CO/5547/2013

Neutral Citation Number: [2013] EWHC 4376 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Priory Courts
33 Bull Street
Birmingham
West Midlands
B4 6DS

Wednesday, 23rd October 2013

B e f o r e:

MR JUSTICE LEWIS

Between:
THE QUEEN ON THE APPLICATION OF CAMPAIGN TO PROTECT RURAL ENGLAND OXFORDSHIRE
Claimant

v

OXFORD CITY COUNCIL
&
OXFORD UNIVERSITY
Defendant

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(Official Shorthand Writers to the Court)

Mr McCraken appeared on behalf of the **Claimant**
Mr Maurici QC appeared on behalf of the **Defendant**
Mr Warren QC and Miss Blackmore appeared on behalf of the **Interested Party**

J U D G M E N T
(Approved)
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1. MR JUSTICE LEWIS:

2. This is an application for permission to apply for judicial review of what is said to be the decision of Oxford City Council contained in a letter of 28th March 2013, refusing to make a discontinuance order under section 102 of the Town and Country Planning Act 1990.

3. The position is this. Planning permission was granted to the University of Oxford to build student accommodation in a particular area of Oxford which has very attractive views and historic and cultural significance or might have such attractive views and historic cultural significance. Mr McCracken, who appears on behalf of the claimant today, contends that it is arguable that there were errors committed prior to the granting of that planning permission, in connection with the way in which the assessment of likely significant environmental effects was considered. I am proceeding, for the purposes of this afternoon on the basis that there have been those errors but I express no view as to whether or not such errors actually occurred.

4. Given that position Mr McCracken's submission is this. There is a duty or an obligation on both this court and indeed the local authority, to take all the general or particular measures necessary to nullify the consequences of that failure and to remedy, so far as possible, the breaches that have occurred.

5. Mr McCracken says that the way to do that is to make an order under section 102 of the Town and Country Planning Act. There are two aspects to what broadly could be the subject of the discontinuation or discontinuance order. The first aspect deals with the procedural obligations underlying the environmental impact assessment Directive and the domestic implementing regulation, that is ensuring developers, if it is necessary to do so, produce environmental statements. There is then consultation on those and a considered decision which is reached by the planning authorities.

6. The second area of concern is substantive. If at the end of the day it turns out that steps need to be taken to address any substantive deficiencies in the way that this building interacts with its environment, section 102 provides powers to require the discontinuance of use of land or impose such conditions as may be specified in an order, on the continuation of the use of land, or indeed to require that such steps as may be specified be taken for the alteration or removal of the buildings or works.

7. Initially I had understood the claimant's concern was with the substantive consideration of these matters. The question, putting it crudely, is whether the building was too big and should be reduced in size, whether additional screening should be erected and so on. I suspect that Hickinbottom J also considered it in that way because the council had indicated they were considering whether or not things needed to be done in relation to the building because of its potential or actual environmental effects. Given that the council were considering those issues, Hickinbottom J raised the question of whether this claim was premature and whether the matter should be stayed. In fact, Mr McCracken's submissions are different. They are these. Firstly, he submits there is an

EU obligation to nullify the consequences of action that involves a breach of an EU regulation or Directive. Secondly, the relevant EU Directive here has procedural obligations which are important. There would be three stages normally. Firstly, the authority would carry out a screening process to see if an EIA was required. Secondly if an EIA was required the university would have to prepare an impact statement and thirdly, there would be consultation in prescribed ways prior to a decision on the substance by the university.

8. Mr McCracken says that a local authority can nullify the consequences of not having followed that procedural process properly prior to grant of planning permission by use of section 102. In a very carefully drafted proposed order, he submitted that it is arguable that under section 102 the council must make a first stage discontinuance order in the following terms:

"(a) the taking of such steps communicated in writing as the council considers necessary to ensure compliance with, or as a result of compliance with the requirements of EIA Directive 2011/11/EU including the supply of information such as an environmental statement and/or cessation of use and/or removal or whole or part of the buildings and/or be compliant with conditions communicated in writing other than thereafter judged necessary by the council."

9. Mr McCracken submits that it is possible and indeed obligatory relying on the European Court decision in Marleasing to interpret 102 as permitting the imposition of conditions on the continuation of the use of the site which would require the university, by way of example, to provide an environmental statement.

10. 9. Consideration of the second stage of the exercise, that is what substantive steps if any need to be taken in relation to the development, would, in my judgment, be premature. The council has not decided yet what steps to take. That would be a difficult discretionary decision and would involve a number of considerations as is clear from a reading of paragraph 426 of the decision of Stadlen J in the case of R (on the application of) Evans v Basingstoke and Deane Borough Council.

