HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 30

on appeal from [2004] EWCA (Civ) 1765

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Corporation of London) (Respondents) *v.* Secretary of State for Environment, Food and Rural Affairs and others (Appellants)
R (on the application of Corporation of London) (Respondents) *v.* Secretary of State for Environment, Food and Rural Affairs (Appellant) and others (Conjoined Appeals)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hope of Craighead
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Mance

Counsel

Appellants:
Secretary of State for Environment, Food and Rural Affairs
Jonathan Crow
Tim Ward
(Instructed by DEFRA)
Covent Garden Market Authority
Hazel Williamson QC
Amanda Tipples
(Instructed by Stephenson Harwood)

Respondents:
Timothy Straker QC
Philip Coppel
(Instructed by Comptroller and City Solicitor Corporation of London)

Hearing dates:
20 – 21 March 2006

ON
WEDNESDAY 21 JUNE 2006

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

R (on the application of Corporation of London) (Respondents) *v.* Secretary of State for Environment, Food and Rural Affairs and others (Appellants)
R (on the application of Corporation of London) (Respondents) *v.* Secretary of State for Environment Food and Rural Affairs) (Appellant) and others
(Conjoined Appeals)

[2006] UKHL 30

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Scott of Foscote. For the reasons he gives, with which I agree, I would allow these appeals.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Scott of Foscote. I agree with it, and for the reasons he gives I too would allow the appeals.

LORD SCOTT OF FOSCOTE

My Lords,

Introduction

3. London has three very ancient markets. Smithfield Market is a market for the sale of meat. Billingsgate Market is a market for fish. Both are owned by the Corporation of London ('the Corporation'). Each of these markets is entitled under common law to protection from competition by any rival market held within a distance of 7 miles. The third ancient market, the market with which this appeal is particularly concerned, is the Covent Garden Market.

4. As is well known the Covent Garden Market, or the New Covent Garden Market as it is now known, is a market for the sale of horticultural produce, flowers, fruit, vegetables and the like. This Market, which I shall for convenience continue to refer to as the Covent Garden Market is now regulated by the Covent Garden Market Act 1961 (the 1961 Act) as amended by Acts of 1966, 1969 and 1977. The market, originally located in Covent Garden, is now located at a site at Nine Elms London SW8 (within 7 miles of the Smithfield and Billingsgate Markets) and is owned by the Covent Garden Market Authority ("CGMA"), a statutory corporation established by the 1961 Act. The Nine Elms site was vested in CGMA by the 1961 Act. The 1961 Act sets out, as one would expect, the duties and powers of the CGMA. The primary duty of CGMA is to provide facilities for the sale of horticultural produce and the statutory powers conferred on CGMA are designed to enable it to do so. Section 18 of the 1961 Act has a side heading "Additional Functions" and sub-section (1) sets out, in six paragraphs, various additional powers that CGMA may exercise. The first five of these paragraphs all relate in one way or another to the sale of horticultural produce, but paragraph (f) confers power on CGMA

> "to carry on all such other activities as it may appear to [CGMA] to be requisite, advantageous or convenient for them to carry on for or in connection with the discharge of their duties or with a view to making the best use of any of their assets …"

This power, however, is then limited by the following proviso

> "but [CGMA] shall not, by virtue of paragraph (f) of this subsection, carry on activities with a view to making the best use of any of their assets except with the consent of the Minister."

"The Minister", for the purposes of the 1961 Act is now the Secretary of State for Environment, Food and Rural Affairs.

5. CGMA has on a number of occasions between October 1995 and August 2003 obtained the Minister's consent to the grant by CGMA of leases or licences to traders at its Nine Elms site permitting the carrying on of activities other than, or in addition to, the sale of horticultural produce. On three occasions leases granted in exercise of the paragraph (f) power had permitted the distribution of meat or of fish but had included an express prohibition on face-to-face trade in such produce. But CGMA was anxious to have the power to authorise face-to-face trading in meat or fish and, under cover of a letter of 20 June 2003, the Minister gave, or purported to give, pursuant to the proviso to section 18(1)(f), his consent to this.

6. The consent was expressed to permit CGMA to grant, or extend the scope of, leases

> "… for the purpose of selling fish or meat, or fish or meat products on such part or parts of the site as [CGMA] considers to be surplus to its requirements for the purposes of providing market facilities for the dealing in bulk in horticultural produce"

but was subject to the condition that CGMA gave one month's written notice to the Corporation of its intention to exercise this power and contained an express proviso that the consent

> "… shall not be taken as (i) granting any market rights, or (ii) dispensing with any requirement to obtain the consent or authorisation of any other person that may be required for the purposes of carrying on the activities to which

consent is given, or (iii) authorising any activity carried on without such other consent or authorisation being obtained or (iv) authorising any activity that may otherwise be unlawful."

