Neutral Citation Number: [2024] EWHC 705 (Admin)

Case No: AC-2022-MAN-000340

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

Monday, 25th March 2024

Before:
FORDHAM J

- -

Between:

THE KING (on the application of HALTON BOROUGH COUNCIL)	**Claimant**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendant**
- and -	
(1) HEALTH & SAFETY EXECUTIVE	**Interested**
(2) VIRIDOR ENERGY LTD	**Parties**

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John Hunter (instructed by Halton BC) for the **Claimant**
Robert Williams (instructed by GLD) for the **Defendant**
The Interested Parties did not appear and were not represented

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Hearing date: 25.3.24
Judgment as delivered in open court at the hearing

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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.

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FORDHAM J

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

FORDHAM J:

1. These judicial review proceedings are the sequel to the judgment of HHJ Stephen Davies, sitting as a Deputy High Court Judge [2023] EWHC 293 (Admin) [2023] PTSR 1125. The context is summarised at paragraphs 7 to 12 of that judgment. The Council has advanced 6 grounds for judicial review, one of which was granted permission by DHCJ Ridge on 6 December 2023, one of which has been abandoned, and the remaining four of which are pursued at this oral hearing. One of those four is new but has permission to amend (but not yet permission for judicial review). The targets for judicial review are the Secretary of State's 27 July 2022 twin decisions ordering the Council to pay the HSE's costs from 23 June 2021 (the date of HSE's statement of case) and Viridor's costs from 2 November 2021 (the date Viridor was added as a rule 6 party). The relevant "Guidance" is the Planning Practice Guidance: Appeals (6.3.14), which everybody agrees would benefit from proper paragraph numbering.

2. The Council had resolved (5.10.20) to grant a planning application (reference 17/00468/FUL) despite HSE's May 2020 contrary advice. The Secretary of State had "called in" the planning decision (7.5.21) at HSE's request. The Council adduced written expert evidence of a consultant, Mr Hopwood. When cross-examined at a (closed) inquiry hearing by HSE's advocate (13.1.22), Mr Hopwood agreed that – if he were in a planning inspector's position – he would have to advise strongly against planning permission. That was in the light of a line of questioning. GLD (for the HSE) then wrote to the Council in the light of that evidence. The Council responded, recognising that it could no longer maintain its support for planning permission. The developer withdrew the application. HSE and Viridor made applications for the Council to pay their costs.

3. The Secretary of State's impugned decisions record that the Council's changed position had caused the inquiry to collapse and found costs orders warranted based on "unreasonable" conduct. The unreasonable conduct was the withdrawal by the Council, "when they did", with "no good reason". The unreasonableness found lay in the Council's failure, in "appointing" an expert, as well as in continuing to appraise the position, to be "satisfied with the strength" of the expert evidence relied on and, "crucially", its "being capable of standing up to scrutiny". The decisions emphasised that Mr Hopwood's concessions, and the Council's changed position, were a "volte face" which had arisen in circumstances where there had been: no change in the position being adopted by the HSE in objecting to planning permission; no change in the evidence of the HSE; and no change in the planning circumstances.

4. The ground for judicial review on which permission has already been granted by Judge Ridge is that it was arguably unreasonable for the decision in favour of the HSE to set the Council's costs liability as arising from 23 June 2021, when it was later in the inquiry process that HSE's crystallised position was lodged. That issue is already proceeding to a substantive hearing.

5. The Guidance says (§34) that it is not envisaged that a party would be at risk of an award of costs for unreasonable behaviour "relating to the substance of the case", "or" relating to "action taken prior to the call-in decision". It continues that a party's failure to comply with "the normal procedural requirements of inquiries", including "aborting the process by withdrawing the application without good reason", risks an award of costs for unreasonable behaviour. Other passages in the Guidance describe: costs for

unreasonable behaviour; the distinction between procedural matters (relating to the process) and "substantive" matters (relating to the issues arising from the merits of the appeal); and illustrative examples of both "procedural" and "substantive" behaviour. In those examples, "substance" is said to include failure to produce evidence to substantiate a reason for refusing planning permission; and it is said to include a party not reviewing their case promptly following lodging an appeal or an application.

