Case No: C1/2014/1902

Neutral Citation Number: [2015] EWCA Civ 1289
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT AT LEEDS
Mr Justice Blair
[2014] EWHC 1638 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2015

Before :

THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE RICHARDS
and
LORD JUSTICE FLOYD
- -

Between :

	The Queen on the application of **(1) Allensway Recycling Limited** **(2) Allen Williamson** **(3) Martin Williamson**	**Claimants/ Appellants**
	- and -	
	The Environment Agency	**Defendant/ Respondent**

- -
- -

Andrew Thomas QC (instructed by **High Street Solicitors**) for the **Appellants**
Stephen Hockman QC and **Andrew Marshall** (instructed by **The Environment Agency**) for the **Respondent**

Hearing date: 24 November 2015

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Judgment **Lord Justice Richards :**

1.The issue in this appeal is whether entry to residential premises in the exercise of powers

under section 108 of the Environment Act 1995 ("the 1995 Act"), and pursuant to a warrant lawfully granted under schedule 18 to that Act, can lawfully be effected only after giving at least seven days' notice to the occupier of the premises, even where the warrant has been granted on the basis that an application for admission to the premises would defeat the object of the proposed entry. The issue turns on the proper construction of section 108(6).

2. The first appellant, Allensway Recycling Limited ("Allensway"), is the operator of a permitted waste composting facility at Prospect House Farm, Holme upon Spalding Moor, East Yorkshire. The second appellant, Mr Allen Williamson, is Allensway's managing director and lives at Waterside Farm, about a mile away from Prospect House Farm. The third appellant, Mr Martin Williamson, owns Prospect House Farm and lives with his family in a bungalow there.

3. There is an ongoing investigation by the respondent, the Environment Agency ("the Agency"), into the composting operations of a number of operators, including Allensway. In that connection, the Agency wanted to examine Allensway's business records. It alleged (though this is disputed) that Mr Allen Williamson was aggressive and uncooperative. It also suspected (correctly, as it turned out) that documents were being removed from the company's offices at Prospect House Farm and were being taken to Mr Allen Williamson's home address at Waterside Farm.

4. On 10 May 2013, one of the Agency's Environmental Crime Officers applied to Leeds Magistrates' Court for warrants to enter and inspect premises under section 108 of, and schedule 18 to, the 1995 Act. The application was supported by an information which stated that the premises within the warrants included "residential property lived in by Martin Williamson" and the "home address of Mr Allen Williamson". It explained the need for warrants by reference to the allegedly confrontational behaviour of Mr Allen Williamson, and expressed the belief that if the Agency were to attempt a search without the use of a warrant, entry would be refused and the purpose of the search would be defeated, because paperwork would not be available and evidence of unauthorised waste activities would be removed or destroyed. The magistrates issued four warrants, two of which are relevant. They related respectively to Prospect House Farm and Waterside Farm.

5. The warrants were executed early on the morning of 17 May 2013. Officers of the Agency, together with police officers, attended in some numbers. A considerable amount of documentation was downloaded by the officers in electronic form, or taken in physical form, from the office premises at Prospect House Farm. Officers also entered and carried out an inspection within the bungalow where Mr Martin Williamson lives, but it appears that no relevant documentation was found there. Relevant business records were, however, found in an outbuilding at Waterside Farm.

6. The appellants brought proceedings for judicial review to challenge the *execution* of the warrants (the challenge does not relate to the *issue* of the warrants themselves). The claim was heard by Blair J, sitting in the Administrative Court at Leeds. He dismissed the claim: see [2014] EWHC 1638 (Admin). There were three issues before the judge, but the appeal against his order relates only to the one issue that I have already identified. The appeal is brought with permission granted by the judge himself. Reference can be made to his judgment for a fuller account of the facts.

The statutory provisions

7. **Section 108** of the 1995 Act is headed "Powers of enforcing authorities and persons authorised by them". Section 108(1) provides:

> "(1) A person who appears suitable to an enforcing authority may be authorised in writing by that authority to exercise, in accordance with the terms of the authorisation, any of the powers specified in subsection (4) below for the purpose –
>
> (a) of determining whether any provision of the pollution control enactments in the case of that authority is being, or has been, complied with;
>
> (b) of exercising or performing one or more of the pollution control functions of that authority; or
>
> (c) of determining whether and, if so, how such a function should be exercised or performed."

