

Court of Appeal Demolishes the Demolition Direction



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In an important decision, the Court of Appeal has held that a major part of the Government's demolition direction is unlawful and, as a result, planning permission may need to be sought for demolition operations in many cases. This judgement may leave many developments which have been consented, or which are still in the consenting process, having to seek a screening opinion for Environmental Impact Assessment under the permitted development order process, and obtain planning permission if the demolition is likely to have significant environmental effects.

The SAVE Britain's Heritage Court of Appeal Judgment

The case concerned the proposed redevelopment of a site in Lancaster involving the demolition of a brewery. The application for the redevelopment was refused but the developers wished to demolish the brewery in any event. The developers proceeded on the basis that planning permission was not needed as it was covered by the Secretary of State's Demolition Direction¹. This provides that demolition of certain buildings does not amount to "development" and therefore does not require planning permission under the Town & Country Planning Act 1990 (the "Planning Act"). Buildings covered by the Demolition Direction comprise:

- (a) listed buildings;
- (b) buildings in a conservation area;
- (c) scheduled ancient monuments;
- (d) buildings other than dwelling houses or a buildings adjoining a dwelling house;

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¹ Town and Country Planning (Demolition – Description of buildings) Direction 1995 contained at Appendix A to Circular 10/95: Planning Controls over Demolition.

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- (e) any building not exceeding 50 cubic metres in volume; and
- (f) gates, fences, walls or other means of enclosure.

Pressure Group SAVE Britain's Heritage (SBH) commenced judicial review proceedings (the SBH case) seeking a declaration that the Demolition Direction was unlawful as it contravened the Directive on Environmental Impact Assessment (EIA)². SBH's argument was that demolition should be considered a "project" under the Directive, potentially requiring EIA to be carried out. The problem arises because deeming demolition not to constitute "development" means that no planning permission is required for the demolition works. Since, under the Planning Act, EIA can only be required where planning permission is needed, this results in demolition escaping from the requirement for EIA.

The Secretary of State (defending the Demolition Direction) argued that demolition was not a project as understood by the Directive³. Under Article 1(2) of the Directive, 'project' means:

- "— the execution of construction works or of other installations or schemes (*first limb*),
- other interventions in the natural surroundings and landscape (*second limb*) ..."

The High Court held that demolition could not amount to an EIA project, basing its judgement, among other factors, on the House of Lords Judgement in *R (Edwards) v Environment Agency*⁴ in which Lord Hoffman had considered that a "project" under the Directive required the creation of "something new" (in that case the change of fuel in a cement plant was held not to be the creation of something new). However, in the background to the SBH case was the European Court of Justice judgement in *Commission v Ireland*⁵ which was given on 3 March 2011 (after the High Court decision but before the Appeal Court decision in the SBH case). The ECJ determined in *Commission v Ireland* that demolition in the context of a motorway project could be a "project" requiring EIA as an "intervention in the natural surroundings and landscape" (i.e. the second limb).

"it is a curious, and thoroughly unsatisfactory, feature of the Direction that those demolitions which are most likely to have an effect on the cultural heritage - the demolition of listed buildings, ancient monuments and buildings in a conservation area – are effectively excluded from the ambit of the Directive".

Sullivan LJ

On appeal in the SBH case, the Court of Appeal⁶ (reversing the High Court decision) rejected the Secretary of State's arguments which were that demolition could not be an EIA "project" because the "second limb" did not apply (the brewery was in an urban rather than natural rural area) and that the ECJ in *Commission v Ireland* had implicitly accepted that the "first limb" did not apply. On the contrary, the Court of Appeal concluded that "... *demolition works which leave a site on completion in a condition which protects the public and preserves public amenity*⁷ are capable of being a scheme" for the purposes of Article 1.2."; in other words "the first limb" of the definition of "project" applied. The fact that EIA must take into account effects on "cultural heritage" was a further reason to suggest demolition should be included. The Court of Appeal also thought that the second limb might also apply as an "intervention in the landscape".

So far so good for SBH. However, in order for the project to require EIA it needed to come within one of the categories of project in Annex 1 or Annex 2 of the Directive. The Secretary of State argued that none of the categories applied (demolition was only specifically mentioned in relation to nuclear installations). The Court of Appeal disagreed and held that, if demolition could amount to a scheme (and therefore a "project"), it was also capable of being an "urban development project", in particular since a number of listed projects did not necessarily involve construction works (e.g.

² Directive 85/337/EC

³ Under Article 1(2) 'project' means the execution of construction works or of other installations or schemes, or other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.

⁴ [2008] UKHL 22.

⁵ Case C50-09.

⁶ (R (On The Application Of SAVE Britain's Heritage) (Appellant) v (1) Secretary Of State For Communities & Local Government (2) Lancaster City Council (Respondent) & Mitchells Of Lancaster (Brewers) Ltd (Interested Party) [2011] EWCA Civ 334.

⁷ This condition is a requirement that the local authority can impose on demolition works by notice under Section 81 of the Building Act 1984.

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agriculture and food industry projects). The Court noted the ECJ's comments that "*those annexes refer ... to sectoral categories of project, without describing the precise nature of the works provided for*".

Impact of the Judgement

Prior to this judgment, demolition could generally be carried out without planning permission, subject to compliance with relevant Building Act 1984 requirements and any applicable listed building or conservation area restrictions. Following this case, developers will now need to consider specifically whether planning permission (including possibly an EIA) is required for the demolition phase of a development.

Relying on an existing planning permission

Where a development subject to a planning permission already expressly includes demolition as part of the development then it will be possible to rely on that existing planning permission to carry out demolition. However, by doing so, the development will likely be taken to have commenced and this may trigger various planning conditions, Section 106 obligations and road closure orders as well as possibly contractual obligations that may be contained in documents such as development agreements, options or agreements for lease.

Relying on permitted development rights

In the absence of a planning permission for demolition, it will be possible to seek to rely on Part 31 of Schedule 3 of the General Permitted Development Order 1995. In order to do so an application must be made to the local authority to see if prior approval of the method of demolition is required, and there are also site notice obligations.

Environmental Impact Assessment

If demolition falls within the categories prescribed by Annex 1 or Annex 2 of the Directive (for example as an urban development with an area greater than 0.5ha) then permitted development rights will only attach if a screening opinion or direction has been obtained to the effect that an EIA is not required. If an EIA is required then it is not possible to rely on permitted development rights and a planning permission will be required for the demolition.

Recommendations

This judgement is likely to have significant implications for developers who are either going through the planning process or who have already consented schemes. For those with unimplemented schemes, developers should:

- make sure that demolition is expressly permitted by the unimplemented planning permission;
- consider relying on permitted development rights and, if so, factor notification requirements into any project timetable; and
- consider whether EIA is required, including obtaining a screening opinion, and where necessary, seek planning permission for the demolition works.

Developers applying for planning permission in the future should expressly consider including demolition as part of the development that is to be subject to the planning permission, as well as the necessity for EIA, and the scope of any required EIA.

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