Neutral Citation Number: [2016] EWHC 2618 (Admin)

Case No: CO/2470/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2016

Before:

THE HON. MRS JUSTICE PATTERSON DBE

- -

Between:

THE QUEEN (on the application of EMMA LOUISE DOWLEY)	**Claimant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
- and -	
NNB GENERATION COMPANY (SZC) LIMITED	**Interested Party**

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- -

Gregory Jones QC and Ned Westaway (instructed by **Lewis Silkin LLP**) for the **Claimant**
David Blundell (instructed by **Government Legal Department**) for the **Defendant**
Nathalie Lieven QC (instructed by **Herbert Smith Freehills LLP**) for the **Interested Party**

Hearing date: 7 October 2016

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Judgment Approved

Mrs Justice Patterson:

Introduction

1. This is a claim for judicial review of a decision on the part of the defendant dated 31 March 2016 to authorise the interested party to enter onto land for the purpose of site investigation prior to the construction of a new nuclear power station known as Sizewell C. The authorisation was granted pursuant to section 53 of the Planning Act 2008 (2008 Act).

2. The authorisation was subject to conditions and related to land forming part of the Theberton House Estate (the Estate) owned by the claimant with her husband. The authorisation excluded land at Potters Farm. I say nothing further in the circumstances about land at Potters Farm.

3. The defendant is the authorising authority for the purposes of section 53 of the 2008 Act.

4. The interested party is the prospective developer of the development consent for Sizewell C new nuclear power station. It was the applicant for the authorisation. No application has yet been made for a development consent order for the proposed development.

5. Under the authorisation the interested party is able to enter onto the claimant's land for the purposes of site investigations in connection with its proposal to construct a new nuclear power station. The claimant's estate had been identified by the interested party as necessary to carry out various surveys, including environmental surveys, for the purposes of deciding the appropriateness of the land for development and the form of the proposal for the next stage of consultation. The surveys in question are both non-intrusive, such as walking over the land, and intrusive, such as the undertaking of various boreholes and trenching required for archaeological surveys. Other surveys are required to facilitate compliance with the Directive 2011/92/EU (the EIA Directive) and Directive 92/43/EEC (the Habitats Directive).

6. Permission to bring the challenge was granted by Cranston J on 20 July 2016 on all grounds.

7. In summary, the claimant's case is that the decision was unlawful on three grounds:

    i) That the defendant failed to take into account, or properly take into account, the claimant's potential business losses as a result of the interested party's access onto the land;

    ii) That the defendant misunderstood the claimant's case on the reasonableness of negotiations and/or failed to provide adequate reasons as to how he addressed that; and

    iii) That, in considering the reasonableness of the negotiations, the defendant improperly, unfairly and/or irrationally restricted his assessment to a limited period and left out of account negotiations that had taken place subsequently.

Legal framework

8. Section 53 of the 2008 Act provides, so far as is relevant, that:

> "(1) Any person duly authorised in writing by the Secretary of State may at any reasonable time enter any land for the purpose of surveying and taking levels of it, or in order to facilitate compliance with the provisions mentioned in subsection (1A), in connection with—
>
> (a) an application for an order granting development consent, whether in relation to that or any other land, that has been accepted by the [Secretary of State] [1] ,
>
> (b) a proposed application for an order granting development consent, or
>
> (c) an order granting development consent that includes provision authorising the compulsory acquisition of that land or of an interest in it or right over it.
>
> (1A) Those provisions are any provision of or made under an Act for the purpose of implementing—
>
> (a) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended from time to time,
>
> (b) Council Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended from time to time, or
>
> (c) any EU instrument from time to time replacing all or any part of either of those Directives.
>
> (2) Authorisation may be given by the Secretary of State under subsection (1)(b) in relation to any land only if it appears to the Secretary of State that—
>
> (a) the proposed applicant is considering a distinct project of real substance genuinely requiring entry onto the land.
>
> …
>
> (4) A person authorised under subsection (l) to enter any land-
>
> (a) must, if so required, produce evidence of the person's authority, and state the purpose of the person's entry, before so entering,

> (b) may not demand admission as of right to any land which is occupied unless 14 days' notice of the intended entry has been given to the occupier, and
>
> (c) must comply with any other conditions subject to which the Secretary of State's authorisation is given.
>
> …
>
> (7) Where any damage is caused to land or chattels—
>
> (a) in the exercise of a right of entry conferred under subsection (1), or
>
> (b) in the making of any survey for the purpose of which any such right of entry has been conferred,
>
> compensation may be recovered by any person suffering the damage from the person exercising the right of entry.
>
> (8) Any question of disputed compensation under subsection (7) must be referred to and determined by the Upper Tribunal."

9. Section 3(1) of the Human Rights Act 1998 (the HRA) imposes an obligation "so far as it is possible to do so" to read and give effect to primary legislation in a way which is compatible with Convention rights. Convention rights are defined in section 1(1)(b) of the HRA to include the right to peaceful enjoyment of possessions in Article 1 of the First Protocol (A1P1) to the European Convention on Human Rights (the ECHR). By section 6(1) of the HRA it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

Relevant guidance

10. The Department for Communities and Local Government (DCLG) has produced non-statutory guidance in a note headed Planning Act 2008: The Infrastructure Planning (Fees) Regulations 2010 Guidance. That provides in Annex A that:

> "Applicants are expected to act reasonably, first seeking to obtain … permission to access land directly before seeking authorisation under these provisions. Specifically, applicants should only submit requests for … access to parcels of land, where they consider they have been unreasonably refused that … access."

Factual background

11. The Estate was identified by the interested party as being necessary for potential use for spoil storage, roads, borrow pit, campus accommodation and construction activities associated with the proposed construction of Sizewell C. The Estate has some 420 acres. The land affected by the authorisation is some 75 acres. At present, the land is used as agricultural land and as a commercial shoot.

