HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 30
on appeal from [2006] EWHC 1083 (Admin)

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of National Grid Gas plc (formerly Transco plc)) (Appellants)
v.
Environment Agency (Respondents) (Civil Appeal from Her Majesty's High Court of Justice)

Appellate Committee

Lord Hoffmann
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Mance
Lord Neuberger of Abbotsbury

Counsel

Appellants:
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Respondents:
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LORD HOFFMANN

My Lords,

1. I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Scott of Foscote and gratefully adopt his statement of the facts and issues.

2. The Environment Agency puts its case in two ways. First, it says that National Grid Gas plc ("National Grid") is an appropriate person against whom a remediation notice may be served under section 78E of the Environmental Protection Act 1990. Section 78F(2) defines an appropriate person as one who "caused or knowingly permitted the substances…by reason of which the contaminated land in question is such land to be in, on or under that land." But National Grid did not cause or knowingly permit any substances to be in, on or under the land. That was done by the East Midlands Gas Board or its predecessor gas undertakers many years before National Grid came into existence. There is nothing in the Act to say that an appropriate person shall be deemed to include some other person or which defines who that other person should be. National Grid is plainly not an appropriate person within the meaning of the Act.

3. The other argument is that in 1948 there was a statutory transfer of the assets and liabilities of the privately owned predecessor undertakings to the East Midlands Gas Board (see section 17(1) of the Gas Act 1948), in 1972 there was a statutory transfer of the assets and liabilities of the East Midlands Gas Board to the British Gas Corporation (see section 1(1) of the Gas Act 1972) and in 1986 there was a statutory

transfer of the assets and liabilities of the British Gas Corporation to British Gas plc (see section 49(1) of the Gas Act 1986). National Grid has since acquired the gas transportation and storage undertaking of British Gas plc and the relevant liabilities. In each case the statutory provisions for succession said that the successor company would take over the liabilities of the predecessor company "immediately before" the transfer date.

4. The Environment Agency submits that the liability of the East Midlands Gas Board and its predecessors to have a remediation order made against them under section 78E was a liability passed down the chain to National Grid. But I find it quite impossible to say that this was a liability which existed, even as a contingency, "immediately before" the transfers of 1948, 1972 or 1986. No such liability existed until Part IIA was inserted into the 1990 Act by the Environment Act 1995. It is true that the legislation was retrospective in the sense that it created a potential present liability for acts done in the past. But that is not the same as creating a deemed past liability for those acts. There is nothing in the Act to create retrospectivity in this sense.

5. For these reasons and those given by my noble and learned friend Lord Scott of Foscote, with which I agree, I would allow the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

Introduction

6. Coal was one of the engines of the industrial revolution and for over 150 years, until the advent of natural gas from the North Sea in the early 1970s, one of its important uses was in the production of coal gas. But the production of coal gas left residues that had to be disposed of. One of these residues was coal tar and the main means of disposal was to bury the coal tar in containers beneath the earth. One of the places where coal tar was thus disposed of was a site at Bawtry in Doncaster, a site that now consists of 11 residential properties with gardens.

7. The presence of the coal tar beneath these gardens constitutes contamination that is potentially harmful to health and the Environment Agency (the respondent to this appeal), formed the opinion, an opinion with which no one has disagreed, that remediation works to remove the contaminating material needed to be carried out. The Agency, pursuant to its duties and responsibilities under the Environmental Protection Act 1990 (as amended in 1995) has carried out the necessary works at a cost in the region of £66,000 per residence. The question is who should bear that cost.