11. Dealing with the first stage of the exercise however, the argument about prematurity has less force because Mr McCracken says that involves a procedural obligation or a procedural step that should be taken now and the council should be using section 102 to remedy the procedural failures that he says occurred prior to the grant of planning permission. Viewed in that light I well understand the prematurity may not be a reason for refusing permission.

12. But however, viewed in that light, it is now clear from the correspondence from the University of Oxford and from the submissions made by counsel on behalf of the City Council and University of Oxford that is what is proposed.

13. In a letter of 9th July 2013 Mr Paul Goffing, the Director of the States at the University of Oxford said this under the heading "Environmental Information":

"The university does not accept the development is an EIA development

> requiring an environmental impact assessment. It will nevertheless carry out an assessment of the environmental impact of the development on a voluntary basis following the processes of the Directive and the regulations so far as possible."

14. Mr Maurici, counsel for the City Council, says at paragraph 11 of his skeleton argument, on instructions, the following:

> "The council proposed that having received
>
> (1) the voluntary EIA which the university has agreed to produce (see above) and.
>
> (2) detailed proposals from the university for mitigating the impact on Port Meadow and how these are to be secured (see again above)and following consultation with all interested parties it will ask the Area West Planning Committee to determine whether
>
> (i) the Castle Mill development was constructed in accordance with the permission and if it is not whether it is expedient that any enforcement action should be taken
>
> (ii) whether the university's applications to discharge both conditions under the permission should be granted and.
>
> (iii) whether the council should make a discontinuance order."

Pausing there, by "discontinuance order" what is meant in that context is an order dealing with the second stage matters going to the substance.

15. So standing back from matters Mr McCracken says it is arguable that a local authority must use its powers to remedy any defect that occurred in relation to the environmental impact assessment process prior to the grant of planning permission. He says that there should be a screening process and if that said an EIA was required, then there would have to be an environmental statement prepared by the university, then consultation and then a decision on what steps, if any, are required to be taken in relation to the building. That, according to what the council in the correspondence say, is effectively what is going to happen. In those circumstances, the intervention of the court and the grant of permission to apply for judicial review is not necessary. The situation is being rectified and addressed by the council and the university realises that they would have to co-operate with that process.

16. Mr McCracken expresses a number of concerns. He points out the university are preparing a screening opinion on a condition relation to contamination. He says: why are they bothering to do that if what was proposed was a full environmental statement as such a statement would deal with that in any event? As I understand it, the council have very particular concerns about the contamination condition, and are being absolutely careful to make sure they follow the process to the letter in relation to that.

But I do not infer from that any indication that they do not intend to do what they say in their letter they intend to do.

17. Secondly, Mr McCracken says that the letter itself clearly does not understand what the law requires because the developer at the university does not carry out an assessment of the environmental impact of the development, the council does that. I really do think that is just criticism of the words used. In the vernacular everyone talks these days about the developer carrying out the assessment, when what one actually means in strict terms is that the developer is going to submit an environmental statement. It is clear the council is going to have to consider and assess the statement and it is quite clear from the skeleton arguments put in by Mr Maurici that the council is contemplating doing that in due course.

18. Thirdly, Mr McCracken says that the rest of the letter of 12th July indicates that the university has prejudged the outcome. I do not read the letter in that way. The university is taking a firm stance but they know they are proposing to do an assessment of the environmental impacts, in the sense of submitting an environmental statement following the processes of the Directive and the regulations so far as is possible. If they do not, they may well face problems with the council or problems with the claimant. So, I do not consider that that is a reason to doubt the accuracy of what Mr Goffing said in his letter of 12th July 2013.

19. There is also a suggestion that the Court of Appeal decision in the case of R (on the application of) Carlton-Conway v Harrow London Borough Council means that it is inappropriate to refuse permission on a discretionary basis. I do not read the judgment of the Court of Appeal in that way. Furthermore, the facts of the case here are very different from the facts of the case in the Carlton-Conway case.

20. In my judgment, standing back from those matters, now that one has fully understood the claimant's case, that is there are procedural deficiencies which should be rectified by use of the section 102 power and considering that those procedural deficiencies are actually in the process of being rectified so far as possible by the council and the university, replicating so far as possible the processes in the Directive in the regulation, the intervention of the court is not necessary and therefore I will refuse permission to apply for judicial review.