12. In October 2012 the interested party began negotiations with the claimant for the acquisition of the land and also, from 22 April 2013, to enter the land for the purposes of carrying out a range of surveys. Those surveys are for a variety of purposes and include surveys to inform potential changes to the red line boundary of the site and ground condition surveys to inform the land take required as well as studies relating to ensuring compliance with Directive 2011/92/EU (the EIA Directive) and Directive 92/43/EEC (the Habitats Directive).

13. The chronology of the negotiations is set out in an appendix to the interested party's summary grounds of resistance. The appendix has not been the subject of any dispute. I attach it as Annex A to this judgment to show the negotiations carried out.

14. By early June 2015 the negotiations for rights of access to the land had not progressed. On 9 June 2015 the interested party made an application to the defendant for the grant of authorisation to access the land pursuant to section 53 of the 2008 Act. As a result of discussions a revised set of application documents were submitted on 10 July 2015. The defendant treated that submission as a revised application.

15. During the consideration of the application, but before it was determined, the claimant's representatives requested the defendant not to determine the application on two occasions to allow the fruitful progress of negotiations. First, in a letter dated 19 August 2015, the claimant's representatives requested the defendant to delay the determination of the authorisation request to enable the applicant and land owner to negotiate a fee undertaking and an access licence based on the draft the Applicant has previously provided, for a maximum of two months. Secondly, in a letter dated 3 December 2015 the claimant's representatives requested the Planning Inspectorate to delay the determination for a further six weeks.

16. Negotiations continued until 20 January 2016 when the interested party confirmed in correspondence that it would negotiate no further and would await the outcome of the authorisation request.

17. In March 2016 the Planning Inspectorate (PINS) issued its Recommendation Report (the report) to advise the Secretary of State on the determination of the interested party's application. The report recommended that the application be granted, subject to conditions, with the exception of the area known as Potters Farm.

18. On 31 March 2016 the defendant granted the interested party's application for authorisation subject to conditions. The decision notice included the schedule of conditions and the recommendation report. Both were sent to the claimant's representatives as well as the interested party and were made available on the Inspectorate's website.

19. The claimant accepts that the interested party:

    i) is considering a distinct project of real substance; and

    ii) genuinely requires entry onto the land.

20. The claimant's challenge, confirmed in oral argument, is to the exercise of the discretion on the part of the Secretary of State which is given under section 53(2). In

short, the claimant contends that the fact that the statutory requirement for the making of an order is met, does not mean that the defendant is under an obligation to go on to make it. The defendant has a discretion whether to grant the authorisation which is to be interpreted consistent with the statutory scheme in question. The claimant's claim is a challenge to the executive act on the part of the defendant and not to the scheme.

Ground 1: Whether the defendant failed to take into account, or properly take into account, the claimant's potential business losses by reason of the interested party's access to the land

21. The essence of the claimant's case is that she has always been advised that she would suffer substantial business losses, some of which are not recoverable under the 2008 Act. Her case is that the defendant wrongly left out of account the financial losses to the claimant's business interests from disturbance, in particular, agricultural operations and a pheasant and partridge shoot and/or failed to determine whether or not such disturbance would be subject to compensation.

22. Her case is that the issue of compensation for business disturbance was clearly raised in correspondence by her advisers. Matters that she raised were not exhaustive but illustrated the problem. In response to a question from the court the claimant helpfully provided general itemisation of heads of losses which she suggests are not covered by section 53(7). They would include:

    i) "Any loss deriving from disruption as opposed to damage especially including commercial shoot losses where wild and released birds would not be 'chattels';

    ii) Other indirect financial losses including loss of farming revenue and associated losses, for example, disruption to crop rotation, and loss of subsidy payments, environmental grants and charges;

    iii) Other indirect financial losses;

    iv) Inconvenience and hardship;

    v) Licence fee foregone."

23. Those were all matters that were clearly raised with the defendant, first in a letter dated 23 July 2015 from King & Wood Mallesons (then acting for the claimant) which pointed out that "given that construction of the accommodation blocks and associated facilities would take up only a limited proportion of the land, extensive archaeological trenching work would be wholly disproportionate and would lead to long term disruption of crop production, our clients' shooting enterprise and, by implication, the employment of staff on our clients' estate." The letter sought that any authorisation should include a condition that the applicant would be liable for the inevitable loss of income that the claimant would suffer due to the interruption of their farming and shooting operations.

24. Second, on 3 December 2015, by which time Paul Winter & Co were acting for the claimant, the issue was raised again in a letter that repeated that the draft conditions and section 53 provided inadequate protection in relation to financial losses arising from disruption to the claimant's commercial shooting and other activities on the

estate, assuming that the relevant losses were not caused by damage to land and chattels.

25. Third, in an email dated 21 January 2016 Mr Winter raised the question as to whether "it is proportionate to leave Mr and Mrs Dowley in a position of being uncompensated for the substantial financial business losses which would be caused by [the interested party's] exercise of the extensive and intrusive access rights sought."

26. The claimant submits that it was incumbent on the defendant to address the issue with enhanced care (or anxious scrutiny) as whether or not compensation was payable was plainly highly relevant to any assessment as to whether or not the proposed interference with the claimant's proprietary rights was lawful and proportionate. It was a point that the defendant did not and has not addressed in either the reasons for the decision which are entirely silent on the topic or in the recommendation report which, while it does refer to the point, does not grapple with it.

27. Such an approach, the claimant submits, infringes her legitimate interests and represents an unlawful approach in that:

    i) If the PINS considered that the claimant's business interests did not require protection there was no basis upon which it could come to that conclusion and/or it gave no reasons for coming to that view;

    ii) If PINS did consider that the business interests were protected by section 53(7) or the draft conditions proposed that was wrong and/or irrational and/or not the subject of any reasons;

    iii) If PINS intended to provide a condition to protect the business interests it wrongly omitted to do so.