8. There are, judged by the language of the relevant provisions of the 1990 Act, three obvious possibilities. One possibility is that the costs should be borne by the polluters, that is to say, by the companies that, in the process of turning coal into coal gas, produced the coal tar and buried it in the ground at the Bawtry site. Another possibility is that the cost should be borne by the present owners of the residences beneath whose gardens the coal tar was buried. The third obvious possibility is that the cost should be met out of public funds. Notwithstanding that these are the three possibilities apparently contemplated by the statutory language, the Agency has contended for, and Forbes J in the court below accepted, a fourth possibility, namely, that the appellant, National Grid Gas plc (previously Transco plc, by which name it is convenient to refer to the appellant) should bear the cost. This is a surprising contention, for Transco was not the polluter, and indeed has never been in the business of producing coal gas – its business is, and has always been, the transportation of natural gas. Nor has Transco ever been the owner of any part of the Bawtry site. The Agency's contention is based on the circumstance that Transco is the statutory successor to the assets, rights and liabilities of the East Midlands Gas Board ("EMGB"), a state owned area gas undertaker to which, as with the other area gas boards, the assets and liabilities of the privately owned gas undertakings had been transferred by the Gas Act 1948. The contention, in short, is that the polluter should pay and that Transco should be regarded as standing in the shoes of the polluter. To test this contention it is necessary to refer to the history of the Bawtry site, to the statutory scheme whereby the privatisation of the gas industry was brought about, and, finally to the relevant provisions of the 1990 Act.

The history of the Bawtry site

9. The actual polluters of the Bawtry site had been, first, two private companies, namely, the Bawtry and District Gas Company ("B&DGC") and the South Yorkshire and Derbyshire Gas Company ("SY&DGC").

The B&DGC had purchased the Bawtry site in about 1912 and constructed on the site a gas works which became operational in about 1915. In 1931 the B&DGC was amalgamated with the SY&DGC and the amalgamated company continued gas production at the Bawtry site. The gas industry was nationalised by the Gas Act 1948 after which the site was owned and controlled by the EMGB. However gas production at the site was discontinued shortly after nationalisation and in 1965 the site was sold to Kenton Homes Ltd. In 1966 the site, still undeveloped for housing purposes, came into the ownership of Kenneth Jackson Ltd, which company applied for and obtained planning permission to build houses on the site. The 11 residences already referred to were then built. Seven of them were, for a time, owned by the Secretary of State for Defence but subsequently all 11 passed into private ownership.

10. As is explained in para 30 of Forbes J's judgment, it is not known exactly when the coal tar residues were buried at the site. It is probable that most of this happened when the site was in private ownership before nationalisation, but some part may have happened while the site was owned by the EMGB.

11. Section 17(1) of the Gas Act 1948 provided that:

> "… all property, rights, liabilities and obligations which, immediately before [the appointed vesting date] were property, rights, liabilities and obligations of an undertaker [eg B&DGC and SY&DGC] … shall on the vesting date vest by virtue of this Act and without further assurance in such Area Board as may be determined by order of the Minister".

Thus the Bawtry site passed into the ownership of the EMGB subject to the liabilities of the B&DGC and the SY&DGC "immediately before" the vesting date.

12. According to evidence given to Forbes J, it was not, in the mid 1960s when the EMGB sold the site or previously, considered dangerous to leave coal tar residues under the land, provided they were properly contained. The conveyance of the site by the EMGB to Kenton Homes Ltd in 1965 described the site as including "the underground tanks installed on part thereof" (see para 31 of Forbes J's judgment).

13. By the Gas Act 1972 the Area Gas Boards were abolished and their property, rights, liabilities and obligations were transferred to the British Gas Corporation (the "BGC") which remained in state ownership. So the BGC became subject to any liabilities of the EMGB arising out of its previous ownership of the Bawtry site or inherited under section 17(1) of the 1948 Act from B&DGC and SY&DGC.

