



Neutral Citation Number: [2023] EWHC 3332 (Admin)

Case No: AC-2023-LON-002811

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2023

Before:

THE HONOURABLE MRS JUSTICE CUTTS DBE

Between:

THE KING
on the application of
ROBERT ZACHARY COX

Claimant

- and -

FORESTRY COMMISSION

Defendant

Ms Louise Bagley (instructed via direct access) for the **Claimant**
Mr Joel Semakula (instructed by **Michelmores LLP Solicitors**) for the **Defendant**

Hearing date: Tuesday 19 December 2023

Approved Judgment

This judgment was handed down remotely at 2pm on Thursday 21 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE CUTTS:

1. Following refusal by Calver J, the Claimant renews his application for permission to challenge the decision of the Forestry Commission, the defendant, as set out in a letter

dated 20/06/2023 to continue its use of clear-felling/deforestation of the New Forest National Park (NFNP) in particular and on a larger scale across England in general. It is the Claimant's case that clear-felling has many widely known harms to all of nature. In pre-action correspondence with the defendant, he requested a review of its use of clear-felling. The defendant declined in the aforementioned letter to undertake such a review. It is that decision which is now the subject of challenge.

2. In the letter of 20/06/23, the defendant refused to review its use of clear-felling maintaining:
 - a. There would be no urgent review of the clear-felling policy ahead of that required under the policy;
 - b. That clear-felling is taking place pursuant to an unchallenged policy (in place since 2019);
 - c. That as a matter of common sense there is no general duty on the Forestry Commission to give reasons for following an adopted policy; and
 - d. Declining to provide additional information as requested by the claimant.
3. In the original claim, the Claimant sought:
 - a. An order quashing the decisions and requiring their reconsideration and further/alternatively;
 - b. A mandatory order requiring the defendant to:
 - i. Immediately review the ongoing decisions to clear-fell and provide reasons for any ongoing clear-felling decisions;
 - ii. To provide details of all clear-felling sites and dates taking place under Forestry England management throughout England;
 - c. An interim injunction preventing the defendant from carrying out any further clear-felling in England.
 - d. A prohibitory order preventing the defendant from carrying out clear-felling in England (including within all National Parks and all forests/woods under FE management) and preventing the defendant from issuing licences to clear-fell in England.
 - e. A declaration that the defendant's procedures are unlawful due to procedural impropriety and conflicts of interest.
4. When refusing the application Calver J observed that the Claimant had failed to provide a clear and concise statement of the grounds for bringing the claim. The statement of facts and grounds were excessively long, diffuse and failed concisely to identify the relevant issues that the court is required to determine. This is contrary to paragraph 7.3 of the Administrative Court Guide 2023. I agree entirely with this observation. Whilst there has been an attempt by the Claimant for the purposes of the

renewal hearing to regroup his various grounds under fewer separate headings, this has not concisely identified the relevant issues in the way paragraph 7.3 requires. As the Defendant submits, it is of considerable importance and incumbent on a claimant to comply with this paragraph. Should permission be given, the High Court jurisdiction is constrained by the scope of the grounds. A lack of clarity increases the risk of disputes arising within the hearing and increased costs.

Factual Background

5. The factual and policy background is set out in the defendant's AoS.
6. The SS for the Environment, Food and Rural Affairs is responsible for setting the policy and the Forestry Commission is responsible for putting it into practice. The Forestry Commission delegates to Forestry England the making of day to day management decisions and to review "policy".
7. Part II of the Forestry Act 1967 sets out certain controls about tree felling. The Commission undertakes or permits clear-felling nationally in accordance with the UK Forestry Standard (UKFS) which is a Government Policy with which the Commission is required to comply and, where appropriate, implement. The relevant version of the policy is the 4th edition published in 2017.
8. Forestry England produces a focused management plan for each of the forests it manages. These are subject to external consultation during the plan development process. All responses are considered before determining whether to approve the forest plan.
9. Before operational activity at a single site is undertaken Forestry England undertakes an Operational Site Assessment which includes consideration of specific habitat species to inform how the clear-fell activity is undertaken. This process is commenced 6 months before the onset of timber harvesting operations in the New Forest.
10. The New Forest Inclosures Forest Plan 2019-2029 (NFIFP) (adopted on 23 December 2019) was produced in accordance with the guidelines set out in UKFS. It sets out how Forestry England implements relevant national policy in the New Forest alongside local objectives.
11. The plan is time limited with a review point at the five year mark. This review is set to take place in 2024. It considers whether the objectives are being met and whether modifications are needed in response to significant changes to external or internal policy. Amendments are made to the plan if necessary.