28. The separate section within the recommendation report under the heading 'Human Rights Act 1998' did not revisit the issue and appeared, without any clear explanation, to rely upon the imposition of conditions. Such an approach, the report concluded, would be justified and proportionate.

29. In the case of **R (Innovia Cellophane Limited) v Infrastructure Planning Commission**[2012] PTSR 1132, a decision on section 53 of the 2008 Act, Cranston J found compliance with A1P1 on the basis that the authorisation was under a set of conditions that protected the landowner's interests [36]. Here, it is submitted that the claimant faces at least twelve months of disturbance to her commercial use without any compensation for business losses.

30. At the very least there was a duty on the defendant to give reasons which he did not do. The claimant relies upon the case of **R v Northamptonshire County Council** [1998] ELR 291 where Laws J (as he then was) said:

> "…however exiguous any particular statutory duty to give reasons may be, there must surely at least be a basic requirement, namely that the decision–maker must explain, with whatever brevity, why the decision in question has been taken…"

31. The issue of whether the claimant could recover compensation was relevant to whether the authorisation decision was proportionate. The amount of any compensation could be determined by the Upper Tribunal at a later date.

32. The defendant contends that section 53(2) poses a statutory test. Once that is satisfied the defendant can consider whether to exercise his discretion to make the order.

33. It is of note that section 53(7) refers to "any" damage to land or chattels and subsection (8) provides that "any question of disputed compensation" under subsection (7) must be referred to and determined by the Upper Tribunal. Whilst the claimant does not accept the jurisdictional question of heads of damage the statutory language is very clear. The Upper Tribunal is specialist in the area of compensation and, therefore, it is understandable that Parliament left the losses which were the subject of the claims for damages to be determined by it. It is not for the Secretary of State to interfere with this statutory scheme.

34. The defendant contends that the claimant should go to the Upper Tribunal and argue that her losses were compensatable. On a domestic construction the losses could be within section 53(7). If they were not, the section could be read down in accordance with section 3 of the HRA. That would cover many heads of loss.

35. Even if the Upper Tribunal ruled that the losses claimed were not eligible for compensation there remains A1P1 so that the claimant is protected on all approaches.

36. The interested party contends that the claimant's case is contrary to the statutory scheme. The claimant's approach fails to understand how the statutory scheme works. The Secretary of State is to take into account the nature of the interference in determining whether to grant the authorisation and the statutory scheme says that compensation for losses and other rights is to be determined at the Upper Tribunal. The business losses would appear to be consequential to the damage to the land but, if not, because the interference has to be proportionate it can read down section 53(7) to take into account any losses. If section 53(7) cannot be read down then the issue is one of incompatibility of the statute with the Human Rights Act.

Discussion and conclusions

37. I start with the statutory scheme. Although the claimant refers to the contents of section 53(2)(a) as a precondition it seems to me that they are better described as the statutory requirements which have to be met before the Secretary of State can go on to consider whether to grant authorisation which is then within his discretion. In this case, the claimant accepts that the interested party is considering a distinct project of real substance and genuinely requires entry onto the land. Accordingly, whether described as preconditions or a statutory test matters not because, on any description, the threshold for considering whether authorisation is to be granted has been reached.

38. That means that authorisation for rights of access may be given by the Secretary of State. That authorisation may be conditional. If so, a person duly authorised must comply with conditions on the authorisation which is granted. The claimant described the situation as authorised trespass. In fact, what is being authorised is entry onto land of another that would normally be unlawful, to exercise rights in accordance with the authorisation granted.

39. The statutory scheme provides for compensation arising out of the authorisation in the event of any damage to land or chattels under section 53(7). It further provides that any question of disputed compensation must be referred to, and determined by, the Upper Tribunal. Thus, in my judgment, the scope of section 53 is to grant to the Secretary of State the power to authorise entry onto another's land, subject to conditions where necessary, but not to grant the Secretary of State any power to deal with compensation. Compensation is recoverable by any person suffering damage to land and chattels as a result of the exercise of rights of entry but any dispute of whatever nature, namely, of principle or of quantum is to be referred to and determined by the Upper Tribunal. The reason for that is because the Upper Tribunal in the Lands Chamber is the specialist court in compensation matters. On a plain and ordinary reading of the words used, as a matter of domestic construction, in my judgment that is the meaning, the scope and the architecture of the section.

40. The claimant contends that the defendant should rule on whether the types of losses that she says that she will incur are compensatable. The claimed heads of loss outside the scope of damage to land and chattels were before the Secretary of State in the correspondence submitted in the instant case prior to the grant of authorisation. The defendant, therefore, had to form a view on their recovery as that was relevant to whether the authorisation decision was proportionate. In any event, the defendant was under a duty to give his reasons for whether the claimed losses were within or without the statutory provision. Compensation is limited under section 53(7) to that arising from damage to land and chattels. There is no reference in section 53 to other compensation codes under the Compulsory Purchase Acts.

41. An alternative, which was suggested here by the claimant, was to include a condition on the authorisation which provided for provision for compensation outside the statute. The claimant submits such a condition would be lawful because of the deficiencies in the statutory provision of section 53.

42. The difficulty with the claimant's case is that it appears contrary to the plain words of the statutory scheme. Section 53(8) states that any question of disputed compensation under subsection (7) must be referred to the Upper Tribunal. It draws no distinction between issues of principle and quantum. What is recoverable in principle is often a question of mixed fact and judgment. Whether a loss is consequential on damage to land or chattels is ascertainable and subject to evidence after entry under the authorisation. Those are classically matters for the Upper Tribunal which has specialist expertise in that area.