7. Having obtained this consent CGMA decided to extend the scope of three leases by authorising the lessees to trade in meat or fish produce from their respective units at the Nine Elms site. Notification of their intention was given to the Corporation. The response of the Corporation was to commence the judicial review proceedings which have now found their way to this House. The Corporation fears that meat and fish trading at the Nine Elms site will compete with the meat and fish trading activities carried on at the Smithfield Market and the Billingsgate Market.

The Proceedings

8. The proceedings were commenced by an application made on 19 September 2003 for permission to apply for judicial review. Review was sought of two decisions; first, the section 18(1)(f) consent given by the Minister on 20 June 2003; second, the notice given by CGMA to the Corporation of its intention to extend the scope of the three leases. The application was refused by Maurice Kay J on paper on the ground that the construction of section 18(1)(f) contended for by the Corporation was unarguable. The application was renewed orally on 6 February 2004 before Mitting J but was again refused on the same ground. Counsel for the Secretary of State was not called on.

9. The construction of section 18(1)(f) contended for by the Corporation was (as expressed in para.51 of the document setting out the grounds for judicial review relied on by the Corporation) that

"… section 18(1)(f) of the 1961 Act:

(a) does not empower the CGMA to extend the scope of leases to existing tenants at NCGM [the Nine Elms site] (nor to grant leases at NCGM) so as to permit a lessee to engage in face-to-face trading in meat or fish or in meat or fish produce;

(b) does not enable the Secretary of State to consent to the CGMA granting, or extending the scope of, a lease of a site or part site of NCGM for the purpose of selling fish or meat, or fish or meat products."

10. Pill LJ on 18 May 2004 gave the Corporation permission to appeal but "limited to the construction of section 18(1)(f)". The appeal was heard in November 2004 and on 21 December the Court of Appeal allowed the appeal against Mitting J's refusal of permission, allowed the Corporation's substantive application for judicial review and quashed the Minister's consent [2005] 1 WLR 1286. Pill LJ held that providing leases or licences for the face-to-face selling of fish or meat could not be an activity "in connection with the discharge …" of CGMA's statutory duty to provide facilities for the sale of horticultural produce and, therefore, had to be justified under the second limb of section 18(1)(f), namely, as an activity carried on "with a view to making the best use of any of [CGMA's] assets." As to that, Pill LJ held that Parliament could not have intended to allow CGMA to carry on an activity in competition with the Smithfield or Billingsgate markets. Laws LJ and Sir Martin Nourse held that the grant of a right to hold a market in particular commodities (eg. horticultural produce) imported an implied prohibition on holding a market in any other commodity (eg. meat or fish). Consequently all three members of the Court, albeit for rather different reasons, held that permitting the face-to-face sale of fish or meat at the Nine Elms site was outside the scope of CGMA's statutory powers and was not an activity that could be brought within those powers by a consent under the section 18(1)(f) proviso. Both the Secretary of State and CGMA have appealed. The appeals have been conjoined for hearing before your Lordships.

The Issues

11. The Secretary of State and CGMA now appeal to your Lordships. It is important to emphasise that the issue before the House is an issue as to the construction of section 18(1)(f). Did that provision, on its true construction, enable the Minister to consent to CGMA authorising its traders at the Nine Elms site, or some of them, to carry on face-to-face trading in meat or fish? The Corporation accepts that the grant of the consent did not by itself constitute or bring about an interference with the Corporation's market rights in respect of the Smithfield Market or the Billingsgate Market. The Corporation also, by its counsel Mr Straker QC, rightly accepts that the exercise by CGMA of the additional powers granted by the consent would not *necessarily* involve CGMA in

an interference with the Corporation's market rights. The issue is, therefore, a very narrow one. Does section 18(1)(f) permit the Minister to consent to CGMA carrying on, or granting leases which allow to be carried on, activities unconnected with the sale of horticultural produce?

12. The language of section 18(1)(f) does not contain, expressly at least, any of the limitations or restrictions on which the respective members of the Court of Appeal founded their opinions. The words "to carry on all such other activities as it may appear to [CGMA] to be requisite advantageous or convenient for them to carry on", are very wide. A natural reading of the preceding paragraphs, (a) to (e), suggest a wide rather than a restrictive reading. The first limb of (f), "for or in connection with the discharge of their duties", can certainly be read as importing a restriction to activities relating to the sale of horticultural produce but the second limb, "… or with a view to making best use of any of their assets…" strongly suggests, in my opinion, that the activities need not relate to CGMA's duties relating to horticultural produce.

