

Section 108 Environment Act 1995 - 2020

All officers who work with section 108 Environment Act 1995 are advised to read the following **carefully**, given the implications of *Walker v Chelmsford CC*, decided late last month in the High Court.

Walker v Chelmsford CC [2020] EWCH 635 (Admin):

Summary -

This was a decision made in the High Court in March 2020.

The issue related to whether the specific power under section 108(4)(j) Environment Act 1995 could be used other than on premises.

The appellant began by claiming that the court should have regard to the original heading, as this was entitled "Powers of Entry".

However, the court noted that section 108 comes within Part V of the Act which is entitled "miscellaneous, general and supplemental provisions" and, although originally it had the subheading *Powers of entry*, this was changed in March 2018 to *Enforcement*.

The court noted:

"Any limitations on the powers only appear discretely in a) – (m) of subsection 4. The powers are varied. The first two powers expressly relate to entry onto premises. Under a) there is a power to enter premises if necessary and under b) there is a power on entering premises for the authorised person to take other individuals, equipment or materials with him. The third power in c) is not expressly limited to entering premises. Instead, it is worded as follows "to make such examination and investigation as may in any circumstances be necessary". The fourth power equally does not require entry onto premises...

The power in (j) with which this case is principally concerned is "to require any person whom he has reasonable cause to believe to be able to give any information relevant to any examination or investigation under paragraph (c) above to answer (in the absence of persons other than a person nominated by that person to be present and any persons whom the authorised person may allow to be present) such questions as the authorised person thinks fit to ask and to sign a declaration of the truth of his answers". The provision does not expressly limit the exercise of the power it confers to entry onto premises, albeit it expressly refers to a face-to-face discussion, potentially with limited individuals being present.

The power in (k) is, again, not limited to entry on premises. It enables the authorised person to require the production of relevant records, including extracts kept on computers. These can be inspected and copies can be taken. Similarly, the power in (l), which enables the authorised person to require assistance from others for the exercise of these powers, is not limited to entry on premises."

It was noted that the provisions of section 20 of the Health and Safety at Work etc. Act 1974 (HASWA) are largely identical. It was also noted that a similar argument was raised in *R (on the application of Wandsworth LBC) v South Western Magistrates' Court* [2003] EWHC 1158 (Admin) wherein it was held that the equivalent power under HASWA was to be construed widely and was *not* limited to use only on premises.

The court went on to note: *“we agree with the respondent that the breadth of the powers in section 108 (4) is wholly inconsistent with the contention of the appellant that they are, in their entirety, exercisable only by someone who has entered particular premises”*.

At this point one might expect that Chelmsford CC was destined to win this argument.

Unfortunately, although the Court accepted that section 108 is not generally limited to use on premises, the Court went on to distinguish this section from the power provided for by HASWA insofar as the Environmental Protection Act already contained a provision under section 71 to enable questions to be put in writing. It was put to the Court that it would be inconsistent to have two versions of the same power and this argument held considerable sway with the Court.

The Court was asked three questions:

1. Could the section 108(4)(j) power be exercised other than on premises?

For the reasons summarised above, particularly taking into account its prior existence as section 69 EPA and the existence of section 71 EPA, the Court found that this particular subsection is limited to use on premises only. The same reasoning does not apply to section 108(4) as a whole and in particular does not appear to apply to e.g. section 108(4)(k) or (l).

2. Was Chelmsford CC as a waste collection authority an enforcing authority for the purpose of investigation into offences pursuant to section 33 EPA?

The Court found decisively in favour of the local authority and found that a waste collection authority is an enforcing authority in this context.

3. Was it permissible to request this information, as it was suggested that this was an invitation to admit to wrongdoing?

The Court found that the questions were lawful and sufficient safeguards were in place in terms of PACE and section 108(12) Environment Act 1995.

Commentary –

This case does at least confirm that section 108 Environment Act 1995 is not generally limited to use on premises. It further confirms that local authorities investigating Part II EPA matters are enforcing authorities under this section, and that a requirement to cooperate

and answers questions that may be self-incriminating is not in principle an improper use of these powers.

However, this case presents significant difficulties for local authority enforcing agencies, given that local authorities tend primarily to investigate perpetrators who do not operate from particular business premises. This leads to the question, what are the premises? This issue was acknowledged by the Lord Justice Fulford in this case (see below), wherein he envisaged officers potentially leapfrogging from one premises to another.

Further, section 71 Environmental Protection Act 1990 is worded as follows –

*(2) For the purpose of the discharge of their respective functions under this Part—
(a) the Secretary of State, and
(b) a waste regulation authority,
may, by notice in writing served on him, require any person to furnish such information specified in the notice as the Secretary of State or the authority, as the case may be, reasonably considers he or it needs, in such form and within such period following service of the notice or at such time, as is so specified.*

(2A) A waste collection authority has the power referred to in subsection (2) for the purpose of the discharge of its functions under sections 34B and 34C above.