43. Further, as the interested party submits, the claimant's construction does not work in practice. If the Secretary of State indicated that certain losses were recoverable, in the absence of actual evidence as to what had occurred it could be submitted that either that would bind the Upper Tribunal or it would create a legitimate expectation outside the parameters of the statutory provision. In either event such a consequence would be unnatural and, in my judgment, contrary to the statutory scheme. It is not unusual in the field of compulsory purchase for acquisition of land or acquisition of rights to be confirmed when the entitlement to and level of compensation is not known. That is dealt with at a later stage and, again, if there are disputes, in the Upper Tribunal. Section 53 of the 2008 Act is entirely consistent with that approach.

44. The Secretary of State should obviously take account of the nature of the interference as a result of any authorisation that he grants but there is no need for him to carry out the exercise that the claimant says that he must. He is entitled to rely upon compensatable losses being adjudicated upon in the Upper Tribunal. Business losses would ordinarily be consequential to damage to the land. If they are not, then because any interference has to be proportionate, there is the power on the part of the Upper Tribunal to read down section 53(7) to take into account any such losses. There is no need, as the claimant contends, for the Secretary of State to consider and determine A1P1 at the section 53 stage because those rights remain for consideration by the Upper Tribunal. The Upper Tribunal has broad powers to read down: see **Ghaidan v Godin-Mendoza** [2004] 2 AC 557.

45. The claimant contends that **Mott v Environment Agency** [2015] EWHC 314 (Admin) (upheld on this point in the Court of Appeal) is authority for the proposition that the availability and level of compensation is relevant to the exercise of proportionality when granting the authorisation. I did not find the case of any great assistance on this point. Factually, it is very different involving as it did restrictions on Mr Mott's salmon catch but the paragraphs relied on in particular by the Claimant [80-99] on A1P1 and the approach to be taken, namely, whether the measures in question pursue a legitimate aim and, in particular, whether they strike a fair balance between public interest and the rights of an individual, or impose on the individual concerned an excessive or disproportionate burden, do not advance the issues here. In general terms, I accept that the defendant has to take into account the availability of compensation as part of his decision making process, but that is provided for in the 2008 statutory scheme which he is entitled to rely upon. His conclusion on whether the authorisation is proportionate does not need further particulars.

46. Further, the statutory scheme should, subject to matters of causation, be capable, in principle, of including many, if not all, of the particular business losses. On the list produced at the hearing the interested party accepted that there would be consequential losses sustained by the claimant. In each case a claim would be subject to causation issues but they were not matters where there was or seemed to be a bright line of jurisdiction.

47. As to the claimant's suggested condition it seems to me that that would be going outside the statutory remit on the part of the Secretary of State when the statutory scheme provides a clear guide as to what is recoverable. I have real doubts as to whether such a condition would be lawful as part of the authorisation that the Secretary of State is empowered to grant. That is because such a condition would be authorising compensation (a) outside the statutory scheme of section 53, and (b) impinging on the powers of another body with specialist jurisdiction, namely, the Upper Tribunal.

48. That means that the claimant may not have the certainty that she would like at the authorisation stage that her prospective heads of loss would be recoverable but that is not to say that she will not recover them. Rather, the position is that the extent of that recovery will not be known at the time of authorisation. That is analogous to the position of any party whose land is acquired after the confirmation of a Compulsory Purchase Order (CPO). The position would be different if the claimant were not to be entitled to compensation but she is. It is clearly provided for in the statutory scheme, to be construed as I have set out.

49. Even if the Upper Tribunal ruled that certain heads of loss would be not eligible for compensation then the balancing exercise required under A1P1 would mean that the claimant was protected.

50. The next issue under this ground is the extent of the duty on the defendant to give reasons. The claimant contends that there is plainly a duty to give reasons. Even if there would be no duty, where (as here) a public authority purports to give reasons they must be adequate. As Laws J (as he then was) said in **R v Northamptonshire County Council ex parte W** [1998] ELR 291, "However exiguous any particular statutory duty to give reasons may be, there must surely at least be a basic requirement namely that the decision maker must explain, with whatever brevity, why the decision in question has been taken…" In the present case, as in the case of **Horada v Secretary of State for Communities and Local Government** [2016] EWCA Civ 169 "The reader of the decision letter would have had to have been not only well informed but also psychic" to have understood the reasoning (see [49]). The claimant contends that there is no indication at all of how (and, indeed if,) the defendant resolved the issue of how the level and nature of damage to the claimant's business interests would be taken into account.

51. The authorisation was sent to Mr Winter, acting on behalf of the claimant, under cover of a letter of 31 March 2016. The letter noted that it enclosed a copy of the decision notice which includes a schedule of conditions and the recommendation report. The claimant was then informed that those documents, together with copies of correspondence with PINS were available on the website and a link was given to enable access to those documents. The authorisation is a relatively short document of 31 March 2016. Behind that was a two page document headed 'Reasons for the decision'. Having set out the background the document continued:

> "The Secretary of State is satisfied that the applicant has sought to agree access to the land (excluding the Potters Farm land) with the landowners over a reasonable period of time (between 2013 and 2015) and on reasonable terms, and that there is nothing in the correspondence to suggest that further negotiations would result in the reaching of an agreement. The Secretary of State is satisfied that entry to the land is needed to enable the applicant to carry out surveys required to inform the Project. …The Secretary of State is satisfied on the basis of the information provided and available that he may authorise the service of a notice under section 53(1) and section 53(3A) of the Act for the land (excluding the Potters Farm land), and that this authorisation is justified and proportionate in the wider public interest in this particular instance."

52. Conditions are then set out, as is the authorisation plan. Behind that is the section 53 recommendation report with annexes. The recommendation report extends to some 28 pages including a section on the PINS assessment. Within that there is a subheading 'Human Rights Act 1998'.