8. The powers that an authorised person may be authorised to exercise are set out in section 108(4) and are extensive. Some of them have to do with the taking of measurements, photographs and scientific and other evidential samples, and are not relevant to this case, and others have to do with taking statements and requiring assistance. But the basic provisions of the subsection are these:

> "(4) The powers which a person may be authorised to exercise under subsection (1) or (2) above are –
>
> (a) to enter at any reasonable time (or, in an emergency, at any time and, if need be, by force) any premises which he has reason to believe it is necessary for him to enter;
>
> (b) on entering any premises by virtue of paragraph (a) above, to take with him –
>
> (i) any other person duly authorised by the enforcing authority and, if the authorised person has reasonable cause

to apprehend any serious obstruction in the execution of his duty, a constable; and

(ii) any equipment or materials required for any purpose for which the power of entry is being exercised; ...

(c) to make such examination and investigation as may in any circumstances be necessary …."

9. The powers in section 108(4) relate to entry to "any premises". Section 108(6), however, makes specific provision in respect of entry to *residential* premises:

> "(6) Except in an emergency, in any case where it is proposed to enter any premises used for residential purposes, or to take heavy equipment on to any premises which are to be entered, any entry by virtue of this section shall only be effected –
>
> (a) after the expiration of at least seven days' notice of the proposed entry given to a person who appears to the authorised person in question to be in occupation of the premises in question, and
>
> (b) either –
>
> (i) with the consent of a person who is in occupation of those premises; or
>
> (ii) under the authority of a warrant by virtue of Schedule 18 to this Act."

The term "emergency" is given a restrictive definition in section 108(15). It is common ground that it did not apply to the circumstances of this case.

10. Section 108(7) relates to entry where the use of force may be necessary. It provides:

> "(7) Except in an emergency, where an authorised person proposes to enter any premises and –
>
> (a) entry has been refused and he apprehends on reasonable grounds that the use of force may be necessary to effect entry, or
>
> (b) he apprehends on reasonable grounds that entry is likely to be refused and that the use of force may be necessary to effect entry,

any entry on to those premises by virtue of this section shall only be effected under the authority of a warrant by virtue of Schedule 18 to this Act."

11. Section 108(14) provides a more specific link with schedule 18. It provides:

> "(14) Schedule 18 to this Act shall have effect with respect to the powers of entry and related powers which are conferred by this section".

12. **Schedule 18** is headed "Supplemental provisions with respect to powers of entry". An introductory paragraph on interpretation provides:

> "1(1) In this Schedule –
>
> …
>
> 'relevant power' means a power conferred by section 108 of this Act, including a power exercisable by virtue of a warrant under this Schedule."

13. Paragraph 2 of schedule 18 concerns the issue of warrants. It provides:

> "2(1) If it is shown to the satisfaction of a justice of the peace … on sworn information in writing –
>
> (a) that there are reasonable grounds for the exercise in relation to any premises of a relevant power; and
>
> (b) that one or more of the conditions specified in sub-paragraph (2) below is fulfilled in relation to those premises,
>
> the justice … may by warrant authorise an enforcing authority to designate a person who shall be authorised to exercise the power in relation to those premises, in accordance with the warrant and, if need be, by force.
>
> (2) The conditions mentioned in sub-paragraph (1)(b) above are–
>
> (a) that the exercise of the power in relation to the premises has been refused;
>
> (b) that such a refusal is reasonably apprehended;
>
> (c) that the premises are unoccupied;
>
> (d) that the occupier is temporarily absent from the premises

and the case is one of urgency; or

(e) that an application for admission to the premises would defeat the object of the proposed entry.

(3) In a case where subsection (6) of section 108 of this Act applies, a justice of the peace … shall not issue a warrant under this Schedule by virtue only of being satisfied that the exercise of a power in relation to any premises has been refused, or that a refusal is reasonably apprehended, unless he is also satisfied that the notice required by that subsection has been given and that the period of that notice has expired.

(4) Every warrant under this Schedule shall continue in force until the purposes for which the warrant was issued have been fulfilled."

14. Mention should also be made of section 110 of the 1995 Act, which provides *inter alia* that it is an offence for a person intentionally to obstruct an authorised person in the exercise of his powers or duties, and an offence, without reasonable excuse, to fail to comply with any requirement imposed under section 108. A person guilty of a relevant offence is liable on summary conviction to a fine.