Section 30 of the Environmental Protection Act 1990 provides that:

***(1) Any reference in this Part to a waste regulation authority—
(a) in relation to England is a reference to the Environment Agency;***

Sections 34B and 34C specifically relate only to seizure of vehicles. Accordingly, section 71 is not a simple alternative. It was suggested in this case that local authorities would need to ask the Environment Agency to use its power under section 71.

The judgment in Walker v Chelmsford CC has far-reaching consequences but the High Court has refused to certify the judgment as a matter of national importance. It is not likely to be appealed.

The Potential Silver Lining –

Lord Justice Fulford may well have put the solution directly into the hands of the Secretary of State, as follows:

“I accept that this interpretation may be considered as a partial impediment to the work of enforcing authorities by imposing a barrier to the investigation of environmental issues by a relevant local authority. **It may, for instance, leave the authorised person with no choice but to enter a range of premises in order to perform his or her duties regarding pollution and flood risk, if this is believed to be “necessary” in order to exercise the power in section 108 (4) (j) of requiring an individual to answer questions. Alternatively, the Environment Agency can be asked to make the request in writing pursuant to section 71** under its waste

regulation functions. **There is, however, a straightforward solution should this be a legitimate concern. By section 108 (4) (m) the Secretary of State can confer powers for the purposes of section 108 (1) and (2) by regulation. This may be a necessary and sensible step in light of contemporary circumstances.**"

We would suggest that member authorities join with Chelmsford CC in lobbying the Secretary of State. Given that we currently have little choice during the lockdown but to regulate at arm's length and given the massive rise in fly tipping we are currently experiencing, there appears to be no better time to get the Secretary of State's attention.

In the meantime, authorities should note that questions to be asked of suspects must now be asked at the premises of the persons concerned. Accordingly, at least for the time being, the benefit of the use of section 108(4)(c) and (l) to require persons to attend offices to pursue the investigation is more limited.

However, please note that the above case has NOT rendered the use of section 108(4) unlawful in case of a requirement issued to a person to assist by attending at Council offices. Convictions on the grounds of failure to attend for the purpose of IUC are unaffected. If the person has been invited to attend IUC then section 108(4)(c) and (l) remain unaffected and have indeed been confirmed by this case to be available for use off premises. If the intent of the use of the power is to secure a situation where an IUC may take place, then this remains unaffected.

Note the Court's observation in relation to (l):

"Similarly, the power in (l), which enables the authorised person to require assistance from others for the exercise of these powers, is not limited to entry on premises."

The above observation would appear to add strength to the argument that officers would do better to insist that suspects make themselves available, albeit solely by way of PACE interview. Note that section 108(4)(c) and (l) are expressly available and section 110(2)(b) provides:

It is an offence for a person, without reasonable excuse...

(b) to fail or refuse to provide... assistance... reasonably required by an authorised person in the execution of his powers or duties under or by virtue of that section.

This cannot be read as a refusal to provide assistance only if required in a face to face situation on premises, given that the Court has now expressly provided that the investigation and assistance powers may be exercised whether on premises or otherwise. Use of this power cannot go so far as to require answers to questions but is available to require a person to assist in furthering the investigation, if done where considered necessary and proportionate.

Use of powers in this manner is consistent with the Walker judgment and also with the relevant offence provisions.

Section 110(2)(b): "It is an offence for a person, without reasonable excuse...

(b) to fail or refuse to provide... assistance... reasonably required by an authorised person in the execution of his powers or duties under or by virtue of that section."

Section 110(2)(c): "it is an offence to prevent any other person from appearing before an authorised person".

If the person is required to attend, then the person may be interviewed under PACE, but there will be no opportunity at Council offices to follow up with questions under section 108(4)(j).

Production of documents may still be required at a distance by notice, as this is contained in section 108(4)(k) and this subsection has also been confirmed to be available whether used on entry to premises or otherwise.

Also, please note that local authority powers remain to e.g. attend at a renovation site or at the premises of a product supplier and ask questions or require production of documents (e.g. sales receipt information).

It is reassuring that the Court appears to have agreed with our general analysis of section 108 as a whole, but it is very unfortunate that this judgment has nevertheless also managed to leave us with a significant hole in relation to subsection 108(4)(j).

We cannot stress how strongly we would urge our local authority readers to take up Lord Justice Fulford's invitation to lobby the Secretary of State to correct this flaw. If any situation highlights the need for local authorities to be able to conduct initial enquiries at a distance it is the current emergency and consequent leap in fly tipping across the country.