Neutral Citation Number: [2019] EWHC 621 (Admin)

Case No: CO/4853/2018

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

IN THE MATTER OF A CLAIM FOR PLANNING STATUTORY REVIEW

Cardiff Civil Justice Centre
2 Park St, Cardiff CF10 1ET

Date: 18 March 2019

Before:

SIR WYN WILLIAMS

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Between:

CAMPAIGN FOR THE PROTECTION OF RURAL WALES (BRECON & RADNOR BRANCH)	**Claimant**
- and -	
THE WELSH MINISTERS	**Defendant**
-and-	
POWYS COUNTY COUNCIL	**First Interested Party**
-and-	
HENDY WIND FARM LIMITED	**Second Interested Party**

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Mrs Harriet Townsend and **Mr John Fitzsimons** (instructed by **Richard Buxton Solicitors)** appeared for the Claimant
Mr Gwion Lewis (instructed by the **Government Legal Department**) appeared for the Defendant
The First Interested Party did not appear and were not represented
Mr David Elvin QC and **Ms Heather Sargent** (instructed by **Aaron & Partners**) appeared for the Second Interested Party

Hearing date: 25 February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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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SIR WYN WILLIAMS:

1. The Claimant renews an application for permission to apply for a statutory review, pursuant to section 288 of the Town and Country Planning Act 1990, of a decision by the Defendant to allow an appeal against the refusal of the First Interested Party to grant planning permission for development encompassing the construction and operation of seven wind turbines with a maximum tip height of 110m (hub height 69m) together with associated consequential development situated upon land near the A44 trunk road near Llandegley, Powys. Permission to apply was refused on the papers by Lewis J. Prior to the oral renewal hearing I was provided with detailed skeleton arguments on behalf of the Claimant and Second Interested Party. At the hearing itself I heard reasonably detailed oral submissions on behalf of the Claimant, oral submissions on behalf of the Defendant which were, understandably, shorter and, orally, Mr Elvin QC contented himself with supporting the submissions of Mr Lewis for the Defendant and adding a few supplementary points of his own.

2. Unusually, following a renewed permission hearing, I decided that I needed time to consider the issues raised before me – hence this written judgment.

3. The Defendant's decision to allow the appeal and grant planning permission for the development proposal made by the Second Interested Party (hereinafter referred to as "Hendy") followed a lengthy public inquiry before an Inspector who was appointed to recommend to the Defendant how the appeal should be determined. In the instant case the Inspector recommended that the appeal should be dismissed. The Defendant took a different view.

4. At the inquiry a wide range of issues were considered. At paragraph 322 of his Report to the Defendant, the Inspector summarised the main issues to be considered as follows:-

> "The main considerations are the effect of the proposed development on
>
> (i) the landscape character and visual amenity of the area;
>
> (ii) the setting of heritage assets in the locality; and
>
> (ii) whether any harm identified in relation to the foregoing considerations is outweighed by the benefits of the scheme, particularly its contribution to renewable energy generation and combating the effects of climate change."

It is clear from the paragraphs which followed that the Inspector considered each of those issues in detail and, did so against the relevant planning policy background. No one has suggested to the contrary.

5. It is common ground that both the Inspector, in making his recommendation, and the Defendant, in determining the appeal, had to grapple with and, if appropriate, apply paragraph 6.5.5 of Planning Policy Wales (Edition 9) ("PPW") which reads as follows:-

> "6.5.5 The conservation of archaeological remains is a material consideration in determining a planning application, whether those remains are a scheduled monument or not. Where nationally important archaeological remains, whether scheduled or not, and their settings are likely to be affected by proposed development, there should be a presumption in favour of their physical protection *in situ*. It will only be in exceptional circumstances that planning permission will be granted if development would result in an adverse impact on a scheduled monument (or an archaeological site shown to be of national importance), or have a significantly damaging effect upon its setting. In cases involving less significant archaeological remains, local planning authorities will need to weigh the relevant importance of the archaeological remains and their settings against other factors, including the need for the proposed development."

At the inquiry it was very much the case for the Claimant and the First Interested Party that the proposed development would have a significantly damaging effect upon the setting of four scheduled ancient monuments ("SAMs"). I understand that those parties argued, too, that as a consequence it could only be "in exceptional circumstances" that planning permission should be granted.

6. It is at least possible that Hendy took a somewhat different approach at the inquiry to the interpretation and effect of paragraph 6.5.5. The case for Hendy is set out at paragraphs 115 to 159 of the Inspector's report. At paragraph 136 he records the following as being part of Hendy's submissions:

> "136. In the circumstances it is clear that the reference in the policy to exceptional circumstances does not require anything more than a balancing exercise and if the conclusion is reached that the need for and benefits for the proposal outweigh any harm to the heritage interest this will amount to exceptional circumstance, albeit it will be prudent to address the issue and make it clear that one had found there to be exceptional circumstances, as Mr Croft acknowledged."