The construction adopted by Blair J

15. Blair J held that, as a matter of construction of section 108(6) and schedule 18, notice of proposed entry to residential premises does not need to be given where entry is effected under the authority of a warrant issued on the basis that one or more of conditions (c), (d) and (e) of paragraph 2(2) of the schedule is fulfilled in relation to the premises. The reasoning in support of that conclusion appears in the following passage of his judgment:

"59. … Paragraph 2(3) [of Schedule 18] in terms applies in the case of the first two conditions set out in paragraph 2(2) for the issue of a warrant. These are (a) that the exercise of the relevant power under s.108 in relation to the premises has been refused, or (b) that such a refusal is reasonably apprehended. Paragraph 2(3) stipulates that in such a case, the court has to be satisfied that the seven days' notice has been given and has expired. This, as the Agency points out, distinguishes such a case from (c) and (d), which have to do with the situation in which the premises are unoccupied, and (e) which has to do with the situation in which a request to enter would defeat the object of the proposed entry.

60. I agree with the Agency that as matter of construction, Schedule 18 does not envisage that seven days' notice will be

required where situations (c), (d) and (e) are concerned. As has been submitted, the drafters clearly contemplated that where the ground for the warrant is that the giving of notice would be problematic because the premises appear to be unoccupied or the occupier is absent, or where the giving of notice would defeat the object of the proposed entry, there is no requirement for notice. Where on the other hand the warrant is sought on the basis that access to premises has been refused or such a refusal is reasonably apprehended (in other words under (a) or (b)) the court has to be satisfied that seven days' notice has been given and expired.

…

62. … It is clear, in my view, that in the case of residential premises, the purpose of s.108(6) read with Schedule 18 is to require seven days' notice to be given where a warrant is to be issued under conditions (a) and (b) but not under conditions (c), (d) and (e). It will be recalled that powers of entry have to do with pollution control. It would be absurd to require seven days' notice where a warrant is issued on the basis that the occupier is temporarily absent from the premises and the case is one of urgency (condition (d)). It would be equally absurd to require seven days' notice to be given where condition (e) for the issue of a warrant applies, namely that an application for admission to the premises would defeat the object of the proposed entry.

63. Whilst I agree with much of its substance, I am not however persuaded by the Agency's alternative argument so far as it depends on treating Schedule 18 as a standalone provision, and seeks to draw a distinction between the grant of warrants under the Schedule, and rights of entry under s.108. I agree with the claimants that the provisions are clearly intended to be read together, with the Schedule setting out the conditions for the grant of the warrant referred to in s.108(6)(b)(ii) so far as residential premises are concerned.

64. If the claimants are right that s.108(6) is clear and unambiguous in requiring such notice, I would conclude that this is a case of 'legislative incoherence' … and a case of inadvertence. However, I do not think that this is the case. As a matter of construction, and taking the provisions of s.108(6) and Schedule 18 Environment Act 1995 together, I do not consider that … the word 'and' at the end of s.108(6)(a) requires notice to be given in the cases set out in (b). In the case of residential premises, except in an emergency, any entry by virtue of the section can only be effected after the expiration of at least seven

> days' notice of the proposed entry given to a person who appears to the authorised person in question to be in occupation of the premises. The effect of Schedule 18, however, is that such notice is not required where entry is effected under the authority of a warrant by virtue of Schedule issued under conditions (c), (d) and (e) of paragraph 2(2) of the Schedule.
>
> 65. I do not agree with the claimants that this involves the reconstruction of the statutory provisions. The above gives a sensible construction to the provisions as a whole, and in my respectful view this reading can be reached as a matter of construction …."

16. The judge went on to state that in the alternative he would hold that an obvious drafting mistake had been made and that the mistake could be corrected by the court reading words into the section, in accordance with the approach laid down in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586. He said that the gist or substance of the alteration was as set out in the passage of his judgment dealing with his preferred construction of the statute.

The true construction of section 108(6)

17. In broad agreement with the submissions made by Mr Thomas QC for the appellants, I do not think that the relevant provisions are open to the construction that Blair J placed upon them. That construction does not give proper effect to the language of section 108(6) or to the relationship between that provision and schedule 18.

18. A person may be authorised under section 108(1) to exercise, for the stated purposes, any of the powers set out in section 108(4), including the power to enter any premises. Section 108(6), however, limits the circumstances in which the power of entry may be exercised in relation to residential premises. It provides that entry by virtue of section 108 shall only be effected (a) after the expiration of at least seven days' notice to a person who appears to be in occupation of the premises, *and* (b) *either* (i) with the consent of a person who is in occupation of the premises, *or* (ii) under the authority of a warrant by virtue of schedule 18. The natural meaning of the subsection, having regard to its language and lay-out, including the linking "and" between paragraph (a) and paragraph (b), is clear: in every case there must be at least seven days' notice before entry may be effected, and entry may be effected after the expiry of the notice period only with the consent of an occupier or under the authority of a warrant.

