



Neutral Citation Number: [2023] EWHC 2459 (Admin)

Case Nos. AC-2023-LDS-000092
CO/1251/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
SITTING IN LEEDS

Thursday, 5 October 2023

Before:

MR JUSTICE FORDHAM

Between:

KIRKLEES COUNCIL

Claimant

- and -

SECRETARY OF STATE FOR TRANSPORT

Defendant

- and -

(1) LOVELL PARTNERSHIPS

Interested

(2) UPPER DEARNE VALLEY

ENVIRONMENTAL TRUST

Parties

Ruth Stockley (instructed by Kirklees Council) for the **Claimant**

Katharine Elliot (instructed by Government Legal Department) for the **Defendant**

The **Interested Parties** did not appear and were not represented

Hearing date: 5.10.23

Judgment as delivered in open court at the hearing

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge from the ex tempore judgment delivered in open court.

MR JUSTICE FORDHAM:

Introduction

1. On 8 February 2023 the Defendant (“the Secretary of State”) made the Stopping Up of Highway (Yorkshire & Humber) (No. 5) Order 2023 (“the 2023 Order”). A “stopping up” order restricts public use of a highway. The 2023 Order was made pursuant to section 247 of the Town and Country Planning Act 1990 (“the 1990 Act”). It was to take effect from 23 February 2023. It authorised the “stopping up” of a 25 metre stretch of highway at Skelmanthorpe. The stated purpose of the 2023 Order was the enabling of development to be carried out in accordance with a January 2019 planning permission whose October 2022 reserved matters approval bears the reference 2021/61/94622/E. Background can be found in the public domain by Googling that reference.
2. The 2023 Order was preceded by statutory notice. The Claimant (“the Council”) was a statutory consultee and had lodged an objection on 6 January 2023. The objection raised points about the impact on public rights of way absent a ‘replacement highway’ (ie. an alternative footpath). The Council’s position throughout has been that the acceptability of a stopping up order depends on an ‘alternative highway’ to accommodate public rights of way. The Council’s objection had been maintained by it, including when the Secretary of State had purported on 7 February 2023 to reject it as not raising “valid” grounds.
3. By statutory review proceedings, commenced on 5 April 2023 within the prescribed 6 week period (section 287 of the 1990 Act), the Council has asked the High Court to quash the 2023 Order. Four grounds of challenge were pleaded in the claim. Ground 1 is that the Council had made “an objection from a local authority” for the purposes of section 252(4) and (5) of the 1990 Act, with the legal consequence that the 2023 Order could not be made without there first being a local inquiry (see section 252(4)(a)). Ground 2 is that, by treating the issue of a ‘replacement highway’ as being beyond the scope – or remit – of consideration of the merits of the making a stopping up order, a legal relevancy (expressly reflected in the phrase “the provision... of any other highway” in section 247(2)) had unlawfully been disregarded when the 2023 Order was made. These same points had, in substance, been made by the Council back on 7 February 2023 in response to the Secretary of State’s characterisation of the objection as not being “valid”. There are two further grounds which do not call for comment.

Interested Parties

4. When these proceedings were commenced, the Council named – as “interested parties” – the First Interested Party (“LP”) and the Second Interested Party (“the Trust”). The Secretary of State has not disagreed with that approach. The basis for treating these entities as “directly affected” was as follows. As to LP, it had been the applicant for the January 2019 planning permission, the applicant for the October 2022 reserved matters approval, and the applicant for the 2023 Order. It had been agreed between the Council and LP that lawful implementation of the development, in accordance with the planning permission and reserved matters approval, would require the highway to be stopped up. The purpose of the 2023 Order was to allow LP’s development to be carried out. As to the Trust, it had objected to the proposed order, within the statutory consultation period, making similar impact points about rights of way. These had similarly been treated as

being outside the Secretary of State's 'remit' in deciding whether to make the 2023 Order.