7. It may be (my emphasis) that the Inspector did not reach a clear view about whether Hendy's approach to the interpretation of paragraph 6.5.5 was correct. That is not necessarily surprising since his judgment was that the adverse impact upon the setting of the SAMs taken together with the adverse impacts of the development proposal upon the landscape more generally outweighed the benefits to be derived from the proposed development – see paragraph 409 of the Inspector's Report. That said, the Inspector did record that "the benefit associated with renewable energy production is capable of providing circumstances that are exceptional given the generally supportive thrust of national policy" – see paragraph 408. As I read that sentence in the context of the paragraph as a whole, the Inspector was saying no more and no less than the benefit of a renewable energy production scheme was capable of providing circumstances that were exceptional. It is worth noting that the Claimant, through Mrs Townsend, does not suggest the contrary.

8. Before turning to the approach adopted by the Defendant as set out in her decision letter it is as well to have in mind the benefit of the proposed development as identified by the Inspector. At paragraph 406 of his report, he concluded that the "main benefit" arising from the scheme was its contribution to the production of renewable energy and consequential reduction in CO_2 emissions. He described the contribution as significant in that it was capable of meeting the power needs of up to 12,578 homes and it would displace approximately 26,980 tonnes of CO_2 a year. He went on:-

> "In the context of the supportive stance of national planning policy and the need to meet increasingly ambitious national and international targets this is a benefit that attracts significant weight."

9. In her decision letter the Defendant accepted, expressly, that the Inspector had identified, correctly, the main issues which were determinative of the appeal – see paragraph 11. At paragraph 41 and following the Defendant set out the benefits of the scheme as they had been described by the Inspector. At paragraph 54 she highlighted the main benefit of the scheme as identified by the Inspector and set out above in paragraph 8.

10. Between paragraphs 60 and 68 the Defendant set out the reasoning which underpinned her decision to reject the Inspector's recommendation and allow Hendy's appeal. It is necessary to set out paragraphs 60 to 66 in full:-

> "60. The Welsh Government is committed to renewable and low carbon energy generation and Planning Policy Wales sets out the need to take into account the wider environmental, social and economic benefits and opportunities from renewable and low carbon energy development as part of the Government's overall commitment to tackle climate change. In this case I am satisfied the Inspector has considered the relevant issues in full, however, I do not agree with the conclusions of his balancing exercise and his resulting conclusion.
>
> 61. PPW notes in the short to medium term, wind energy continues to offer the greatest potential for delivering renewable energy and the need for wind energy is a key part of the Welsh Government's vision for future renewable electricity production. This should be taken into account by decision makers when determining such applications.
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> 62. The Inspector notes the contribution the proposal would make towards meeting the need for national energy targets is considered to weigh in favour of the development. The proposal will generate up to 17.5MW and would provide a valuable source of renewable energy which should be afforded significant weight. As the Inspector recognises, whether planning permission should be granted for the proposal rests on the balance between the benefits of generating electricity from renewable onshore wind and the identified impacts of the

scheme on landscape and visual amenity, the setting of the SAMs and other matters raised in evidence.

63. In terms of landscape and visual amenity, the Inspector states the scheme would have a substantially detrimental effect on the visual character of the landscape. I note the proposed wind turbines would be located outside the Strategic Search Areas and Technical Advice Note (TAN): 8 states outside SSAs there is a balance to be struck between the desirability of renewable energy and landscape protection. Whilst I acknowledge the Inspector's conclusions on this issue, I note the site is not located within a nationally designated landscape and the proposal would not impact on any national landscape designation.

64. In this context, I consider the benefits of the proposal in terms of delivering renewable energy are material considerations which are sufficient to outweigh the identified impacts of the scheme on landscape and visual amenity and the balance, therefore, weighs in favour of the appeal.

65. With regard to historic assets, the Inspector concludes the extent to which the setting of the scheduled monuments would be altered by the large and moving structures would represent a significantly damaging effect, in terms of paragraph 6.5.5 of PPW. Paragraph 6.5.5 of Planning Policy Wales (PPW) states "It will only be in exceptional circumstances that planning permission will be granted if development would result in an adverse impact on a scheduled monument (or an archaeological site shown to be of national importance) or has a significantly damaging effect upon its setting."