19. Equally clear on the face of it is that the power of a justice of the peace to issue a warrant under schedule 18 is supplemental to the powers conferred by section 108 and does not alter the conditions subject to which the powers under section 108 are exercisable. By

section 108(14), schedule 18 has effect "with respect to the powers of entry and related powers which are conferred by this section". Paragraph 2 of schedule 18 relates to the exercise of a "relevant power", which is defined in paragraph 1(1) of the schedule as "a power conferred by section 108 of this Act, including a power exercisable by virtue of a warrant under this Schedule". By a warrant issued under paragraph 2, a justice of the peace authorises an enforcing authority "to designate a person who shall be authorised to exercise the power" in relation to the relevant premises. Thus, it is section 108 which confers the power of entry and which specifies the conditions subject to which it may be exercised, including the circumstances in which it is exercisable by virtue of a warrant; whereas the relevant function of schedule 18 is to specify the conditions that must be met in order to obtain such a warrant. The judge rightly rejected the Agency's contention that a warrant issued under schedule 18 confers a stand-alone power of entry, free from the conditions laid down in section 108.

20. The point of difficulty in the case arises out of the fact that, in relation to residential premises, section 108(6) on its face requires seven days' notice to be given and to expire before entry may be effected (except in an emergency), whereas paragraph 2(2) of schedule 18 allows a warrant to be issued in circumstances where notice would at best be pointless or undesirable (conditions (c) and (d)) and at worst would defeat the object of the proposed entry (condition (e)). This leads to the argument that section 108(6) should in some way be given a different meaning from that which it bears on its face, so as to align the conditions for the exercise of the power of entry under section 108 with the conditions for the issue of a warrant under schedule 18. But the routes by which it is sought to produce that result are in my view so strained as to go beyond any legitimate process of statutory interpretation.

21. It should be stressed that the issue relates only to residential premises. The conditions in paragraph 2(2), including conditions (c), (d) and (e), are capable of applying without difficulty in relation to non-residential premises, which, in view of the pollution control purposes for which the powers under section 108 are conferred, can be expected to account in practice for the great majority of premises in relation to which the powers are exercisable. It follows that if section 108(6) is given its natural meaning, it does not render anything in paragraph 2(2) of schedule 18 otiose.

22. Blair J concluded at paragraph 64 of his judgment that the effect of taking the provisions of section 108(6) and schedule 18 together is that the notice requirement in paragraph (a) of section 108(6) does not apply where entry is effected under the authority of a warrant issued under conditions (c), (d) and/or (e) of paragraph 2(2) of the schedule. I cannot accept that construction of the statute. For reasons I have already explained, schedule 18 is supplemental to the section 108 powers and cannot alter the conditions subject to which those powers are exercisable. Moreover, the judge's construction does excessive violence to section 108(6) itself, by treating the linking "and" between subparagraph (a) and subparagraph (b) as if it read "or", or as if it did not exist at all. On that approach, section 108(6) would permit entry on three entirely separate bases: (i) the giving of

seven days' notice, (ii) with the consent of the occupier, or (iii) under the authority of a warrant. That, however, is self-evidently not what the subsection says or how it is structured.

23. Mr Hockman QC, for the Agency, sought to support the judge's approach, submitting that there is a clear overlap between the provisions of section 108(6) and schedule 18 in their application to the same set of circumstances, that it is necessary to make a choice as to which is to prevail, and that once a choice has to be made it is obvious that it should be made in favour of the words of the schedule, so that section 108(6) must be read as being subject to the words of the schedule. That line of argument may, as Mr Hockman put it, make "more transparent" what the judge's approach involved, but it does not meet my objections to the judge's approach.

24. Another way in which Mr Hockman put his case was that, as a matter of necessary implication, section 108(6) is to be read as subject to a proviso. He had some difficulty in formulating the implied proviso, but his third and final attempt was a proviso along these lines, to be inserted at the end of the subsection:

> "Provided that notice under paragraph (a) above shall not be required in a case in which a justice of the peace is satisfied that condition (c), (d) or (e) of paragraph 2(2) of schedule 18 is fulfilled."

However desirable that result might be thought to be, I think that to construe the subsection in that way is too big a step, given the general relationship between section 108 and schedule 18. The conditions for the issue of a warrant cannot in my view be introduced into section 108(6) so as to affect the conditions subject to which the power of entry is exercisable.