Partial Agreement

5. The grounds of challenge had been clearly articulated in a letter before claim dated 15 March 2023 sent to the Secretary of State and copied to LP. By a letter of response dated 6 April 2023, also copied to LP, the Secretary of State accepted that Grounds 1 and 2 were well-founded and that the 2023 Order ought to be quashed. When the proceedings were commenced, and served on LP and the Trust, the Secretary of State repeated that acceptance in an Acknowledgement of Service dated 5 May 2023. That AOS was served on LP and the Trust. There is an agreed position between three of the four parties. By 4 May 2023 there was a draft Consent Order including a Schedule of Reasons, signed by the Council, the Secretary of State and the Trust. Everything was agreed including that the Secretary of State pay the Council's "reasonable costs of the claim, to be subject to detailed assessment if not agreed". The quantum of those costs has also subsequently been agreed. However, the draft Consent Order and Schedule of Reasons were not signed by LP. An email from LP to the Court, dated 6 April 2023, recorded that LP disagreed with the claim. That email also criticised as "false" certain contents of the claim documents. I will return to LP's ongoing resistance of the claim.

Law and Practice

6. It is appropriate to identify some basics regarding judicial review in the Administrative Court and statutory review in the Planning Court. These are all reflected in the Civil Procedure Rules (CPR) and the Administrative Court Judicial Review Guide, which is freely and publicly accessible in the public domain.
 - i) First, as to substantive determinations on the papers. Where there is an agreed final order including a substantive order such as a quashing order or a declaration, the Court can make that order, on the papers without a hearing, "if satisfied that the order should be made" (PD54A §16.2; PD54D §4.50), based on agreed terms of a draft final order and an agreed statement of the matters relied on as justifying it, together with authorities or statutory provisions relied on (CPR PD54A §16.1; PD54D §4.48; JR Guide 2023 §24.4.1). These must be signed by "all parties" to the claim (PD54A §16.1; JR Guide §24.4.1 and fn.462). Even if the outcome is not agreed, the parties can agree to the process of inviting a Judge substantively to determine the issues and make the appropriate substantive order, without a hearing (see CPR 54.18; PD54D §4.48; JR Guide §11.4.1).
 - ii) Secondly, as to the need for judicial adjudication on substantive orders. Orders such as a quashing order or a declaration will always require a judicial adjudication. That is so, even if "all parties" agree: even an agreed substantive order will be made only if the Court is "satisfied that the order should be made" (PD54A §16.2; PD54D §4.50). This reflects the nature of judicial powers within the public law supervisory jurisdiction (R (Elmes) v Essex County Council [2018] EWHC 2055 (Admin) [2019] 1 WLR 1686 at §74) and the need for the Court to be satisfied that orders it makes can properly be given as a matter of law (R (Meredith) v Merthyr Tydfil County Borough Council [2002] EWHC 634 (Admin) at §7). Agreed costs orders are different, which is why costs may

not require a court order at all (JR Guide §25.5.1) and why, when costs stand alone in an agreed court order, they do not require an agreed statement of justification (PD54A §16.4; PD54D §4.52). The fact that a substantive judicial determination is needed does not mean that an oral hearing is needed, as I have explained.

- iii) Thirdly, as to the position of interested parties. An “interested party” is a person “directly affected” by a claim (CPR 54.1(f); CPR 54.23; JR Guide §3.2.3.1). An interested party, once served with the proceedings, is a “party”. They have rights. They must be identified and served with the claim and other documents. They can – if they wish – participate in the proceedings, whether to support or to resist the claim. They can appeal. They can also be the subject of costs orders (JR Guide §§25.1.1 and 25.6.1). As I have explained, for a substantive determination on the papers, based on an agreed draft order and statement, these must be signed by “all parties” to the claim, “including interested parties” (PD54A §16.1; JR Guide §24.4.1 and fn.462). Substantive determination of contested issues on the papers also requires agreement of all parties as to that process (CPR 54.18; PD54D §4.48; JR Guide §11.4.1).

The Judge’s Order

7. HHJ Belcher (“the Judge”) dealt with the case on the papers on 17 May 2023. She granted permission for statutory review on Grounds 1 and 2, and said it was not necessary to deal with the other grounds at this stage. She gave directions for a brief oral hearing. She observed that the terms of the draft consent order appeared appropriate but the Court should not make it on the papers since it was not agreed by all parties, given LP’s position. She referred to CPR 54.18. She also recorded that no Acknowledgement of Service had been filed by LP. The Judge directed that if LP wished to argue that the substantive order should not be made in the terms agreed by the other parties, LP must file written submissions to support that argument by 4pm on the last business day before the hearing. The Judge described this as a final opportunity for LP to make its position clear, with written submissions and the opportunity to address the Court in person or through Counsel at the hearing. In her written observations within her Order, the Judge drew attention to her doubts as to whether in truth LP had a sufficient interest in these proceedings. As to that, she said that – if it were right that LP had no interest in the proceedings – that could itself be a reason for disposal at a brief oral hearing. The Judge’s approach was fully justified and conspicuously fair.

