23 October 1991 bears no condition requesting the removal of the hoardings and associated structures, you are quite correct in that the hoardings have deemed consent. However given the aforementioned regeneration of the area the Council may have grounds to serve a discontinuance notice. The Council does not [wish] to unnecessarily undertake such action and wishes to encourage a suitable solution to this situation. The Council welcomes any possible suggestions you may wish to put forward in respect of retaining some advertisements in this locality but it is unlikely the Council will permit the existing situation to continue."

advertisements were the subject of deemed consent under regulation 6(1) of, and class 14 in schedule 3 to, the 1992 Regulations; (ii) that, in reaching the decision, the Council erred in law in that it failed to have regard to the fact that the total area of the advertising display was less than that originally permitted by the 1991 consent; (iii) that the Council failed to have regard to the legitimate expectation of the claimant — arising from the representation in the letter of 16 February 1998 that the advertisements were the subject of deemed consent — that any action to require removal would be by way of discontinuance notice (in respect of which the claimant would have the opportunity to appeal to the Secretary of State); (iv) that the decision was perverse.

13 The judge noted (at paragraph [20] of his judgment) that the Council accepted that deemed consent continued to exist in respect of Hoarding A. I have not found it easy to understand why the judge thought that that concession had been made. In paragraph 9 of the grounds of objection annexed to the acknowledgment of service it had been recorded that the Council had withdrawn the section 11 notice issued in respect of that hoarding. That that was the position was confirmed in paragraph 2 of the skeleton argument filed on behalf of the Council in preparation for trial. But paragraph 9 of the grounds of objection went on to assert that: "As it is now contended [at paragraph 37 of the witness statement made on behalf of the claimant by Mr Cliff Pratt on 22 August 2006] that Hoarding A was rebuilt in 1992, it was plainly not erected prior to 1 April 1990. Nor does it enjoy deemed consent under Class 14 as the use of the relevant site does not satisfy condition (2)". Be that as it may, the position before the judge was that the claimant did not need an order quashing the section 11 notice issued in respect of Hoarding A: the notice had been withdrawn.

14 By the time the application came before the judge for trial on 7 December 2006, the second of the four grounds advanced in the claim form had been re-formulated; or, perhaps, had become more focussed. It was said that, even if there had been substantial alteration since 1991 (such that the advertisements which were on the site in 2005 were not, themselves, the subject of deemed consent under the 1992 Regulations), nevertheless the claimant had the right to revert to the original advertisements for which deemed consent continued to exist. The fact that the claimant had that right to revert — in conjunction with a comparison between the effect on amenity of the advertisements which would be permitted under the deemed consent and the effect on amenity of the advertisements which were, in fact, on the site in 2005 — was a material consideration which the Council was required to take into account before reaching the decision to issue the section 11 notices. Failure to take that matter into account led, necessarily, to the conclusion that the decision was flawed.

15 The judge rejected the challenge advanced under each of the first three grounds. He did not find it necessary to address the fourth ground: it may be that he took the view that it added nothing to the second ground.

16 On its face, the order of 8 December 2006 grants permission to appeal to this Court on each of the grounds of challenge. But it is clear from the transcript of proceedings after judgment that that was not the judge's intention: his intention was to limit permission to appeal to the second ground. It is unnecessary to resolve the question whether the appellant could have relied on the apparently unlimited permission granted by the order. Whatever the formal position, the first and third grounds of challenge are not pursued on this appeal.

17 In those circumstances it is unnecessary say more, in relation to the first ground of challenge, than that the judge held, for the reasons which he had given in paragraph [20] of his judgment, that the changes to Hoardings B to H since 1998 and since 1991 had been "very substantial indeed". As he put it (at paragraph [21]): "it follows that these are not the advertisements which were given consent in 1991". He noted ( *ibid* ) that the claimant accepted that "if there had been a substantial change, deemed consent rights do not apply". Nor is it necessary to say more, in relation to the third ground of challenge, than that the judge held (at paragraph [36] of his judgment) that the submission that the letter of 16 February 1998 gave rise to a legitimate expectation that any action to remove the advertisements would be by way of discontinuance notice was "fatally undermined" by his findings that there had been substantial changes to all the Hoardings B to H since 1998; so that whatever deemed consent rights there might have been at the date of that letter had not survived.

18 The judge addressed the second ground of challenge at paragraphs [22] to [35] of his judgment. He had identified earlier (at paragraph [12]) that the issue which he needed to decide

express consent had been granted in 1991.

