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Neutral Citation Number: [2021] EWHC 703 (Admin)

Case No: CO/2368/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2021

Before :

MRS JUSTICE LIEVEN

- -

Between :

The Queen on the Application of
CROYDE AREA RESIDENTS ASSOCIATION

Claimant

and

NORTH DEVON DISTRICT COUNCIL

Defendant

and

PARKDEAN HOLIDAY PARKS LIMITED

Interested Party

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- -

Mr Richard Turney and Mr Alex Shattock (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr Peter Wadsley (instructed by **North Devon District Council**) for the **Defendant**
Mr James Maurici QC and Ms Heather Sargent (instructed by **Herbert Smith Freehills LLP**) for the **Interested Party**

Hearing dates: **4 and 5 March 2021**

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Approved Judgment

Mrs Justice Lieven DBE :

1. This is a short judgment setting out my conclusions on the two outstanding issues on the order; whether the costs cap should include VAT and permission to appeal. The background to the case is fully set out in my judgment dated 19 March 2021.

2. After procedural orders had been made earlier in the proceedings by Sir Ross Cranston and Holgate J, the parties agreed a consent order on 19 November 2020 in the following terms:

> *"Any liability of the Defendant and Interested Party to pay costs in this action to the Claimant is capped at £35,000 + VAT (£42,000)." The reasons for this were set out in the recitals namely "AND UPON the Claimant applying, in its claim form and within its statement of facts and grounds, for an Aarhus Protective Costs Order within the meaning of 45.43 of the Civil Procedure Rules AND UPON the parties not contesting that this is an Aarhus claim".*

3. The Interested Party now applies for the costs order to be varied so that the costs liability is limited to £35,000 inclusive of VAT, i.e. with a totally liability of £35,000 not £42,000. The basis for this application is that on 13 January 2021 the Court of Appeal handed down judgment in *R (Friends of the Earth) v Secretary of State for Transport* [2021] EWCA Civ 13. The judgment concerned precisely the issue of whether CPR45.43 provided for the costs cap to be inclusive or exclusive of VAT.

4. At [33] – [36] the Court set out its reasons for finding that the cap was inclusive of VAT:

> *"First, that is the natural meaning of the words used in those provisions. The figures are set out as absolute amounts, without qualification.*
>
> *34. Secondly, this construction is supported by the history of the consultation exercise and the response to it by the Government in the process which led up to the enactment of CPR 45.43.*
>
> *35. Thirdly, it does not seem to us that this would impede or frustrate the implementation in domestic law of the Aarhus Convention. That Convention simply requires that the costs of environmental litigation such as this should not be prohibitive. It does not require a contracting State to specify a particular ceiling, still less to state whether it is inclusive or exclusive of VAT.*
>
> *36. Fourthly, the fact that the regulations applicable in Northern Ireland expressly provide for the ceilings to be exclusive of VAT does not assist FoE. Indeed, it suggests that, when the relevant legislative body wished to make the point clear, it was able to, and did so.*

> *37. We do not consider that what is said in Practice Direction 44, paras. 2.7-2.8, has any material bearing on the true construction of CPR 45.43."*

5. Mr Maurici, for the Interested Party, argues that the plain intention of the consent order was to follow CPR 45.43. At the time it was entered into, the general understanding was that the cap was exclusive of VAT and that is why the order was framed in the terms it is. He argues that the cap should now be varied to reflect the judgment in *Friends of the Earth*.

6. Mr Turney argues that *Friends of the Earth* was not concerned with the construction of the costs order and here the costs order is entirely clear that VAT is excluded. He also argues that the application is made too late and to vary the order now would be to undermine the certainty that the costs capping regime is intended to provide. He says any such variation to a consent order should only be made most exceptionally.

7. Further, he argues the variation would not reflect the purpose of the costs cap, including the resources of the party, and that it would not be just upon the Claimant.

8. In my view, the costs cap should be varied. It is plain that the consent order was phrased as it is because of the then understanding of CPR45.43 which was subsequently changed by the Court of Appeal in *Friends of the Earth*. Mr Maurici is applying for the order to be varied and not construed, and therefore the argument that *Friends of the Earth* was not concerned with construction is beside the point.

9. In circumstances where the order would not have been agreed to exclude VAT if it had come after the Court of Appeal decision, it appears to me that the fair course is to vary the order. That will make the order reflect the proper meaning of the CPR and what must have been the intention of the parties at the time. There is no suggestion that the Claimant would not have proceeded if their ability to recover costs had been restricted by £7,000 and it would be illogical for them to so argue given that they were accepting the risk of having to pay the IP's capped costs if they had lost.

10. The fact that the Claimant is a local residents group and the Interested Party a company goes to the granting of the cap at the level in the CPR in the first place, it does not go to the VAT issue, which was decided by the Court of Appeal.

11. For these reasons I will vary the consent order.

12. On permission to appeal, although the statutory bar issue is an interesting one, I think it is appropriate to leave the decision about permission to appeal to the Court of Appeal. On the delay point, I consider that to be a matter entirely within my judicial discretion having applied the principles in *Thornton Hall*.