Privatisation

14. Privatisation of the gas industry was effected by the Gas Act 1986. A "successor company", in the event British Gas plc, was formed, public subscription in this new company was invited by the Government (the advertised enthusiasm of "Sid" played a prominent part as did, of course, a formal prospectus) and the transfer to the successor company, British Gas plc, of the BGC's assets and liabilities was effected by section 49 of the 1986 Act. Section 49(1) said that on a transfer date to be nominated by the Secretary of State -

> "… all the property, rights and liabilities to which the [BGC] was entitled or subject immediately before that date shall … become by virtue of this section property, rights and liabilities of … [the successor company] …"

15. Members of the public, individual as well as corporate, encouraged by the advertisements and prospectus to which I have referred, subscribed for shares in British Gas plc on the basis of the statutory scheme whereunder the company in which they were investing would take over the assets and liabilities of the BGC as they stood "immediately before" the transfer date. The proceeds of the subscription enriched the Treasury and, thereby, the public at large.

16. After a series of corporate re-organisations in the 1990s, the part of British Gas plc's undertaking concerned with the transportation and storage of gas devolved on Transco. It is worth emphasising that the Bawtry site formed no part of the assets transferred to British Gas plc. The site had been sold for housing over 20 years earlier by the EMGB. And the liabilities created by the Environmental Protection Act 1990 did not exist in 1986 when British Gas plc was floated. To that Act I must now turn.

The Environmental Protection Act 1990

17. The preamble to the 1990 Act described it as an "Act to make provision for the improved control of pollution arising from certain industrial and other processes …" Part IIA (inserted by section 57 of the Environment Act 1995) is the part of the Act with which this appeal is particularly concerned. It deals with the identification of "contaminated land" (see section 78A(2)), with the "remediation" (see section 78A(7)) of contaminated land, and, in section 78F, with the "determination of the appropriate person to bear responsibility for remediation". Section 78F provides, so far as necessary for present purposes, as follows:

> "(2) Subject to the following provisions of this section, any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land is an appropriate person.
>
> (3) A person shall only be an appropriate person by virtue of subsection (2) above in relation to things which are to be done by way of remediation which are to any extent referable to substances which he caused or knowingly permitted to be present in, on or under the contaminated land in question.
>
> (4) If no person has, after reasonable inquiry, been found who is by virtue of subsection (2) above an appropriate person to bear responsibility for the things which are to be done by way of remediation, the owner or occupier for the time being of the contaminated land in question is an appropriate person.
>
> (5) If, in consequence of subsection (3) above, there are things which are to be done by way of remediation in relation to which no person has, after reasonable inquiry, been found who is an appropriate person by virtue of subsection (2) above, the owner or occupier for the time being of the contaminated land in question is an appropriate person in relation to those things."

18. The scheme of the Act is to allow a remediation notice to be served on an "appropriate person" after which, subject to the right to appeal against the notice, the person served has a statutory obligation to

comply with the notice and carry out the specified remediation works. Alternatively the "enforcing authority", the Agency in the present case, can itself carry out the remediation works (see section 78N) and (under section 78P) recover its costs from the appropriate person or persons. But the Agency has a discretion, having regard to hardship that recovery might cause, to decide not to recover the whole or part of its costs from a particular appropriate person (see section 78P(2)). In the present case the Agency has made clear its intention not to pursue any of the present owners or occupiers of the 11 residences for recovery of the cost of the remediation works it has carried out at their respective properties. Transco is the only target at which the Agency is directing its cost recovery effort. If the Agency misses that target the cost must fall on public funds.

The appropriate persons

19. It is clear that B&DGC and SY&DGC would, if they had still been in existence, have been appropriate persons for section 78F purposes. Both were polluters. But both have long since been dissolved. The EMGB, too, a third polluter, would have been an appropriate person, but it was dissolved after the 1986 privatisation of the gas industry. It seems likely that Kenton Homes Ltd and Kenneth Jackson Ltd would have been aware of the presence of the coal tar under the ground of the Bawtry site and that it would have been arguable that they had "knowingly permitted" the coal tar to remain there. But both these companies have been dissolved, the former in 1983, the latter in 1993. The present owners and occupiers of the 11 residences would be appropriate persons but, as I have said, the Agency has decided not to pursue them. But how can it sensibly be said that Transco is an appropriate person, it being common ground that Transco neither caused nor knowingly permitted the coal tar to be buried at the Bawtry site and that British Gas plc, Transco's progenitor, came into existence some 20 years after the Bawtry site had been sold for housing?