## The issues raised on this appeal

21 As I have said, the appeal is limited to the second ground of challenge: that the Council erred in law in failing to take account of the fact that the claimant had the right to revert before reaching the decision to issue the section 11 notices. The judge's conclusion on that point is itself challenged, in the appellant's notice filed on 23 January 2007, on three grounds: (i) that the judge was wrong to hold that the right to revert could only exist if the site had been used continually for the purpose of displaying some permitted advertisements (or hoardings) since the expiration of the express consent; in the alternative, (ii) that (on the basis that it was common ground that the display of advertisements on Hoarding A was lawful) the judge was wrong to hold that the site had been not used continually for the purpose of displaying permitted advertisements since the expiration of the express consent; and (iii) that the judge was wrong to hold (if he did) that the existence of, and the effect on amenity of, the fallback position was not a material factor which the Council was required to consider when deciding whether to issue notices under section 11 .

22 The third of those grounds is, I think, misconceived. On a fair reading of paragraph [35] of his judgment, in the context of the whole, it is clear that the judge did not hold that the existence of the fallback position (if established) would not have been a material factor for the Council to consider. The judge had noted, at paragraph [21], that it was common ground that the existence of the fallback position (if established) would have been a material factor for the Council to consider. The judge held that the Council did not need to take account of the fallback position on the facts in this case; for the reason that, as he had held (at paragraph [33]), the fallback position had not been established. The right to revert did not need to be considered because there was no such right in this case.

23 The Council takes issue with the judge's view (expressed at paragraph [30] of his judgment) that, on a true construction of the exception to limitation (2) to class 14 in schedule 3 to the 1992 Regulations, it would be open to a site owner who has had consent for, say, five hoardings to take "two down and then restore them after some time has elapsed". By a respondent's notice filed on 7 February 2007 the Council seeks to uphold the order of 8 December 2006 for the additional reason that: "Class 14 deemed consent does not cover the re-erection of hoardings (whether following alteration outwith the terms of the express consent or complete removal) after the expiry of an express consent". It is said that such a re-erected hoarding would not be "an advertisement displayed with express consent after the expiry of that consent ..." within the meaning of class 14. The effect of that contention, as it seems to me, is to deny that there can be a "right to revert" under class 14 in the sense recognised by the judge: that is to say, to deny that a deemed consent under regulation 6 can ever be invoked (in reliance on class 14) in respect of a new hoarding save, perhaps, in a case where the new hoarding replaces (without there having been a substantial interruption or alteration) an existing hoarding which itself enjoyed express or deemed consent.

24 On analysis, therefore, it can be seen that the first issue raised by this appeal is whether, on the true construction of the exception to limitation (2) to class 14, a deemed consent under regulation 6 can be invoked (in reliance on class 14) in respect of a new hoarding in a case where the new hoarding does not replace (without there having been a substantial interruption or alteration) an existing hoarding which itself enjoyed express or deemed consent. If the answer to that issue is "No", then — on the basis of the facts found by the judge which are not themselves the subject of challenge on this appeal — it must follow that no deemed consent under regulation 6 can be invoked (in reliance of class 14) in respect of new hoardings which might replace the existing Hoardings B to H. It is only if that first issue is answered in the affirmative that it will be necessary (on the facts in the present case) to address the further issue: whether (on those facts) a deemed consent can be invoked in respect of new hoardings which might replace the existing Hoardings B to H if those new hoardings did not differ substantially from earlier hoardings which did enjoy express or deemed consent — the "right to revert" on which the appellant relies.

**Can a deemed consent under regulation 6 be invoked (in reliance on class 14) in respect of a new hoarding in a case where the new hoarding does not replace (without there having been a substantial interruption or alteration) an existing**

continually since that date.

**Conditions and Limitations**

13

(1) No substantial increase in the extent, or substantial alteration in the manner, of the use of the site for the display of advertisements on 1st April 1974 is permitted

(2) ..."

29 Mr Justice Collins directed himself ( *ibid.* [80]) that, on the legislation as it stood, it was impossible to hold that, as a general proposition, provision of illumination did or did not amount to a substantial alteration in the manner of use of the site. It was necessary to consider the question of substantial alteration in relation to each particular site. The answer would depend on the effect of the illumination in the particular case. He held, ( *ibid* , [86]) that the authority had not carried out that exercise in the case before him. He was unable, himself, to decide (on the material) whether or not it would be correct to conclude as a matter of fact that there was or was not a substantial alteration. But he could say that the authority had been wrong to approach the question on the basis that they had adopted: that, as a general proposition, any illumination was a substantial alteration. The decision should be quashed for that reason.

30 He then went on to say this:

> "[87] A further point was raised in the course of argument. Assuming that the illumination did create a substantial alteration, was it possible for the claimants to remove the illumination and so continue under Class 13 the use of the site with the deemed consent, or did the deemed consent lapse once the illumination was installed?"

It is in that context that Mr Justice Collins made the observations on which the appellant relies in the present case to found the submission that "the basic existence of a right to revert within the law governing deemed consent" was acknowledged in the Maiden case.