The application

12. The Claimant contends that the continued use of clear-felling by the defendant is disproportionate in any and all circumstances and that its use is exploitation of the forest since it is being used for maximising commercial profit at the expense of irreversible harm to nature when alternative methods are available and do not cause the same harms or otherwise cannot be proportionately justified. The Claimant avers that no one disputes that clear-felling causes irreversible harm. He has therefore asked

for a review of the process since there are serious and varied implications of it.

The grounds

13. The Claimant brought the original application on seven grounds. Following the refusal of permission by Calver J he has sought to distil those into two grounds:

- a. First that the refusal to review and to continue to apply the clear-felling policy within NFIFP is unlawful in that it is:
 - i. Ultra vires as it is in breach of The Wildlife and Countryside Act Schedule 1 as since 2022 it harms pine martens, a protected species and other protected species and “against the terms, if not the spirit” of s.6 of the New Forest Act 1877. In oral argument today Ms Bagley, counsel for the Claimant, submits that the harm is not confined to pine martens. She asserts that there are ongoing cumulative harms caused by clear felling in that it is not possible to know what harm has been caused until the deforestation takes place.
 - ii. Wednesbury unreasonable in that cumulative irreversible harms are being caused. It is therefore no longer rational to keep applying the policy. These include harm to animal species, an infringement of human rights and the removal of trees for profit only.
 - iii. Procedurally improper as there is no way of challenging ongoing harm. The defendant is hiding behind the expression “adopted policy”. Ms Bagley accepts that clear felling is intra vires by reason of the policy. However she submits that the policy does not compel clear felling by the defendant. This is the way the defendant chooses to fell trees. Other less harmful ways are available.
 - iv. In breach of s.6 of the Human Rights Act 1998 in that it infringes the Claimant’s Article 9, 8, 2 and 3 rights. The Claimant asserts that he brings this claim due to the devastation the clear-felling is causing to Mother Nature and the effect this is having upon him and others including in light of his protected beliefs about nature.
- b. Second, the refusal to review the use of continued clear felling outside of NFIFP and the failure to disclose the details of the same to enable a challenge is unlawful for the same reasons.

Grounds of resistance

14. The Defendant submits:

- a. Clear-felling is taking place pursuant to a lawfully adopted plan made in compliance with a lawfully adopted Government policy and the public interest is strong in a public body implementing its plan when it is acting in the public interest;

- b. Within the New Forest clear-felling areas proposed within the plan are to meet Forestry England's goal of restoring open habitats and it is only taking place as marked on the plan. The plan shows the consideration of alternatives.
- c. The Operational Site Assessments inform the operational activity at a single clear-fell site. Pine martens are considered at that stage. These have been actively monitored since 2021. Their existence in the New Forest is not new and the Defendant has evidence they do not favour any areas marked for clear-felling.
- d. The New Forest Inclosures Forest Plan was subject to full consultation and submitted for approval in 2017. Felling has taken place pursuant to it since 2020. It contains safeguards, including the 5 year review. The Defendant has been accommodating of the Claimant's extensive requests for information. Further information sought is a fishing expedition and disproportionate at the pre permission stage.
- e. There is no general duty on the Defendant to give reasons for proceeding with a lawfully adopted plan consistent with its duty to comply with/implement Government policy in respect of ongoing felling. There is no express requirement in statute for reasons to be given and no authority has been identified that requires additional reasons to be provided in that context.

15. In refusing the Claimant permission Calver J said:

- a. "Each of the seven grounds of the claim is without merit. I pause to say that those 7 grounds have been wrapped up into the two grounds relied upon in this application.
- b. Although the Claimant states in various places in the Grounds that it is the application of the policy that is challenged on the basis of "new information" it is in fact apparent that it challenges the long established clear felling policy itself as being unlawful. This is plain from the Claimant's assertion that the continued use of clear-felling by the Forestry Commission is disproportionate in any and all circumstances and its use is exploitation of the forest since it is being used to maximise commercial profit at the expense of irreversible harm to nature and plain also from the Claimant's reply witness statement.
- c. The SS introduced the UK Forestry Standard Policy in 2017 which the defendant was required to implement and which it duly did as long ago as 2019 by adopting the New Forest Inclosures Forest Plan 2019-2029.
- d. Where a JR challenge is directed at a policy or practice the grounds to make a claim arise when the Claimant first became affected by the measure and so acquired standing to make the claim: *R (Badmus) v SS for the Home Department* [2020] EWCA Civ 657 [77]-[78] and [82]. On the Claimant's own case that occurred in November/December 2022.
- e. The Claimant has accordingly failed to bring this claim promptly. It would be detrimental to good administration and contrary to the public interest to extend

time in this case, particularly in view of the lack of merit in the claim.

