

Neutral Citation Number: [2023] EWHC 2356 (Admin)

Case No: CO/830/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
THE KING ON THE APPLICATION OF:

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: Thursday, 14th September 2023

Before:

MRS. JUSTICE COCKERILL

Between:

CHRIS WHITE

Applicant

- and -

(1) MAYOR OF LONDON

Respondents

(2) TRANSPORT FOR LONDON

- and -

**(1) SECRETARY OF STATE FOR THE
ENVIRONMENT, FOOD & RURAL AFFAIRS**
(2) SECRETARY OF STATE FOR TRANSPORT
**(3) SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

**Interested
Parties**

MR. PHILIP COPPEL KC (instructed by **Tilbrooks Solicitors**) for the **Applicant**
MS. CHARLOTTE KILROY KC, MR. DAVID HEATON and MS. SOPHIE BIRD
(instructed by **TfL Legal**) for the **Respondents**

APPROVED JUDGMENT
ON APPLICATION

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MRS. JUSTICE COCKERILL:

Introduction: Interim Relief

1. This matter was originally scheduled to be the hearing of a renewed application for interim relief. The background to the matter is set out in some detail in the skeleton arguments, but in broad terms, relates to the decision of the Mayor of London and Transport for London to make London-wide the Ultra-Low Emission Zone or ULEZ, which came into effect on 29th August of this year.
2. The case has a fairly long and complex history. In the barest outline:
 - i) The claim was brought on 23 February 2023 (one day before the 3 months in CPR r 54.5(1) expired;
 - ii) The first application for interim relief was made in the Claim Form in March 2023 and refused in an order of 13 April by Sir Ross Cranston. At the same time he dismissed three of the grounds, and made an order staying two other grounds pending a decision in a lead case, with automatic strike out of the grounds unless submissions were lodged within a short period after that lead decision.
 - iii) An application to renew permission was made in late April, incorporating new grounds. Hearing of the renewal was delayed by the lack of a compliant bundle. On 20 July Swift J indicated that renewal would be heard alongside any submissions on the stayed grounds 1 and 5. On 27 July the Administrative Court Office made an order setting out directions for that hearing;
 - iv) On 28 July 2023 the claim in the lead case was dismissed;

- v) On 9 August 2023 the claimant sought to set aside that order and the 13 April order;
 - vi) Further applications for interim relief were made on 9 August 2023 and 23 August 2023 and were refused on the papers on 24 August 2023 by Sweeting J, including because there was no material change in circumstances since the previous application.
 - vii) By Bourne J's 25 August 2023 Order the renewal of the 9 August application and the 23 August 2023 applications for interim relief were listed for oral hearing today.
3. As matters have transpired, the purpose for which this hearing was originally listed, i.e. to deal with that interim relief application, is no longer live. The claimant no longer pursues the application for interim relief. He is right not to do so. Even ignoring various other arguments about whether the substantive claim survives, to which I shall return in due course, the position appears to be that regardless of the merits of the claim, it is absolutely unarguable that the balance of convenience would point in favour of the grant of an injunction at this point.
4. That is the case because, in the first place, of what one might call standard "balance of convenience" factors. To give but a few examples, damage or refund of charge would be an adequate remedy for those in the class the claimant represents, whereas not for the defendant (as damages would be considerable with revenue being estimated at £550,000 a day), and the claimant shows no signs of being good for that money or being in a position to offer a substantial cross-undertaking in damages.

5. Secondly, and most to the point in these circumstances, the claim was brought somewhat late in the day, at the best of times, and this hearing now happens (as the date of this judgment indicates) after the charge had commenced to operate. The correlate of that fact is that the costs involved in actioning the injunction would be enormous. Added to that in fact the injunction, as sought, would be impossible to be granted because it was aimed at suspending the charge before it came into force.
6. There is another problem in relation to the interim relief application, which is that so far as this is or was a renewal of earlier applications for interim relief, it was a second or third application for the absolute same relief as had been made in earlier applications, applications which were dismissed, in respect of which there was no appeal, and in respect of which there was no material change of circumstances so as to justify a renewal of the application, see *Chanel v Woolworth* and similar authorities. The application for interim relief was, therefore, unarguable; and indeed the application for interim relief was seen by Sweeting J when he last saw it, as abusive.
7. Accordingly, the application for interim relief stands dismissed.

The Issues

8. The question which remains is that of what to do with this hearing, which was listed for an hour and a half.
9. The dispute between the parties has been that the defendants say that I should deal with the remaining application for permission substantively. The claimant has disputed that contention, saying, at paragraph 8 of its skeleton argument, that this is a matter which is effectively under the aegis of the Administrative Court Office, who have said that they would notify when the application was to be heard. It is said it is

not for the parties to usurp the Administrative Court Office's function or to jump the queue. There was no renewal bundle ready. The order which was made by the Administrative Court Office provided for skeleton arguments for the renewal hearing to be filed and served not less than seven days before the date listed for the hearing and it was not possible to comply with that.