25. It should be borne in mind in all of this that Parliament has chosen, by section 108(6), to confer special protection on residential premises as regards the exercise of powers under section 108. It has done so by way of a detailed provision. The court should be very slow to read into that provision an implied qualification to the protection that Parliament has conferred. In *R v Inland Revenue Commissioners, ex p. Rossminster Ltd* [1980] AC 952 it was said by Lord Diplock, in relation to statutory powers to enter a man's home or office, that "if the statutory words relied upon as authorising the acts are ambiguous or obscure, a construction should be placed upon them that is least restrictive of individual rights which would otherwise enjoy the protection of the common law" (page 1008D; see also per Lord Wilberforce at page 998A). *A fortiori*, as it seems to me, where the statutory words are clear, the court should not read them as subject to an implied qualification that would make them more restrictive of individual rights. This is all the more important where, as here, the powers are backed up by criminal sanctions for intentional obstruction of the exercise of a power or for failure to comply with a relevant

requirement.

26. Mr Hockman drew attention to the fact that other statutes in the same general field as the 1995 Act have included provision for entry to residential premises without notice, on the authority of a warrant issued on the basis that an application for admission would defeat the object of the entry: see section 91(2) of the Control of Pollution Act 1974; paragraph 2(3) of schedule 3 to the Environmental Protection Act 1990; section 172 of, and paragraphs 1 and 2 of schedule 20 to, the Water Resources Act 1991; and section 31(6) of, and paragraphs 1 and 2 of schedule 2 to, the Radioactive Substances Act 1993. I think it unnecessary to examine possible differences between those statutes and the 1995 Act as regards the purposes for which relevant powers could be exercised or the likelihood of requiring entry to residential premises for those purposes. More important is that in each of the earlier statutes the position is spelled out clearly, by a variety of drafting techniques. They show that if Parliament had wanted to achieve the same result in the 1995 Act, there was no shortage of precedents for the purpose. Yet Parliament chose to adopt a different approach in the 1995 Act, whilst at the same time drawing heavily on the language of the earlier statutes. It is possible that this resulted in a mistake, giving residential premises a greater degree of protection than was intended, but I come back to the point that in a context such as this the court should not water down the protection given by the clear words of the statute.

27. That brings me to the alternative basis on which Blair J said he would have reached his conclusion, namely by reading words into section 108(6) in accordance with the approach laid down in *Inco Europe Ltd v First Choice Distribution*. The issue in that case was whether the Court of Appeal had jurisdiction to entertain an appeal against the grant or refusal of a stay in favour of arbitration. In order to find that such jurisdiction existed, the House of Lords read words into the relevant statutory provision. The correct approach was explained by Lord Nicholls as follows (at pages 592C-593A):

> "… It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, *Statutory Interpretation*, 3rd ed. (1995), pp. 93–105. He comments, at p. 103:
>
> > 'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'
>
> This power is confined to plain cases of drafting mistakes. The

> courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation ….
>
> Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v. Schindler* [1977] Ch. 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation ….”

28. I am not satisfied that the three conditions specified by Lord Nicholls are met in this case. The court cannot be “abundantly sure” that the intended purpose was to allow entry into residential premises on the authority of a warrant without the giving of seven days’ notice, or that by inadvertence the draftsman and Parliament failed to give effect to that purpose. If an error was made, it may be that that the court can be sufficiently sure of the substance of the provision Parliament would have made if the error had been noticed, but I have some doubts even about that: a proviso along the lines suggested by Mr Hockman, importing the conditions for the issue of a warrant into the conditions for the exercise of a power under section 108, strikes me as an unlikely approach. In any event, I think that the tailpiece to Lord Nicholls’ observations bites on this case: the subject matter is the power of entry to residential premises, which, as indicated above, calls for a strict interpretation of the statutory provisions and is not an appropriate context in which to read words into the statute in order to correct a legislative error. If error there is, it can and should be corrected by Parliament, not by the court.

29. I should mention for completeness that one of Mr Thomas’s submissions was that to construe section 108(6) of the 1995 Act as requiring notice in every case does not leave the Agency without adequate investigatory powers, since in an appropriate case (where

there are reasonable grounds to believe that an indictable offence has been committed, etc.) the Agency can request the police to apply for a search warrant under Part II of the Police and Criminal Evidence Act 1984, authorising entry without notice. From the point of view of the Agency, I do not regard that as a satisfactory alternative to the exercise of powers of its own under section 108 of the 1995 Act. But in any event I do not consider the point to assist in relation to the correct construction of section 108(6).

Conclusion

30. Accordingly, I would allow the appeal and, subject to any further submissions of counsel as to the appropriate relief, would allow the appellants' claim for judicial review on the issue considered in this judgment.

Lord Justice Floyd :

31. I agree.

The President of the Family Division :

32. I also agree.