53. The case of **R v Northamptonshire County Council ex parte W** upon which the claimant relies concerned an appeal to an education appeals committee against a decision on the part of school governors in which they refused to reinstate a child who

had been excluded from school. The court held that the Committee had to explain, however briefly, why the child had been excluded from the school; what the Committee said did not tell the parents why D was being excluded. When an extreme measure was taken something more was justified. An assumption that the parents must have realised that the appeal was being upheld on the same grounds as the headmaster had given was no answer. The Committee had just said permanent exclusion was in the circumstances the reasonable course of action for the school. Laws J (as he then was) said at [296B]:

> "In any event I would be slow to hold that in a context such as this the Committee, which is manifestly obliged to bring its own mind to bear on the matter, must necessarily be taken to have adopted the headteacher's reasoning by virtue only of the fact that it arrived at the same result in the events that had happened."

The attack was on the basis of paragraph 14 of schedule 16 to the Education Act 1996 which provided that:

> "The decision of an appeal committee and the grounds on which it is made shall be communicated by the committee in writing to the relevant person, the local education authority and the governing body …"

54. Not only is the statutory scheme different and distinct from that which is the concern of the court in this case but the wording of the relevant provisions is different. That is not to say that the Secretary of State in the context of the 2008 Act is not under any obligation to give reasons. Far from it, he accepts that he is, hence the heading 'Reasons for the decision'. Where reasons are given it is axiomatic that they have to be adequate.

55. The reasons given do not expressly incorporate the recommendation report supplied by PINS. However, in the accompanying letter it is made clear that the recommendation report from the PINS accompanied the decision notice. The question then is whether it can be inferred that the Secretary of State followed PINS reasoning in its recommendation report.

56. One of the purposes of requiring the decision-maker to give reasons for his decision is so that those who are affected by the decision may themselves decide whether the decision is susceptible to legal challenge: see **Save Britain's Heritage v Number 1 Poultry Limited** [1991] 1 WLR 153 at [166]. Reasons can be seen in the decision letter and in the recommendation report if it is permissible to read them together. The Secretary of State here is the primary decision maker. He is not reviewing or conducting any appeal against an earlier decision. In **Horada** at [36] Lewison LJ said:

> "To paraphrase a famous saying: the inspector proposes; the Secretary of State disposes. Where the Secretary of State follows the inspector's recommendation it will be easy to infer that the Secretary of State has also adopted the inspector's reasoning."

57. **Horada** concerned a decision on a CPO relating to the Shepherd's Bush Market area. The CPO was made under section 226(1)(a) of the Town and Country Planning Act 1990 to facilitate the development or redevelopment of land. There had been a ten-day public inquiry after some 200 objections had been lodged to the CPO. The Inspector's report recommended that the CPO should not be confirmed. The position there was different to that in the current case as there was a difference of opinion between the reporting inspector and the ultimate decision-maker. That is not the case here. I can see no basis, therefore, why the recommendation report cannot be taken to be part of the reasoning of the defendant. The claimant knew from the recommendation report what the reasons for the recommendation were and could gauge whether the decision was susceptible to legal challenge. The claimant was well aware if the documents are read together of what had been decided and the reasons for the decision.

58. When the exercise is done of reading the recommendation report with the decision it is clear from the recommendation report that matters expressed to be of concern now to the claimant were known to, and expressly considered, by PINS. Paragraph 4.24 of the report refers to the letter of 23 July 2015 from the landowners' agent and the schedule attached thereto it records:

> "The letter stated, amongst other points on this matter, that these would cause long-term disruption to crop production, their clients' shooting enterprise, and, by implication, the employment of staff on their clients' estate."

59. Under a section of the report headed 'Human Rights Act 1999' the following was stated:

> "4.61. If the Secretary of State is minded to grant authorisation for this section 53 application, it is considered that granting an authorisation which is in accordance with the provisions of section 53 (which includes a right to compensation for any damages caused to any land or chattels) and which is granted subject to conditions, would be justified and proportionate in the wider public interest.
>
> 4.62. The landowners' agent stated in their letters dated 3 December 2015 and 22 December 2015 that in the absence of a licence providing an appropriate basis for compensating financial losses arising from disruption to their commercial shooting and other activities on the estate, the financial harm caused to the landowners arising from the section 53 would be disproportionate and an unjustifiable breach of their human rights. As described above, the landowners' agent also contends that the authorisation duration is unrealistic and would result in sequential applications for extensions to the section 53 authorisation, and that such an approach would not be reasonable or proportionate in its impacts on the landowners' and the occupiers of Potters Farm's human rights.

> 4.63. The Planning Inspectorate, having considered the authorisation request and the correspondence from the landowners and their agents with regard to the authorisation in relation to human rights, is satisfied that the section 53 authorisation to 'The Land' (excluding Potters Farm) is both lawful and proportionate."

60. Paragraph 4.61 clearly identifies the importance of the statutory scheme and its provision for compensation.

61. Paragraph 4.62 records the claimant's arguments, in letters dated 3 December 2015 and 22 December 2015, that without a licence the financial harm caused to the landowners arising from the section 53 authorisation would be a disproportionate and unjustifiable breach to their human rights.

62. Paragraph 4.63 provides an overall conclusion, having taken into account the authorisation request and the correspondence from the landowners. It was clearly part of that recommendation that the statutory scheme provided sufficient protection for the claimant.

63. It follows that when the recommendation report and the reasons are read together, fairly and as a whole, the reasons that were given were sufficient. It is clear that the Secretary of State accepted that arguments about compensation would take place before an independent tribunal to enable it to determine issues of both principle and amount. The degree of particularity which the claimant seeks in this part of its claim is, in my judgment, not justified by the statutory scheme in question.

64. This ground fails.

Ground 2: That the defendant failed lawfully to assess the reasonableness of the parties' negotiation because he misunderstood the nature of the issue between the parties

65. The claimant contends that the context to grounds 2 and 3 is important. The question is whether a pre-condition to the negotiations should operate as a cap on the landowner. The claimant contends that such a position would be unlawful because that would not be following PINS guidance on fees regulations. One would expect the applicant to behave reasonably. It was not unreasonable to make an order so that the applicant bore the cost of the claimant's professional advice. That would have to be costs that were reasonably incurred but which may go beyond the cap that the applicant had set.