20. The argument for the Agency, advanced by Mr Pleming with success before Forbes J, was that "person" in section 78F, as in the phrase "person … who caused or knowingly permitted … " should be construed so as to include every person who became by statute the successor to the liabilities of the actual polluters ie B&DGC, SY&DGC and the EMGB. This is, in my opinion, a quite impossible construction to place on the uncomplicated and easily understandable statutory language. The emphasis in section 78F, both in subsection (2) and in subsection (3), is on the actual polluter, the person who "…caused or

knowingly permitted…". The suggested construction makes nonsense, also, of the language of the statutory provisions under which, upon nationalisation in 1948, the liabilities of the private gas undertakers were transferred to the state owned Area Boards and, upon privatisation in 1986, the liabilities of the state owned Area Boards were transferred to British Gas plc. Both in section 17(1) of the 1948 Act and in section 49(1) of the 1986 Act the assets and liabilities transferred were expressly limited to those existing "immediately before" the transfer date. The notion that that language can encompass a liability created by Parliament in 1995 by the amendment of the 1990 Act seems to me, with the greatest respect, unarguable. Parliament is, of course, sovereign and can impose what liabilities it sees fit on whom it chooses. But very careful statutory language would be needed to impose on a company innocent of any polluting activity a liability to pay for works to remedy pollution caused by others to land it had never owned or had any interest in.

21. Mr Pleming told your Lordships on a number of occasions that Parliament had enacted the 1990 Act (with its 1995 amendment) on the principle that the polluter should pay and that innocent owners or occupiers of contaminated land should not have to pay. I have no doubt that that was so and have no quarrel with that principle. But Transco was not a polluter and is no less innocent of having "caused or knowingly permitted" the pollution than the innocent owner or occupiers of the 11 residences.

22. Mr Pleming argued, also, that since British Gas plc was the transferee and so had the benefit of the assets of the EMGB, which might be taken as including the proceeds arising from the sale of the Bawtry site, it was right and fair that British Gas plc's successor, Transco, should bear any liabilities relating to that site. An immediate answer is that the liabilities imposed on British Gas plc by the 1986 Act were the liabilities existing immediately before the date of transfer and that those liabilities could not include liabilities coming into existence, some nine years later, under the 1995 amendment of the 1990 Act. But an additional answer is that the Agency's attempt to cast the burden of paying for the remediation works on to Transco falsifies the basis on which the investing public were invited to subscribe for shares in British Gas plc. The investing public (including Sid) were entitled to believe that the liabilities of the new company, identified in the prospectus that accompanied the flotation, were, as section 49(1) of the 1986 Act said, limited to those existing immediately before the date of transfer. They would have subscribed for shares in that belief and the Treasury would have benefited accordingly from the representations that had been made

by government to the investing public. I find it extraordinary and unacceptable that a public authority, a part of government, should seek to impose a liability on a private company, and thereby to reduce the value of the investment held by its shareholders, that falsifies the basis on which the original investors, the subscribers, were invited by government to subscribe for shares. And I can see no reason to suppose that Parliament intended to produce that result.

23. Mr Pleming invited your Lordships, pursuant to *Pepper v Hart* [1993] AC 593, to peruse the Parliamentary record in order to establish whether Parliament intended "the person" in section 78F to bear the extended meaning contended for by the Agency. Your Lordships did peruse the record, de bene esse, but, to my mind, there is little, if anything, to assist Mr Pleming's argument. In any event, while recourse to Hansard may be permissible to assist in resolving an ambiguity in the statutory language, I can find no relevant ambiguity in section 78F. *Pepper v Hart* provides no authority for recourse to Hansard in order to alter plain and unambiguous statutory language.