13. The grounds relied on in the Court of Appeal for coming to a different conclusion as to the scope of the second limb of paragraph (f) cannot, in my respectful opinion, be accepted. It cannot be right that *any* activity by CGMA at its Nine Elms site that would be in competition with the Smithfield or Billingsgate Markets would for that reason alone be excluded from the scope of paragraph (f). The proprietor of a market cannot complain about competition unless, first, the competition constitutes a rival market, second, the rival is trading within the area in which the proprietor is entitled to protection from competition and, third, the competition is sufficiently substantial to constitute in law a disturbance to the proprietor's market. The first and third requirements raise issues of degree and are dependant on the facts. Pill LJ's construction of section 18(1)(f) attributes to Parliament an intention to bar CGMA from activities which might compete with but would not under the ordinary law applicable to markets constitute an actionable interference with the Corporation's two markets. That construction cannot, in my opinion, be right. Laws LJ and Sir Martin Nourse implied into the grant to CGMA of a franchise to hold a horticultural produce market a restriction against holding a market for the buying or selling of any other commodities (see Sir Martin Nourse at paragraph 50 and Laws LJ at paragraph 40). That implication may or may not be right, and there is no need for your Lordships to express a view on it, but the consent of 20 June 2003 given by the Minister expressly said that the consent should not be taken as granting any market rights. The consent does not authorise CGMA to hold a meat or

fish market. If what CGMA do in purported reliance on the consent does constitute the holding of a meat or a fish market, CGMA will, in my opinion, be going outside the ambit of the consent. Laws LJ said, at paragraph 40, that the establishment on the Nine Elms site of outlets to sell meat or fish would "affect the nature of the market" granted by CGMA's franchise to hold a horticultural produce market. This puts the same point in a different way. If the number of the outlets and the extent of the business carried on justifies the conclusion that a meat or fish market is being carried on, that is one thing. But that will be a question of degree and unless the number of the outlets and the extent of the business does justify that conclusion, the proposition that the "nature" of the horticultural market will have thereby been changed will, in my opinion, be unsustainable. It has, as I have said, been rightly accepted that the exercise by CGMA of the additional powers granted by the consent would not necessarily involve an interference with the Corporation's market rights. Unless and until that point of actionable interference is reached it could not, in my opinion, be said that the nature of the CGMA's market had changed.

14. Mr Straker did advance other arguments in support of the Court of Appeal's conclusion. He pointed out that the second limb of paragraph (f) referred to "making the best use of any of their assets". This, he said, referred to CGMA's existing assets, and I would agree. But, he said, the Minister's consent had purported to confer on CGMA a new asset, namely, the right to authorise trading in meat and fish at the Nine Elms site. Paragraph 19 of his printed Case expresses the point:-

> "Section 18(1)(f) does not give the Minister power to grant the Market Authority additional assets. Section 18(1)(f) does not empower the Market Authority to award new rights to itself, whether by changing the description of their existing assets or otherwise."

If this point is no more than a resurrection of the proposition that the second limb of paragraph (f) is restricted to authorising CGMA to carry on other activities relating to the sale of horticultural produce than those referred to under paragraphs (a) to (e) then, while disagreeing with the point for the reasons I have already given (in para 12 above), I can understand it. But I think Mr Straker intended his point to be a different one. As I understood him he was contending that unless an owner of land had a grant from the Crown, or statutory authority, authorising the convening of a concourse of buyers and sellers on his, the owner's, land for the purpose of selling and buying commodities, the owner had no

right to convene a concourse of buyers and sellers for that purpose. Consequently, Mr Straker contended, the Minister's 20 June 2003 consent had purported to confer on CGMA a new asset, namely, the right to convene that concourse. The premise to this contention, a premise which would come as a great surprise to Women's Institutes and organisers of car boot sales up and down the country, has no substance and Mr Straker was unable to produce any authority in support of it.

15. Mr Straker points out, also, that the Minister's consent could lead to an actionable interference with the Corporation's Smithfield and Billingsgate Markets. So it could, but if it does CGMA will be outside the scope of the consent and Mr Straker has accepted that it will not necessarily do so.

16. I have, therefore, no hesitation in concluding that the judicial review attack on the Minister's consent of 20 June 2003 must fail. If what is subsequently done by CGMA or, I suppose, if what CGMA has already done, in purported reliance on that consent does constitute an interference with the Corporation's market rights, the Corporation can obtain a remedy in tort. For that relief a careful examination of the facts, an examination not possible in these judicial review proceedings, would be necessary. I would add that Miss Hazel Williamson QC, counsel for CGMA, submitted that the Minister's consent could be upheld also under the first limb of paragraph (f). I would prefer to express no view on that submission.

17. For these reasons I would allow the appeals, with costs here and in the courts below, and set aside paragraphs 3, 4 and 5 of the order of the Court of Appeal dated 21 December 2004.

BARONESS HALE OF RICHMOND

My Lords,

18. For the reasons given in the opinion of my noble and learned friend, Lord Scott of Foscote, with which I agree, I too would allow these appeals and make the orders which he proposes.

LORD MANCE

My Lords,

19. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Scott of Foscote. For the reasons he gives, with which I agree, I would allow these appeals.