66. In the recommendation report under the heading 'Applicant's efforts to agree voluntary access' a review of the inter parties correspondence is set out. The recommendation report says:

> "4.35. During the course of consideration of the authorisation request, the applicant states in letters dated 27 August 2015, 18 December 2015 and 20 January 2016 that the difference in opinion on the issues of costs remains outstanding between the parties and they cannot envisage this being resolved to the satisfaction of both parties. The applicant maintains that the

> position remains the same and they have no confidence that matters would be resolved outside of the section 53 process.
>
> 4.36. The landowners' agent described in correspondence of 23 July 2015, 19 August 2015, and 22 January 2016 why they believe the applicant has not acted reasonably in contrast to the landowners' reasonable behaviour. The points raised by the landowners' agent on this matter relate to:
>
> - the lack of progress with the proposed development;
> - the need for the landowners to have access to the necessary professional advice;
> - the landowners requiring an undertaking in respect of their reasonable costs; and
> - the landowners' right to refuse access to their land until an appropriate and reasonable costs undertaking is agreed with the applicant.
>
> 4.37. In their letter of 2 August 2015 [sic; scil: 19 August 2015], the landowners' agent asked the Planning Inspectorate to delay the determination of the authorisation request to enable the applicant and landowners to negotiate a fee undertaking and an access licence, for a maximum of two months. The landowners' agent stated in a number of letters and emails that they believe an agreement could be reached outside of the section 53 process.
>
> 4.38. Although the landowners have expressed willingness to agree an access licence outside of the section 53 authorisation, the issue of what their agent describes as 'the costs hurdle' remains (paragraph 18 of the landowners' agent's letter of 3 December 2015). Paragraph 9 of that letter acknowledges that the draft licence submitted by the applicant to the landowners in three letters during 2014 (NB. The letter referenced as 9 May 2014 in the 3 December letter is not included with the authorisation request) contained what he described as 'sensible provisions' including provision for the Licensor's reasonable and proper costs for entering into the licence. He notes that there was no capped limit for those costs in the draft licence but that a cap emerged in later correspondence."

67. The claimant contends that both there, and in paragraph 4.41, which reads:

> "4.41. Both parties accept that an agreement to pay reasonable legal and professional fees would have been appropriate in negotiating a mutually acceptable arrangement for access. In essence, the 'costs hurdle' referred to by Mr Winter appears to be a difference of opinion as to the level of fees that would be reasonable in the circumstances."

the reference to "costs hurdle" illustrates the misunderstanding of the issue on the part of PINS. The issue between the parties was whether there should be a cap on the claimant's costs. The claimant refused to allow access to her property until there was an agreement on fees. That was not an unreasonable stance to adopt. The defendant's error was that he failed to consider this key issue of principle and/or gave no reasons for how he resolved it.

68. Negotiations did not proceed because the interested party was not prepared to underwrite the claimant's reasonable costs. It was important for the defendant to grapple with and rule upon that issue. It would clearly not be reasonable for a landowner to have to pay for her own costs when she had no interest in a public project.

69. There had been other cases where uncapped fees had been allowed.

70. The PINS guidance on fees makes it clear that the applicant has to conduct reasonable negotiations. That had not happened here.

71. The defendant refers to the correspondence between the interested party and the claimant. First, a letter dated 9 July 2014 from EDF, which said:

> "As I stated in my letter of 26 June we are unable to offer an unlimited undertaking to cover your fees. Any undertaking we provide would initially be limited to £60,000 and then subject to periodic review as negotiations progress."

That was repeated in a letter of 21 July 2014 in which Ms Harding-Edgar, the land program manager of EDF, said:

> "EDF Energy is willing to provide an undertaking for fees in relation to the negotiation of the licence and negotiations for acquisition of your client's land as may be required for the Sizewell C project. Such an undertaking is proposed initially to be limited to £60,000 and would cover all reasonable professional adviser costs, properly incurred and evidenced."

72. On 10 September 2014 Ms Harding-Edgar wrote a further letter in which she said:

> "From experience of negotiating such agreements, the undertaking for fees that we have offered is adequate for what we are proposing. The undertaking would be split between the access licence (up to £20,000) and the land acquisition (up to £40,000) in recognition that the acquisition is likely to be a more lengthy process. As previously stated, once negotiations commence, if the fees were to go beyond the ceiling, EDF Energy would be happy to review the undertaking, however such a review would clearly depend on the circumstances and why the fees had reached such a level."

73. The defendant contends that disputes are bound to occur, and indeed did occur, about what is reasonable. On 19 August 2015 in a letter from King & Wood Mallesons,

solicitors then acting for the claimant, Mr Ricketts, the partner there dealing with the claim, said:

> "[O]ur clients accept that they should only be able to recover their reasonable and proper costs and that these costs would, in the normal way, be capable of determination by an independent third-party's independent expert. If that does not give you sufficient comfort, our clients would additionally be prepared to put a ceiling on the costs that was capable of recovery. The ceiling would need to be placed at a high level given that the full nature of work that would be entailed is not yet known… We would propose that the ceiling should comprise:
>
> a. In relation to agents' fees, anticipated those to be those of Strutt & Parker, a figure of 5% of the consideration finally agreed …
>
> b. In relation to all legal costs the figure is £250,000.
>
> c. In relation to other consultants, their proposed scope of work of a fee to be agreed in advance by the parties acting reasonable and, if necessary, arbitrated by an independent expert whose costs would be covered by the Applicant."

