

Case Name: *Parkes, R (On the Application Of) v Dorset Council* [2024] EWHC 1253 (Admin)
(23 May 2024)

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Commentary:

This was an unsuccessful claim by Mrs Carralyn Parkes (“the Claimant”) to challenge the decision by Dorset Council (“DC”) that the area occupied by the Bibby Stockholm barge falls outside its planning control. The Bibby Stockholm is a barge moored in Portland Harbour in Dorset to accommodate asylum seekers. It is moored adjacent to a pier above a part of the seabed which is never exposed to the ebb and flow of the tide (i.e. the relevant area of the seabed is always below the mean Low Water Mark (“LWM”).

Grounds

The Claimant brought the claim on the following five grounds ([62]):

1. The boundaries of DC encompass Portland Harbour and thus includes the area above which the Bibby Stockholm is moored;
2. By virtue of being moored indefinitely in Portland Harbour, the Bibby Stockholm has become an “accretion from the sea” within the meaning of s.72 of the Local Government Act 1972 (“LGA”) and therefore falls within the planning control of DC;
3. Even if the geographical extent of the administrative area of DC does not extend further into the harbour than the finger pier, DC’s enforcement powers nevertheless apply to the Bibby Stockholm;
4. DC erred in failing to consider taking enforcement action in respect of any breach of planning control in the form of a material change in the use of, or operational development upon, the quayside, the finger pier and access road; and
5. If on an ordinary interpretation of the legislation, DC does not have power to take enforcement action in relation to the area in which the Bibby Stockholm is located, it does have such a power by interpreting the legislation in accordance with the Marleasing principal, so as to give effect to the requirement of the EIA Directive (Directive 2011/92/EU) that there be an assessment of the likely significant effects of relevant project on the environment.

Judgment

Grounds 1 and 2

The Claimant put forth various arguments to support their submission that the Portland Harbour, and namely the area of the seabed above which the Bibby Stockholm is moored, falls within the boundaries of DC and thus must be subject to planning control. First, the Claimant argued that, under the United Nations Convention on the Law of the Sea (“UNCLOS”), “England” extends as far as all baselines from which territorial sea is

measured and therefore the seabed up to these baselines must be considered as falling within the boundaries of local authorities. The Court rejected this argument and held that the use of baselines under the UNCLOS is for the operation of international rights of navigation and passage – it does not relate to the geographical extent of the powers of a local administrative body ([94]). Moreover, to adopt the Claimant’s definition of “England” would mean that even those laws which apply only to England or “land” in England would equally apply to large swathes of the seabed which would render the definition of “England” in the Interpretation Act 1978 otiose ([103]). Where Parliament intends for specific legislation to apply beyond “land” within England, this is explicitly stated within the relevant legislation ([102]). In the absence of any clear indication to the contrary and given the definition of “land” under s.336(1) of the Town and Country Planning Act 1990 (“TCPA 1990”), the Court held that the geographic scope of planning control does not extend beyond the LWM ([110]). The Court further reviewed the Scottish Courts’ approach in interpreting parallel legislation in Scotland and found it to support the conclusion that planning control does extend beyond the LWM ([162-174]).

The Claimant also relied on permitted development rights (“PDRs”), namely Part 18 Class A Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015 (“GPDO”) to argue that a harbour or port should be treated as “land” within the TCPA 1990. The Court held that this PDR did not assist the Claimant’s case since it does not alter the definition of the term “land” under s.336(1) of TCPA 1990. Further, the Court held that delegated legislation is generally not to be used as an aid to the construction of primary legislation unless the delegated legislation was promulgated roughly contemporaneously with the primary legislation ([175-177]).

The Court also considered the meaning of the phrase “any corporeal hereditament” under s.336(1) of the TCPA 1990 and concluded that the seabed beyond the LWM cannot be a corporeal hereditament due to its legal status as allodial land and the potency and use of the term “land” in planning legislation ([181-195]).

As to whether the Bibby Stockholm can be deemed an “accretion from the sea” under s.72 of the LGA 1972, the Court held that it cannot be such an accretion for two reasons. Firstly, the seabed on which the Bibby Stockholm is moored is below the LWM and, secondly, barges can be moved or towed to a different location, so they can only be considered as chattels and not as permanent fixtures ([153-157]).

For the above reasons, Grounds 1 and 2 were dismissed.

Ground 3

The Claimant argued that a purposive interpretation of the TCPA 1990 should be adopted which would allow DC the powers to control activities outside its boundary. This was because the purpose of the TCPA 1990 is to control the use of land in the public interest which includes activities beyond the boundary of a local planning

authority (“LPA”) having a significant impact on the community or environment of the LPA’s area. The Court rejected this argument for two reasons:

- 1) Both legislation and case law clearly indicate that an LPA cannot take enforcement action on development outside its boundaries even if the development were to have a significant impact within its area ([200]);
- 2) Parliament has indicated that planning control is confined to “land”, including “tidal lands”, but not the seabed below LWM ([201]).

Ground 4

The Court rejected this ground and held that it was evident that DC had indeed considered whether to take enforcement action, hence the Claimant was seeking an order from the Court directing the DC to reconsider its decision that it cannot take enforcement action ([203-205]).

Ground 5

The Court rejected this ground and held that the positioning and use of the Bibby Stockholm is not a “project” for the purposes of the EIA Directive ([216]). Further, the court held that the Marleasing principle cannot be used to read words into legislation that are inconsistent with the statute or its fundamental principles ([219]). In this case, the fundamental principle of the relevant legislation is that planning control is only concerned with the carrying out of operation on, and the use of, “land”.

For the above reasons, the claim was dismissed.

Case summary prepared by Chatura Saravanan