Conclusion

24. This litigation began with an application by Transco for an order quashing the Agency's decision of 13 September 2005 that Transco was an "appropriate person" within the meaning of section 78F of the 1990 Act. Forbes J dismissed the application with no order as to costs. This appeal, brought to your Lordships' House by the leapfrog procedure made possible by the Administration of Justice Act 1969, must, in my opinion, for the reasons I have endeavoured to give, be allowed. I would quash the Agency's decision of 13 September 2005. The parties agreed prior to the hearing that each side would bear its own costs whatever the outcome.

LORD WALKER OF GESTINGTHORPE

My Lords,

25. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Scott of Foscote and Lord Neuberger of Abbotsbury. I am in full agreement with them, and for the reasons which they give I would allow the appeal.

LORD MANCE

My Lords,

26. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Scott of Foscote and for the reasons he gives, I too would allow this appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

27. It is unnecessary for me to explain the factual and statutory background to this appeal, as it has been fully and clearly set out in paragraphs 6 to 18 of the speech of my noble and learned friend Lord Scott of Foscote, which I have had the privilege of seeing in draft.

28. The uncontroversial underlying submission of Mr Pleming QC, on behalf of the respondent, the Environment Agency, was that it is a cardinal general principle underlying the amendments made in 1995 to the Environmental Protection Act 1990 that "the polluter pays". In other words, that the person responsible for contaminating land should be the person primarily liable to pay for its decontamination. That seems to me to follow from section 78F of the 1990 Act, and from the Ministerial Guidance contained in Part 3 of Chapter D of Circular 02/2000 published by the Department of the Environment, Transport and Regions. However, that is only the beginning of the respondent's case, which involves the concept of "the polluter" in the context of this principle being given a very, indeed artificially, extended meaning.

29. There are no doubt arguments for extending "the polluter pays" principle to a company which has acquired the whole of the business (or at least the whole of the relevant part of the business) of the polluter, at least in some circumstances, perhaps particularly where the company concerned has taken a statutory transfer of the business. However, there are also arguments against extending the concept of "the polluter" beyond the original polluter, for instance to entities which happen to have acquired the whole or part of the business of a polluter, perhaps

particularly where members of the public have been invited to subscribe for shares in such an entity, when there was no statutory liability in respect of contaminated land at all.

30. Thus, it would give rise to an understandable grievance on the part of owners of shares (particularly if they were original subscribers in 1986) in the appellant, National Grid Gas Plc (which was, at least in part, effectively hived-off from British Gas Plc), if it was rendered retrospectively liable for the cost of decontaminating land, which it had never occupied or enjoyed, let alone contaminated, simply because the land had been contaminated by an entity whose business happens to have been acquired by a statutory predecessor of the appellant many years ago.

31. However, at least for my part, I would not want to suggest that it would cause particular surprise if that was indeed the consequence of this legislation. The amendments effected to the 1990 Act by the Environment Act 1995 inevitably have an effect which involves a degree of retrospectivity. For instance, during the 1980s, directors of companies, whose activities had innocently contaminated land decades ago, will have made decisions on payment of dividends and on investments, which might have been very different if they had known that potential liability for the cost of decontamination would be imposed on the company in 1995. Similarly, people who, before 1995, purchased shares in a company, whose activities many years ago had caused contamination, could justifiably contend that the introduction of the principle that "the polluter pays" in 1995 has unpredictably and retrospectively falsified the basis upon which they acquired the shares.