74. Advice from Strutt & Parker was that a considerable range of experts was likely to be necessary.

75. In dealing with that aspect PINS said from paragraph 4.42:

> "4.42. The Planning Inspectorate is not in a position to evaluate whether the fees that have been incurred by the landowners are or are not reasonable. An offer was made at one stage of the negotiations to reimburse fees of up to £60,000, double the figure that the landowner had apparently already incurred at that stage.
>
> 4.43. The Planning Inspectorate has considered the correspondence from all parties and is satisfied that the applicant has sought to agree access with the landowners over a reasonable period of time (between 2013 and 2015) and on reasonable terms. The Planning Inspectorate also considered that there is nothing in the correspondence to suggest that further negotiations would result in the reaching of an agreement."

76. The defendant submits that in the light of the correspondence the reference to costs hurdle was an entirely appropriate description. Paragraph 4.42 was dealing with the costs cap and answering the question posed by the guidance, namely, had the applicant acted unreasonably. There is nothing to suggest that PINS misunderstood the situation. They had correctly understood the correspondence and the issues.

Discussion and conclusions

77. Although dealing with a different issue the case of **Innovia Cellophane** (supra) was concerned with an authorisation granted under section 53 of the 2008 Act. There, one of the issues was whether the authorisation had been granted as a last resort as was the advice that it should be under Advice Note 5: section 53 then in force. Again, negotiations had broken down and an issue was whether there was anything in the recommendation report or on the face of the authorisation which enabled the claimants to understand how the breakdown had been dealt with and whether the Infrastructure Planning Commission had properly taken into account the factual position. Cranston J said:

> "34. In my judgment, it cannot be said that the Commission's decision to issue the section 53 authorisation as a last resort was in any way disproportionate or flawed. In making that judgment all the circumstances were relevant, including the fact that after a prolonged period the parties had not been able to reach agreement. It is plain from the secretariat report that the Commission did have regard to the guidance on last resort. There is no possible basis for inferring that the Commissioner, Lorna Walker, ignored this or failed to apply it when she was expressly told that was the approach required. She was provided with the report and the full correspondence. She was aware of the competing contentions of the parties about the history of the negotiations. It is clear from her witness statement that she read the whole file, applied the guidance and concluded that it was necessary to grant the section 53 authorisation as a last resort. There is no discrepancy between what was said at the time and what she has now told the court. It simply will not do for Mr Warren to question what a senior public official has said in a witness statement and not be prepared to apply to cross-examine her.
>
> 35. There was no need for the Commission, in reaching its conclusion, to determine whose fault it was that agreement between the parties had not been reached. I reject the claimants' contention that so long as they as the landowners were prepared to negotiate in good faith the presumption should be that reasonable efforts have not been exhausted. In practice that would give a landowner a ransom over a project, because negotiations in good faith could continue almost indefinitely. Such an approach would not accord with the Commission's statutory remit. Ultimately at what point negotiations can be judged to have failed, and the last resort reached, is a matter of judgment for the Commission, in the light of all the circumstances. From the history of the negotiations I have outlined above, the fact is that over a prolonged period, and for whatever reason, the claimants and NNB had not reached any sensible agreement to give NNB access to the land. Given that history, and the Commission's

> statutory remit to decide applications for nationally significant infrastructure projects expeditiously, there was nothing flawed about the Commission's conclusion that the section 53 authorisation was required as a last resort."

78. It is clear from that that there was no duty on the Secretary of State to determine why negotiations had failed or who was at fault. The key test posed by the guidance now is whether it was unreasonable for the interested party to say that they would not pay, in the first instance, fees above a certain level.

79. It is clear from the extracts from the correspondence that I have set out that there was a disagreement between the parties as to what were reasonable fees. In those circumstances, to refer to the difference as a "costs hurdle" was an entirely appropriate description.

80. It is clear from paragraph 4.42 of the recommendation report that PINS were indeed answering the question posed by the guidance as to whether the applicant had acted reasonably. There is nothing to say that PINS had misunderstood the question. In those circumstances, to allow a potential claimant for compensation to run-up unlimited fees would be, prima facie, unreasonable. There is, therefore, a strong argument to say that costs should, in appropriate circumstances, be dealt with in a staged way with the initial imposition of a cap. The approach of the interested party was clearly taken into account in the PINS report in considering whether in the correspondence that the applicant had acted in a reasonable manner through offering reasonable terms and over a reasonable period of time. PINS were clearly of the view that was the case.

81. As stated under ground 1 in the circumstances there was no need for the Secretary of State to go further and produce additional reasons.

<u>Ground 3: Whether the period over which the defendant considered it reasonable to negotiate was unfairly and improperly curtailed</u>

82. The claimant contends that the reasons refer to agreements sought between October 2012 and May 2015 and conclude that "the applicant has sought to agree access to the land … over a reasonable period of time (between 2013 and 2015) … and … there is nothing in the correspondence to suggest that further negotiations would result in reaching an agreement." The problem with that is that it fails to have regard to negotiations that postdate the application i.e. after July 2015. The claimant says that is of particular importance given the letter from PINS of 9 July 2015 that they would strongly encourage both parties to restart negotiations. It was a material consideration to take into account post-application correspondence. It all goes to whether the stance adopted by the parties is reasonable or not.

83. On the defendant's analysis it would be possible for a section 53 applicant simply to refuse to negotiate once an application is submitted so that there is no prospect of agreement. That would distort the process and is not the basis upon which compulsory right should be acquired.

84. The defendant points to the record of negotiations considered as set out within the recommendation report from paragraph 4.35:

"4.35. During the course of consideration of the authorisation request, the applicant states in letters dated 27 August 2015, 18 December 2015 and 20 January 2016 that the difference in opinion on the issues of costs remains outstanding between the parties and they cannot envisage this being resolved to the satisfaction of both parties. The applicant maintains that the position remains the same and they have no confidence that matters would be resolved outside of the section 53 process.