- f. In any event there is no material factual change that renders it irrational to continue to implement the policy. In particular the alleged new information called upon in relation to pine martens is misconceived.”

16. In oral submissions today, the Claimant submits that Calver J’s reasons for refusing the application were wrong. In particular Ms Bagley submits:

- a. It is wrong to say that the Claimant has failed to bring the claim promptly. He was not aware until November/December 2022 that clear felling was taking place in the New Forest. Thereafter he sought to find out who was responsible. It is only upon making those enquiries that he became aware of the NFIFP. He thereafter engaged in correspondence with the Defendant, sending a letter dated 19 February 2023. This was delayed by reason of the Christmas break, the fact that he had exams and that he wanted legal assistance. It was only when the letter of 20/6/23 was sent by the Defendant, refusing his request for a review, that he was able to bring the application for judicial review. He acted as quickly as he could after receipt of the 20 June letter when issuing the claim. Ms Bagley relies on the chronology set out at page 45 behind Tab B in support of these submissions.
- b. It is wrong to say that there is no material factual change that renders it irrational to continue to implement the policy. That new information includes the first confirmed successful breeding of pine martens which was not until December 2022 which obviously could not be considered in the 2018 decision. There is additionally ongoing irreversible cumulative harm.
- c. Just because there is policy in place does not mean that ongoing decisions to apply that policy is infallible. It must be the case that reasonable requests to review the application of policy where there is ongoing and cumulative harm including protected species and generally to Mother Earth that any decision to refuse to review the application of policy is justiciable.

17. Mr Semakula has set out his submissions in a skeleton argument dated 14 December 2023 which address in more detail the grounds of resistance I have summarised at paragraph 14 above. He made the following additional submissions in oral argument:

- a. First that Calver J was correct to find that this claim was not brought promptly. It is important to identify the real grievance of the claim. That is, as identified by Calver J, the long-established clear-felling policy itself as unlawful. This policy was introduced in 2017 and implemented by the Defendant, as it was required to do, by adopting the NFIFP in 2019.
- b. The defendant on his own case became aware of clear felling in the New Forest in November/December 2022. He did not issue his claim until 8 September 2023. This is significantly out of time. There has been no application for an extension of time.
- c. Mr Semakula relies on the decision of the Court of Appeal (Civil Division) of *Arnold White Estates Ltd v The Forestry Commission [2022] EWCA Civ 1304*

at [52] that the time for bringing a claim for judicial review can be extended by generating correspondence whose effect, unless some new factor has emerged, is merely to confirm a decision which has been taken previously. As the court said, to permit the time limit for issuing a claim for judicial review to be circumvented in this way would subvert the certainty which is an essential purpose of the time limit. The court cited with approval the decision of Chamberlain J in *Inclusion Housing Community Interest Company v Regulator of Social Housing* [2020] EWHC 346 (Admin) at [69] “a claimant cannot in general start time running again by writing a letter asking the decision maker to reconsider and then treating the refusal to reconsider as a new decision.”

- d. There has been no continuing unlawfulness in this case (the policy of clear felling is plainly lawful). The Forestry Commission has acted in good faith as a public body in the exercise of the statutory functions conferred upon it by the 1967 Act. No new factor has emerged.
- e. The delay in issuing the claim was issued well out of time. This should be enough without more to refuse permission for judicial review.

18. I have considered the matter afresh and agree entirely with the decision of Calver J that permission should not be granted for the reasons he gave:

- a. First that the long established policy of clear felling is what is actually being challenged in this application. In my view the letter of 20/06/23 provided no decision which can be challenged. It simply set out the Forestry Commission’s view that clear felling was taking place pursuant to an unchallenged policy in place since 2019 and there was no to be no review other than that required by the policy.
- b. On the Claimant’s own case he is substantially out of time in making the claim. There has been no application for an extension of time.
- c. No new factor has emerged. There is no material factual change that renders it irrational to implement the policy. In particular the alleged new information relied upon regarding the breeding of pine martens is misconceived.
- d. It would be detrimental to good administration and contrary to the public interest to extend time in this case, especially in view of the lack of merit to the claim.

19. This renewed application for permission for judicial review is accordingly refused.

Costs

20. The Defendant has been put to considerable cost as a result of this application. It is conceded however that this is an Aarhus claim. I therefore award capped costs of £5,000.