66. Whilst I do not disagree with the Inspector's conclusion the proposal will have a significant impact on the setting of historic assets, however, I consider in this case, the need for development which produces renewable energy outweighs the presumption against grant of permission in relation to the impact on the setting of SAMs. Paragraph 62.3 of PPW states "the public benefit of taking action to reduce carbon emissions, or to adapt to the impact of climate change, should be weighed against any harm to the significance of historic assets." I am of the view, in this case, the proposal's contribution to renewable energy targets constitutes an exceptional circumstance for the purpose of paragraph 6.5.5 of PPW, particularly as the identified harm is reversible and the setting of the scheduled monuments will revert back to their present state once the scheme is decommissioned.

67. Therefore, I disagree with the Inspector's recommendation…"

11. The statement of facts and grounds which supports this proposed statutory review identifies two grounds upon which it is said that the Defendant's decision was arguably unlawful, although conceptually, at least, the first ground has two distinct strands. Ground 1 asserts that the Defendant misconstrued or misinterpreted the phrase "exceptional circumstances" in paragraph 6.5.5 of PPW. Additionally or alternatively, it is suggested that the Defendant's decision to the effect that exceptional circumstances existed within that paragraph is irrational. Ground 2 asserts that the Defendant failed to provide adequate reasons for her decision.

12. I remind myself that at this stage of the proceedings my task is to determine whether the grounds of review identified by the Claimant are arguable in the sense that they give rise to a realistic prospect of a successful review. When, as in the instant case, three experienced lawyers deploy their advocacy skills to good effect it becomes tempting to conclude that the threshold for permission is bound to be reached. However, in cases of this sort, in particular, it is necessary to scrutinise the grounds with a degree of rigour; the judge at the permission stage should avoid falling into the trap of concluding that a ground is arguable simply because it is presented attractively by an experienced advocate.

13. With that reminder to myself, I turn to consider the grounds in this case.

14. Underpinning Mrs Townsend's contention that the Defendant misconstrued or misinterpreted the phrase "exceptional circumstances" in paragraph 6.5.5 of PPW is the contention that she did not distinguish between the need to identify exceptional circumstances on the one hand and what might be described as the balance of benefits and harm which, necessarily, must be assessed when a decision-maker is determining whether or not planning permission for a particular project should be granted. She submits, correctly, in my judgment, that the requirement that exceptional circumstances should be found to exist as a pre-requisite for the grant of planning permission demands that the decision maker do more than simply assess the balance of benefit and harm. According to Mrs Townsend, the Defendant, at least arguably, failed to appreciate this was the correct approach.

15. Mrs Townsend submits that this alleged error upon the part of the Defendant has its genesis in the way that Hendy presented its case at the inquiry before the Inspector and, as a consequence, neither the Inspector nor the Defendant examined whether the prevailing circumstances were exceptional as opposed to determining whether the balance of benefits and harm associated with the proposal pointed to the conclusion that permission should be granted.

16. As I have said, there are passages in the Inspector's report which apparently demonstrate that Hendy did invite the Inspector to the view that exceptional circumstances could be demonstrated provided the balance of the benefits of the proposal outweighed its detrimental impacts – see, in particular, paragraphs 135 and 136 of the Report. That said, I am not convinced that there is any real indication in the Inspector's report which suggests that he concurred with that view. My judgment upon the approach taken by the Inspector is set out at paragraph 7 above.

17. What is clear is that the Inspector did accept that in a particular case the benefits of a proposal might be sufficiently significant so as to constitute exceptional circumstances

within paragraph 6.5.5. Correctly, in my judgment, Mrs Townsend does not seek to suggest that such an approach, in a particular case, could not be open to a decision-maker.

18. In any event, whatever may have been the approach of the Inspector, the crucial issue is whether the Defendant, arguably, fell into error when interpreting or construing paragraph 6.5.5.

19. When analysing this issue it is crucial to read individual sentences or paragraphs within her decision letter in the context of the letter as a whole. In my judgment, paragraph 66 of her decision, read in the context of the decision letter as a whole (including, in particular, paragraph 62), demonstrates that the Defendant did not misinterpret or misconstrue paragraph 6.5.5 of PPW. She understood, fully, that there was a need to identify exceptional circumstances to justify the grant of permission if, as she was prepared to find, the proposal had a significant impact on the setting of the SAMs. She found that such circumstances existed and, in so doing, she was not simply weighing the benefits of the proposal against the harm which, she acknowledged, would be caused by the development. As Mr Lewis said more than once in oral argument, the Defendant chose her language very carefully in paragraph 66 of the decision letter and, it seems clear to me that she was saying no more and no less than that the benefits associated with the proposal before her constituted exceptional circumstances for the purposes of the Policy.

20. Was that decision irrational? I do not think it can be so categorised, even arguably. There was no dispute about the benefits of the proposal. They were set out in the Inspector's report and they are repeated at paragraphs 41 and 62 of the Defendant's decision letter. Whether those benefits properly constituted exceptional circumstances was, quintessentially, a matter of judgment for the decision-maker. It would not have surprised me if the Defendant had concluded that the benefits did not amount to exceptional circumstances. After all, that is what the Inspector found. However, I do not consider that there is any basis for categorising the Defendant's decision as irrational.