31 Mr Justice Collins began his consideration of the question which he had posed in the passage which I have just set out by noting ( *ibid.* [88]) that section 11 of the 1995 Act was "all or nothing": there was "no power to require the removal of an offending extra". So, if the authority were correct, "once something is done, which in fact creates a breach of the condition in 13(1), the deemed consent disappears and it is not possible to repair the situation". That, he held, would be a draconian provision. He pointed out that the question was whether, on the true construction of class 13 as a whole, "the change, if it be a substantial alteration, means that the deemed consent comes to an end". He set out the submissions advanced on behalf of the claimant:

> "[91] Mr Holgate submits that what is being done in order to achieve [the construction for which the authority was contending] 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 1st April 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 1st 1974. The breach of the condition may enable action to be taken, but if the condition 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."

He went on to say this:

> "[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 .... I have no reason to believe that the

deemed consent is granted for the display of an advertisement falling within the class (as specified or described), subject to the conditions and limitations specified in relation to that class. The intended effect of the conditions and limitations is to exclude from the scope of the deemed consent advertisements which would otherwise fall within the class as described; not to bring within the scope of the deemed consent advertisements which would not otherwise fall within the class as described. The fact (if it were established) that the site on which a hoarding was erected had been "continually used for the purpose" (whatever meaning is to be given to that expression) since the expiry of the express consent would not lead to the conclusion that the hoarding enjoyed deemed consent if it did not otherwise fall within the description in class 14.

36 It must also be kept in mind that the description itself contains two requirements and two qualifications. The requirements are (i) that the advertisement is an advertisement "displayed with express consent" and (ii) that it is an advertisement "displayed ... after the expiry of that consent". The qualifications are (a) that no "condition to the contrary" was imposed on the consent and (b) that no renewal of consent was applied for and refused. It is necessary, therefore to refer, in rather more detail than hitherto, to the terms of the express consent (or consents) relevant in this case.

37 Consent under the Town and Country Planning Act 1971 and the Town and Country Planning (Control of Advertisements) Regulations 1984 was granted by the Council on 5 June 1989 (under reference TP/ADV-1390-B-AJF) in these terms:

> "CONSENT to the advertisement at Site at ST GEORGES' CIRCUS (Between BLACKFRIARS ROAD [and] BOROUGH ROAD SE1) described as follows:— Two advertisement [hoardings] measuring 10# × 20# and five advertisement hoardings measuring 10# × 40#
>
> Feather edge fencing: — 4# below each panel + 70# × 6# in fill static externally floodlit.
>
> In accordance with the application received 12/4/89 and plans registrar No 515/89 applicants' plans Nos, Un-numbered"

That consent was granted for a period of two years and subject to the following condition (amongst others):

> "1. The advertisement(s) or sign(s) hereby granted consent shall be displayed for a period of not more than 2 years from the date of this consent at the end of which period the advertisement(s) or sign(s) shall be removed together with any fixing points or supporting structure and the building or land made good."

The period of that consent expired on 5 June 1991. The hoardings were not removed. A further application for consent was made on 17 August 1991. Consent was sought for "Advertisement Hoardings as per previous application and approval — Your ref: TP/ADV -1390- B — AJF: Advertising Panels measuring 10# × 20# (× 2, panels 1 & 7) 10# × 40# (× 5, panels 2, 3, 4, 5, 6)". On the basis of that application consent was given on 23 October 1991 under the 1990 Act and the Town and Country Planning (Control of Advertisements) Regulations 1989 (SI 1989/670). The 1991 consent was for "The retention of seven advertisement hoardings to boundary wall NORTH EAST QUADFRANT, ST GEORGE'S CIRCUS" for a period of two years. That reflected the provision — now contained in regulation 13(2)(c) of the 1992 Regulations — that an express consent may be for the retention of any display of advertisements. Unlike the 1989 consent, the 1991 consent did not include an express condition as to removal at the end of the two year period. There was no standard condition to that effect in the 1989 Regulations (or, so far as material, in the 1992 Regulations)

38 The appellant does not, I think, suggest that the 1989 consent is a relevant "express consent" for the purposes of class 14 in schedule 3 to the 1992 Regulations. It is right not to do so. The 1989 consent plainly does contain a "condition to the contrary" within qualification (a) to the class 14 description: it contains an express condition requiring the removal of the hoardings at the end of the period for which express consent was granted. The 1989 consent can provide no basis for a deemed consent for future hoardings on the site. The appellant must seek to rely on the 1991 consent as the relevant "express consent" for the purposes of class 14.

39 In construing the descriptive words in class 14 of schedule 3 to the 1992 Regulations it is

43 For those reasons, which differ in some respects from the reasons on which the judge relied, I would dismiss this appeal.

Lord Justice Moore-Bick

44 I agree.

Lord Justice Waller:

45 I also agree.