4.36. The landowners' agent described in correspondence of 23 July 2015, 19 August 2015, and 22 January 2016 why they believe the applicant has not acted reasonably in contrast to the landowners' reasonable behaviour. The points raised by the landowners' agent on this matter relates to:

- the lack of progress with the proposed development;
- the need for the landowners to have access to the necessary professional advice;
- the landowners requiring an undertaking in respect of their reasonable costs; and
- the landowners' right to refuse access to their land until an appropriate and reasonable costs undertaking is agreed with the applicant.

4.37. In their letter of 2 August 2015 [sic; scil: 19 August 2015], the landowners' agent asked the Planning Inspectorate to delay the determination of the authorisation request to enable the applicant and landowners to negotiate a fee undertaking and an access licence, for a maximum of two months. The landowners' agent stated in a number of letters and emails that they believe an agreement could be reached outside of the section 53 process.

4.38. Although the landowners have expressed willingness to agree an access licence outside of the section 53 authorisation, the issue of what their agent describes as 'the costs hurdle' remains (paragraph 18 of the landowners' agent's letter of 3 December 2015). Paragraph 9 of that letter acknowledges that the draft licence submitted by the applicant to the landowners in three letters during 2014 (NB. The letter referenced as 9 May 2014 in the 3 December letter is not included with the authorisation request) contained what he described as 'sensible provisions' including provision for the Licensor's reasonable and proper costs for entering into the licence. He notes that there was no capped limit for those costs in the draft licence but that a cap emerged in later correspondence.

4.39. In their letter of 23 July 2015 the landowners' agent summarised the position about costs as follows:

- in November 2013, the applicant had offered to reimburse 'costs for all reasonable incurred professional fees';
- by July 2014 the applicant had already incurred fees of £30,000;
- in July 2014 the applicant offered an undertaking limited to £60,000;
- in July 2015, the agents wrote to the applicant asking if the November 2013 offer remained open;
- the applicant replied offering 'reasonable legal and professional fees up to £20,000'.

> 4.40. The applicant initially confirmed that they would continue to negotiate outside of the authorisation request, but that they had no confidence in the negotiations. The applicant confirms in its correspondence of 20 January 2016 that they would not negotiate further, but await the outcome of the authorisation request."

85. It is quite clear from the contents of paragraph 4.43 that PINS had considered the correspondence from all parties and that there was nothing in it to suggest that the further negotiations would result in the reaching of an agreement.

Discussion and conclusions

86. Although in 4.43 "between 2013 and 2015" does appear in brackets after the phrase "a reasonable period of time" it is clear from a fair reading of the report and the dates attributed to the various letters that PINS did in fact take into account correspondence after the application: see paragraphs 4.35, 4.36, 4.37, 4.38, 4.39 and 4.40.

87. The problem was that, despite taking into account correspondence over a protracted period of time, there was nothing to suggest that the position between the parties had changed. In short, they had reached an impasse as a result of failing to agree on the issue of payment of fees. But the fact that PINS expressly recorded letters after the date of application and, indeed, encouraged continuing negotiations without prejudice to the processing of the section 53 application illustrates that they took the decision on the basis of all circumstances up to and including 20 January 2016. Thus there was no omission of a material consideration nor was their conclusion irrational or unfair.

88. This ground fails also.

Is this an Aarhus claim?

89. There is a dispute between the claimant and the defendant as to whether this is a claim to which the Aarhus Convention applies. The claimant contends that this is a claim involving national law relating to the environment which should benefit from the protection in CPR 45.41 to 45.43.

90. The claimant submits that the case involves law relating to the environment in two clear respects. First the decision affects the claimant's land used inter alia for agriculture and shooting grouse. It will have an adverse effect on that land.

91. It is clear from **Secretary of State for Communities and Local Government v Venn** [2015] 1 WLR 2328 that environmental matters and environmental information are to be given a broad meaning. Applying that to the circumstances here the surveys to be carried out will have a temporary but significant impact on the land of the Estate.

92. Secondly, the decision relates to environmental law on a much larger level. It is part of the planning consent process for a project with major environmental implications.

93. If the decision were under challenge by an environmental amenity group arguing, for example, that the surveys would affect their management, or that it ought to have been consulted, it would unarguably have been an environmental claim. It is submitted that the position should be no different because the claim is brought by landowners.

94. The defendant contends that the claimant is wrong. Cranston J observed, when granting permission on all grounds, that this was not an Aarhus claim.

95. The defendant submits that this is a challenge about compensation for access to land.

96. As a result the case is not about a decision relating to environmental law so that **Venn** does not assist the claimant. Nor it is a case for the benefit of the environment so that **R (McMorn) v Natural England** [2016] PTSR 750 does not apply either.

97. Accordingly the claimant is not entitled to Aarhus costs protection.

Discussion and conclusions

98. Article 9(3) of the Aarhus Convention applies to provide access to justice for members of the public to challenge "acts or omissions by … public authorities which contravene provisions of national law relating to the environment."

99. The definition of "environment" is to be given a broad meaning: see **Venn**, and **Lesoochranarske Zoskupenie VLK v Ministerstvo Zivotneho Prostredia Slovenskej Republiky** (Case C-240/09) [2012] QB 606.

100. The impugned decision is made under section 53 of the 2008 Act for the grant of authorisation to enter onto the land of another to carry out surveys, both non-intrusive and intrusive.

101. The execution of such surveys, in my judgment, relates to the environment; especially when that is given a broad meaning.

102. Accordingly, I find that this claim, which is to the authorisation enabling those surveys to be carried out, is one that benefits from the protection of the Aarhus Convention.

103. It would be different if this was a claim against an award or the principle of compensation under section 53(7) or 53(8) but that is not this claim. Whilst compensation matters have featured large and may be the ultimate interest of the

claimant, in terms of this claim, which is to the validity of the authorisation, in my judgment, Aarhus protection applies.

104. For all of those reasons I dismiss this claim.

105. I invite the parties to agree an Order and costs.