32. The increasing awareness, during the last quarter of the previous century, of the seriousness and extent to which land had been contaminated by industrial processes, must inevitably have previously unanticipated consequences which are not only physical but also economic. The legislature has decided that the force of grievances such as those described in the previous paragraph is outweighed by the public and private interests in decontaminating land at the expense of the polluter, ie the person who contaminated it. Where the polluter has ceased to exist and the whole of its business, or at least the whole of its relevant business, has been acquired by another company, it might well appear to many people to be similarly justifiable, at least in some circumstances, if liability for decontamination was extended to apply to that other company. After all, by acquiring all the assets (or relevant assets) of the polluter, such a company could be said to be, at least in

commercial terms, the successor of the polluter, or to stand in some respects in the shoes of the polluter. However, to other people, the imposition of such a liability might appear to be an unjustifiable and unfair extension of the principle that the polluter pays.

33. Whether, and, if so, in what circumstances and on what basis, it would be right to extend the concept of a polluter paying in such a way is a matter of policy for the legislature, not for the courts. The role of the courts is to interpret the relevant statutory provisions which the legislature has enacted, in order to determine whether they have that effect. In this case, the question for your Lordships is whether, as the respondent contends, and Forbes J found, the statutory provisions discussed in the speech of Lord Scott have the effect, as a matter of interpretation, of rendering an entity such as the appellant, in its capacity as the ultimate successor to the businesses of B&DGC and SY&DGC, liable as if it had been the original polluter. In that connection, the specific issues thrown up on this appeal are whether the appellant is right in its contentions (a) that the definition of "an appropriate person" in section 78F (2) of the 1990 Act is wide enough to cover a successor to the business of the original polluter, and (b) that the references to "liabilities" in section 17 (1) of the Gas Act 1948 and in section 49 (1) of the Gas Act 1986 apply to liabilities which did not exist, and indeed could not have existed, at the date of those Acts, namely liabilities arising under the amendments effected in 1995 to the 1990 Act. Essentially for the reasons given more fully by Lord Scott, I consider that neither of those contentions can be made out.

34. So far as the first contention is concerned, the appellant is plainly not, as a matter of ordinary language, a "person … who caused or knowingly permitted" the contamination to occur: it is a company which (albeit indirectly) acquired the business and assets of such a person. The respondent's case does not merely run into problems because of the clear language of section 78F(2) of the 1990 Act. If the section is to be interpreted as extending to a successor to the business of the original polluter, is the extension to be limited to a statutory successor, or to a successor who has not acquired the business at arm's length, or to a successor who has occupied or owned the land, or is it to apply to any successor to the business? And what if the relevant business had wholly ceased before the polluter's assets were acquired? As my noble and learned friend, Lord Mance, pointed out in argument, additional difficulties of interpretation arise on the respondent's interpretation, in the case of the transfer of a business, where the original polluter still exists.

35. As to the second contention, the "liabilities" referred to in the 1948 and 1986 Acts, while plainly extending to contingent liabilities which existed at the time, cannot sensibly be interpreted as applying to liabilities which did not then exist, not merely in fact, but even in principle. Given that B&DGC and SY&DGC had long ceased to exist by 1995, it cannot sensibly be said that they have ever had even a potential liability to decontaminate the relevant land by virtue of the amendments to the 1990 Act effected in 1995. Over and above that, the relevant sections of the 1948 and 1986 Acts are limited to "liabilities" existing "immediately before" a date in, respectively, 1948 and 1986. As Mr Gordon QC for the appellant contends, much more explicit words would be needed to justify the contention that the term is apt to cover non-existent liabilities created later, words such as were used, for instance, in para 3 of Schedule 2 to the Water Act 1989.

36. In my judgment, each of the respondent's contentions involves redefining, rather than interpreting, the relevant statutory words. As I understood him, Mr Pleming conceded that the respondent had to succeed on both contentions in order for the appeal to be dismissed. I am not convinced that the appeal would necessarily succeed if the respondent won on only one of the points: it may depend on how precisely one formulates the respondent's redefinition of "an appropriate person" in the 1990 Act or of "liabilities" in the 1948 and 1986 Acts. However, in the light of the fact that the respondent fails on both its contentions, it is unnecessary to consider that aspect further.