6. There was plainly good reason for the Council withdrawing support for the application after the Hopwood concessions (13.1.22). This saved everybody ongoing costs. But was there good reason for not withdrawing the support earlier than this? The approach to the Guidance §34 in the impugned decisions is that "withdrawal … without good reason" can mean withdrawal "whose belated timing was" without good reason.

7. One question which arises is whether a withdrawal, based on what an expert witness has said under cross-examination about a question related to the planning "merits", is something relating to the "substance" of the case, rather than being "procedural", for the purposes of the Guidance §34. There are questions about whether "substance" is about taking a "merits" position; and whether withdrawal is a "procedural" matter when it is based on recognition that the position which has been taken on the "merits" is unsustainable. There are questions about the policy implications of potentially incentivising people towards maintaining a "merits" position so as to avoid being said to have taken the "procedural" step of "withdrawing". There are questions about whether these considerations are matters of interpretation at all, or rather straightforward questions of case-specific application.

8. There are other questions. At the heart of the case is a question about what has been described as a party's failure of "due diligence" in relation to their expert, and what their expert is saying or not saying. That phrase "due diligence" is found in Ridgeland Properties Ltd v Bristol City Council [2011] EWCA Civ 649 at §46. There, the Court discusses the teamwork necessarily involved in preparing evidence including expert evidence for a hearing. The same topic was discussed in R (DPP) v Aylesbury Crown Court [2017] EWHC 2987 (Admin) [2018] 4 WLR 30, including at §24. There, the Court discussed the responsibility of a prosecuting authority, having called an expert, and whether in that context and on the facts of that case (a) the circumstances suggested a need to "interrogate" the expert or (b) the expert was saying something which was "plainly wrong" or should have been "obvious".

9. The Council's case was and is that Mr Hopwood did not "come up to proof" in cross-examination (13.1.22), making concessions which were inconsistent with his written expert evidence about impacts and implications which he had there said were "tolerable" or "acceptable". Mr Williams, in the summary grounds of resistance, embraces as accurate the description of Mr Hopwood as not having "come up to proof". The decision letters speak in terms of his evidence is not having been "capable of standing up to scrutiny", and of a "volte face".

10. The claim raises questions as to the public law reasonableness of an adverse "due diligence" conclusion, in the context of expert evidence, measured against the threshold of "unreasonable conduct" in the Guidance, and linked to questions as to the legal adequacy of the Secretary of State's reasoning in the decision letters.

11. Mr Hunter has persuaded me that the questions to which I have referred cross the threshold of arguability, viewed through the prism of his pleaded judicial review grounds, for the purposes of permission for judicial review. Mr Williams for the Secretary of State has undoubtedly identified an arguable defence. But he has not, in my judgment, administered a clean knock-out blow. I have I have taken time to identify key points and themes which I provisionally think are at the heart of the case. But I am also satisfied that the five grounds, which are clearly interlinked and overlap, should all remain open at the substantive hearing. That will also allow the virtue of the case being considered 'in the round'. The claim, as advanced in the five further grounds being pursued, is arguable. That is all I have decided.

12. I record that an option which was open to the Secretary of State, based on Judge Ridge's directions, was for the renewed grounds to be before the Court at the substantive hearing on a 'rolled up' basis, by agreement. As it was, the Secretary of State wished to have reconsideration of the renewal of the grounds dealt with at a separate hearing and resolved, one way or the other. That is what has happened today .

13. Consideration can now appropriately be given to the effective case-management of the substantive hearing of a case which has already passed through several pairs of judicial hands. I will welcome Counsel's assistance on that and on whether Judge Ridge's directions can be readopted or should be revised.

14. Having discussed with Counsel how best to promote the overriding objective, the Order I have made is for a one day substantive hearing, if possible before me in person in Manchester on Tuesday 23 July 2024, with the usual directions for detailed grounds of resistance, any application for reply evidence, bundles, skeleton arguments (including an orderly sequence to minimise repetition from Interested Parties) and the agreed list of issues, chronology and essential reading.

15. I record, finally, that this was a remote hearing by MS Teams, as originally scheduled by the Court and then requested by the parties, with open justice secured in all the usual ways.

25.3.24