10. It is said that the defendants should, if they wanted renewal to be considered today, have sought the claimant's consent in sufficient time that the relevant paragraphs of the Administrative Court Office's order could be complied with or, if it was a matter of agreement between the parties, that this was the right way forward and notify the court what was being proposed and get an amended order.
11. Overall, the claimant says that this approach up-ends the order of 27th July and pre-empted the listing office, that it was not a matter for the parties to decide when the matter should be renewed and that under the CPR, at the bare minimum, the rules say that parties will be given at least two days' notice, that if a particular party wishes to obtain a particular hearing date, they should approach the Administrative Court Office, both by the rules and the guide, and that there was no application to revoke or amend the order providing for a skeleton seven days in advance. It is said that first suggestion of this approach came on 30th August, in prime holiday season, a letter which did not come to the solicitor for the claimant's attention until sometime later.
12. In essence, it is really said that the claimants are not in a position to deal with renewal today and it would be unfair to them to do so.
13. The claimant also contends that I should not deal with the other procedural question of whether the claim or part of it is in any event struck out for default in compliance with an order of 13th April of Sir Ross Cranston.

14. In the course of submissions, I have asked Mr. Coppel KC what actually does remain live of the renewed application for permission, because beyond any doubt, what this hearing should achieve is clarity on that point.
15. What appears to be the position is that the claimant is seeking to pursue what it calls "Ground 1 as developed in greater detail" which is what the defendants call "Ground 8". What is common ground is that the claimant is not pursuing any of the other grounds, so the grounds as originally sought to be renewed, that is Grounds 2, 3 and 4, are not sought to be pursued. Ground 5, which fell within the Cranston Order of 13th April, is also not sought to be pursued.
16. The defendants have said that it is not possible to characterise the new grounds as within the ballpark of what is originally argued and I should take the view that the grounds which are now sought to be pursued are not actually a development of Ground 1. They are an amendment or replacement of Ground 1, which ought to have been pursued by way of an amendment at an earlier stage, if at all.

Discussion

17. This claim is one which has absorbed to date a good deal of time and costs. The reality is that the bulk of the original grounds are no longer pursued. What this hearing must at least establish is an order saying that those grounds are no longer pursued.
18. But further than that, in particular where more of the court's resources than should have been used to date have been used inter alia by making the repeated applications in relation to interim relief, this hearing should be used to decide such case

management and other issues as are possible unless to do so would be procedurally unfair. That means at least this hearing will tidy things up as best as possible.

19. On the substantive permission application, I entirely see the point made by Mr. Coppel for the claimant, that consideration of the details of the merits of any renewal application might be procedurally unfair and substantively unfair to the claimant because of the existing order which has not been revoked, varied or amended. The claimant was entitled to expect a period of time in which to put in a skeleton argument dealing with merits of the live issues.
20. However, the question is what live issues there are for such a skeleton. As I have noted, we can at least set out which renewal grounds (Grounds 2, 3 and 4) are not pursued. But that takes us to the question of the status of the non-renewal grounds, Grounds 1 and 5 and in particular Ground 1, which on Mr. Coppel's analysis is actually what he wants to pursue by way of renewal. There is here the procedural question as to whether those have been struck out.
21. Pausing here, as for the grounds no longer pursued, including Ground 5, it would be a triumph of formalism if one were to say that the claim based on those grounds cannot be refused or dismissed because skeletons have not been served, because no skeleton would deal with those points.
22. Therefore, the question is, since the only ground which appears to be pursued is the one which is either a development of Ground 1 or is a new ground, whether we should be able to deal with the position, to the extent of ascertaining the position on that ground. While Mr. Coppel has urged me to say that I cannot deal with it today, or I should not deal with it today because it is covered by Sweeting J's order, paragraph 5 which provides for this issue to be determined at the renewal hearing, I can, despite

careful reflection, see no real basis on which this simple question requires further consideration before it can be dealt with and Mr Coppel struggled to suggest that further time for reflection and preparation was necessary on this point.

23. The first issue is: has that claim, Ground 1, been struck out? The position is this: on 13th April, Sir Ross Cranston refused permission on Grounds 2, 3 and 4. He stayed consideration of Grounds 1 and 5, pending a decision in what is either known as the *642* case or the *Borough* case or the *Hillingdon* case.

24. The wording of the order, which is characteristically clear, provided that:

“The claimant's application for permission on grounds 1 and 5 shall be stayed pending a final decision of this Court on the judicial review, CO/642/2023 [the Borough Claim]. The claimant shall, within 14 days following the date on which a final decision in that case is made,

(a) inform the Court, the defendants and the interested parties whether he intends to pursue grounds 1 and 5; and

(b) if such an application for permission is to be pursued, file and serve written submissions in support of that application. If that is not done the case will be automatically dismissed.”