Extension of Time

8. On 5 May 2023 the Secretary of State filed an application (Form N244) for an extension of time for filing the Acknowledgment of Service, it having come to light that the Claim Form was received a few days earlier than the date used for calculating the 21 day deadline. The Claimant agreed with the extension of time. Nobody has opposed it. The Judge’s Order did not refer to the N244 application or an extension of time. The matter was properly brought to my attention. This is not a permission hearing (CPR 54.9(1)(a)) and there has been no non-compliance by the Secretary of State with any post-permission direction (CPR 54.9(1)(b)). In those circumstances, I do not think permission is needed to participate, nor is any extension of time needed. But – if needed – I would grant either or both without hesitation.

LP's Ongoing Resistance

9. The position in the run up to this hearing was set out by the Council's barrister (Ms Stockley) in an email of 21 September 2023. As with all the communications described above, this was cc'd to LP. Ms Stockley explained that LP had not consented to the terms of the draft consent order but, rather, had sent further email correspondence asking that the substantive order should contain a term that the quashing of the 2023 Order does not take effect for a two-year period, on the ground that the highway is not currently safe for public use. LP's email, dated 12 September 2023, had said that LP's "only request" was that any quashing order allow "a sensible and practical grace period", of "at least two years for any quashing ... to come into force", "in the interest of public safety". LP asked that this "request" be included "within the hearing". LP also sent that same email to the Court (12 September 2023) and to my clerk (21 September 2023) asking that it be considered. Ms Stockley's email (21 September 2023) explained that this request for the quashing order to be deferred was opposed by the Council, and that safety is a distinct issue engaging a separate statutory scheme. The Council, the Secretary of State and the Trust have maintained their agreed position as to the Order which the Court should make. They signed and supplied a new draft Consent Order – also cc'd to LP – which was revised to include the agreed quantum of costs (£12,000) agreed between the Council and the Secretary of State. The position as at yesterday 4pm was that no further submissions had been received from LP nor had LP responded to a request to indicate whether anyone would be attending today on its behalf. Nobody has attended today's hearing for LP.

Quashing

10. I have explained why the Court needs to make a substantive evaluative judgment. The Court needs to be satisfied that a quashing order is the legally justified and correct course. I am quite satisfied that Grounds 1 and 2 are each made out, either one of which would justify the quashing of the 2023 Order, as the Secretary of State has rightly recognised since 6 April 2023. I am also satisfied that the reasons for this are those accurately identified in the Schedule of Reasons in the draft Consent Orders (edited to reflect the definitions used in this judgment):

1. This is a claim for statutory review under section 287 of the [1990 Act] against the decision of the [Secretary of State] to make the [2023] Order ... dated 8 February 2023 and made by the [Secretary of State] under s.247 of the 1990 Act. 2. At the time when the [2023] Order was made, an objection had been made by the [Council] and had not been withdrawn. The subject of the objection related to the consequences of the [2023] Order for public rights across the site and the question of whether the 2023 Order should make provision for [a] replacement highway. The [Secretary of State] had expressed the view that the objection was not valid as it related to matters beyond the stopping up to be effected by the [2023] Order. However, the [Secretary of State] now accepts that the objection was and is valid. 3. In such circumstances it was not open to the [Secretary of State] to make the 2023 Order without holding a public inquiry under s.252(4) of the [1990] Act. The parties agree that this renders the 2023 Order unlawful. 4. The parties also agree that the [Secretary of State] was wrong to approach the justification of the 2023 Order on the basis that information relating to the provision of replacement highway was irrelevant. 5. The parties reserve their position on grounds (3) and (4).

Costs of the Claim

11. Leaving aside any costs of this hearing, the costs position between the Council and the Secretary of State is agreed. I am satisfied that the agreed costs order is lawful and within my powers and that it does not require any judicial determination as to the incidence or quantum of costs.