25. The position after this is that, in terms of timing, the *Hillingdon/Borough/642* claim was dismissed by Swift J on all grounds by his judgment [2023] EWHC 1972 (Admin) on 28th July 2023. On 9th August, the claimant filed an application notice requesting that an order of 27th July by the Administrative Court Office be set aside, that the 29th August date for the commencement of the expanded ULEZ be suspended, i.e. a renewal of the application for interim relief, that TfL answer what was somewhat generously called a Part 18 request, dated 7th August 2023, and that the timetable set out in the order of 27th July 2023 should commence 14 days after the TfL or Department of Transport supply the information in the Part 18 request.

26. To short-circuit matters, I note here that the Part 18 request has been dismissed. That dismissal has not been appealed.
27. The claimant did not appeal Sir Ross Cranston's decision on Grounds 1 and 5. The claimant did not comply with Sir Ross Cranston's decision. What has been said before me today is that the application of 9th August 2023 should be looked at as compliance with Sir Ross Cranston's Order as regards provision of submissions in support of grounds 1 and 5. However it plainly is not compliance with Sir Ross Cranston's decision. It can on no analysis be seen as service of submissions on those points.
28. The only document which might even conceivably be said to be a substantive answer to what Sir Ross Cranston Order is the Amended Statement of Facts and grounds, which was served on 25th August. That is of course well after the 14-day period set out in the Cranson Order. It follows, therefore, that the claim, as regards Grounds 1 and 5 in this matter, was automatically dismissed 14 days after the judgment in the *Hillingdon/ 642/ Borough* case.
29. As I have noted, the only reason the other grounds (Grounds 2-4) were still arguably extant at the time was that the claim has been handled somewhat chaotically, with bundles for renewal not being served, extra applications such as the 9th August application being made for interim relief rather than renewing the original application for permission. But, has matters have transpired, those other grounds are now no longer pursued, so it is of little moment that they were arguably extant.
30. That then takes us to the question: if Ground 1 was automatically dismissed, what is the position on Ground 8? There are two possibilities. The first is that Mr. Coppel is right and that Ground 8 is effectively a development of Ground 1. If so, it is a

development of a ground which had been struck out. Thus if it is the same ground, it has been struck out.

31. The other possibility is, as the Respondents say, that it is a new ground. Parenthetically I observe that it appears to me in substance that that is a rather more likely analysis, because although it does involve an *ultra vires* argument, it is not remotely the same *ultra vires* argument which appears to have been originally put forward; and also testing it by reference to whether the original answer on behalf of the Respondents would have been capable of responding to the amended grounds, it is obvious that it could not.
32. So on that basis, if (as it appears) it is an entirely different ground, that is a new or proposed, as the title suggests, amended ground, the problem is that there has been, and was, no application to amend the Statement of Facts and Grounds. No application has been made at any point, contrary to the requirement in Practice Direction 54A, paragraph 11.1, the Administrative Court Guide, paragraphs 7.11.1 and as indicated in the case of *AB v Chief Constable of Hampshire Constabulary* [2019] EWHC 3461 (Admin) paragraphs 112-114, judgment by Dame Victoria Sharp, the President of the King's Bench Division.
33. Accordingly, and as the Administrative Court Guide makes clear, in relation to such applications for amendment or to substitute or rely on further grounds, any such application should have been made by application notice for an order, using the interim applications procedure set out at paragraph 13.7 of the Administrative Court Guide. That has not been done.
34. For this reason, I come to the conclusion that there is no application to amend Ground 1 to or to substitute Ground 8.

35. Where does that leave us? Even if an application to amend were now to be made, there is no real prospect of being permitted to argue Ground 8 in circumstances where two of the other grounds have been automatically dismissed and the remainder are no longer being pursued. The position is that the claim, such as it was originally constituted, has fallen to the ground and must be dismissed. The application to amend would come considerably after that, considerably after the scheme has come into effect and a very great deal of time after the three-month long stop period, and it is a long stop period, provided by CPR 54.
36. In the circumstances, therefore, it seems to me that the correct answer to this case, simply in terms of housekeeping the matter in an efficient manner in line with the overriding objective is to say that:
- i) The application for interim relief is dismissed, as is common ground;
 - ii) Grounds 1 and 5 of the original Statement of Facts and Grounds are held to have been dismissed automatically in line with Sir Ross Cranston's Order of 13th April 2023;
 - iii) The remaining grounds, 2, 3 and 4, as they were characterised in the defendants' response to the original statement of facts and grounds, are also dismissed.
37. In those circumstances, the claim is dismissed.

(For continuation of proceedings: please see separate transcript)