Deferred Quashing

12. In light of LP's position in its email of 12 September 2023, I have considered the Court's newly codified powers to make a deferred quashing order (Senior Courts Act 1981 s.29A; JR Guide §§12.3.4-12.3.7). I am quite satisfied that there is no basis to defer the quashing order to take effect at a future date. The 2023 Order cannot stand in law, on grounds which are unanswerable. It has been made in breach of the empowering Act, and in disregard of a statutory relevancy under the empowering Act. It is legally invalid. In light of the local authority objection of the Council, the merits need to be considered at a local enquiry. The question of impacts and alternatives, and any other legally relevant consideration, need to be dealt with in the context of a re-evaluation of whether and what stopping up order is appropriate on the merits. There is no basis for this Court to take any step – or make any finding – as to safety or unsafety. Nobody doubts the importance of safety. But, as Ms Stockley had pointed out in her email of 21 September 2023 (cc'd to LP), issues of safety are matters for consideration under Road Traffic Regulation Act 1984 powers, if appropriate. The point made about whether the highway is currently safe for public use does not begin to constitute a reason for leaving an unlawfully made stopping up order in place. It would moreover provide a two year period, for implementation by LP of the planning permission, restricting public rights of way, without any lawfully taken decision in which objections and impacts have been considered.

Order

13. I will therefore Order as follows:
 - (1) The Stopping Up of Highway (Yorkshire & The Humber) (No.5) Order 2023 is quashed.
 - (2) By consent between the Claimant and the Defendant, the Defendant shall pay the Claimant's costs of this claim in the sum of £12,000 within 28 days of this Order.
14. This could and would have been dealt with on the papers by the Judge on 17 May 2023, if LP – as a named Interested Party – had not declined to sign a consent order, and if LP had not communicated its disagreement.

LP's Sufficiency of Interest

15. I think the Judge was right to identify a possible course, which would have 'cut the knot', as being to consider whether LP in fact had a sufficiently close interest in these proceedings to be an "interested party". If not, a direction could have been made removing LP as a "party". Absent a successful application by LP to be heard (see CPR 54.17), the problem of LP's resistance could have fallen away. In the event, no submissions have been filed by any party on this topic. For my part, I think the Council was right to identify LP as an interested party, in the circumstances which I described

earlier. LP is the developer under the planning permission, and was applicant for the impugned 2023 Order, whose stated purpose is to allow LP's development to take place. It is unnecessary to consider the position of the Trust.

Costs of today's hearing

16. As a consequential issue, which arises in light of the judgment which I have just given, there is a double application for the costs of today's hearing. Both the Council and the Secretary of State make applications that their costs of today should be paid by LP. For the reasons which I have already explained, today's hearing has been solely necessitated by the position adopted by LP, in declining to sign the draft Consent Orders and declining to communicate that the quashing order, to take immediate effect, was agreed and not opposed. My provisional view is that it is entirely unsurprising, and entirely predictable, that the Council and the Secretary of State should now make the applications for costs that have been made. My provisional starting point is that there is a powerful case in support of such orders.
17. Having said that, I am also – and again provisionally – somewhat surprised to find that neither the Council nor the Secretary of State have considered it appropriate to have given a clear and open warning to LP of these potential costs applications. This would have necessitated nothing more than a letter or an email. Had there been such a warning, the position today, so far as today's costs are concerned, would in my judgment have been irresistible: I would now be making two costs orders without hesitation, in circumstances where LP had continued to resist the order being sought, notwithstanding clear costs warnings. I am, again provisionally only, not currently attracted to the Secretary of State's argument that no warning was given because the position crystallised only very recently, or only today.
18. In my judgment, there is clearly a prima face a case in support of the costs orders that are sought against LP. However, and remembering that LP is not legally represented, the course which I have decided is appropriate is as follows. I will direct that LP shall have until 4pm on Thursday 12 October 2023 to file and serve any submissions as to any reasons why the Court should not make such an order; and the Council and Secretary of State shall have until 4pm on Tuesday 17 October 2023 to file and serve any submissions in reply. These must all simultaneously be emailed to my clerk. This process ensures that there is no risk of unfairness or unfair surprise. I will then deal with the question of costs on the papers, in light of any written submissions received, as is conventional with costs matters following a judgment. I am currently minded, when I do so, to release a short sequel judgment which will explain, consistently with the open justice principle, how this issue was determined or resolved. Earlier in this judgment, I described costs issues as matters capable of agreement. Should these costs applications be resolved by agreement, the Court needs to be promptly informed.