21. Mrs Townsend seeks to persuade me otherwise by suggesting that the Defendant has categorised as exceptional that which, in reality, was no more than the inevitable consequence of a development of the type in question. I do not consider that is correct. The Defendant clearly focused upon the particular benefits in the particular case.

22. Mrs Townsend also submits that it was irrational for the Defendant, when assessing whether the circumstances prevailing were exceptional, to take account of the fact that the development had a finite lifespan. I do not see how that consideration can found an argument in favour of irrationality on the part of the Defendant. The duration of the development was, on any view, capable of being a material factor and, in those circumstances, it was capable of being a factor to be taken into account when assessing whether the prevailing circumstances were exceptional.

23. I can deal with Ground 2 much more succinctly. As I have indicated, the Defendant identified the exceptional circumstances, as she saw them, and concluded that they were sufficient to rebut the presumption against development contained within paragraph 6.5.5 of PPW. More generally, she concluded that the benefits associated with the

development outweighed the harm which would be caused to visual amenity. Like the Inspector, the Defendant identified the main issues upon which her decision would be based and it is not suggested that she failed to address any of those issues in her decision letter. Applying the well-known principles upon which "reasons challenges" are to be determined (see *South Bucks DC v Porter (No 2)* [2004] 1WLR 1953), I have reached the clear conclusion that it is not arguable that the Defendant failed to provide appropriate reasons such that the informed reader of her decision letter could not understand the basis upon which she had reached her decision upon the principal issues. I accept that the summary grounds contained within the Defendant's acknowledgement of service and the points made in the skeleton argument presented on behalf of Hendy demonstrate, conclusively, that the reasoning of the Defendant was adequate and sufficient.

24. It follows that I have reached the conclusion that permission to bring this statutory review should be refused. I make it plain that I am in agreement, wholeheartedly, with the basis upon which Lewis J refused permission on the papers. Inevitably, this judgment is significantly longer than the reasons for refusal provided by Lewis J at the paper application stage. Essentially, however, my reasons for refusing permission are no more than an elaboration of that which Lewis J provided at the paper application stage.

Costs

25. In the light of my decision on the permission issue, the Claimant accepts that the Defendant should be awarded the costs of and incidental to the preparation of her acknowledgement of service (AOS). The Claimant complains, however, that the amount of such costs claimed on behalf of the Defendant is excessive and that I should direct that a lesser amount should be paid.

26. My understanding is that the total amount claimed by the Defendant is £4,491. Having regard to the hourly rates charged by the Government Legal Department and Counsel (neither of which can be regarded as unreasonable) I would be entitled to reduce the sum claimed only if I regarded the work done in preparing the AOS to be unreasonable. The Defendant has provided an itemised breakdown. I do not consider it discloses any evidence that unnecessary work was undertaken in the preparation of the AOS. I reject the suggestion that the sum claimed is excessive, unreasonable or disproportionate.

27. However, I am also asked to determine an application by Hendy for its costs of preparing its AOS. The sum claimed is £10,164.

28. This application raises issues which are far from straightforward. At the permission hearing I invited submissions upon costs upon various hypotheses with the aim of reducing the possibility of there being additional costs incurred in arguments upon costs. However, with the benefit of hindsight, the issues arising were not dealt with as fully in oral argument as I would have liked. Since the oral hearing I have been sent a variety of documents and some authorities which bear upon whether I should make an order in favour of Hendy. It seems to me the following points arise. First, given that this is an Aarhus Convention case, does the costs cap set out in CPR 45.43 as amplified in Practice Direction 45, apply in this case? If yes, is the cap of £10,000 the limit of the costs which can be awarded regardless of whether costs are split between the

Defendant and other parties? If not, what is the proper approach to an award of two sets of costs in Aarhus Convention cases?

29. In this unusual state of affairs I am not inclined to rule, definitively, upon the applications for costs. If the parties seek a definitive ruling I see no alternative but to convene a further oral hearing which, of course, may be wholly disproportionate in terms of the costs at stake. That being so, I am prepared to offer this provisional view, namely that in an Aarhus Convention case the limit under CPR 45.43 and Practice Direction 45 defines the total amount of costs for which a claimant may be liable. In this case the Claimant has been directed to pay £5,000 towards the costs of Hendy by the order made by Garnham J at a hearing relating to interim relief. Accordingly the balance of the cap available to be awarded against the Claimant either in favour of the Defendant or split between the Defendant and Hendy is £5,000. Again on a provisional basis, my instinct is that the Defendant should have first bite at that particular cherry in which case virtually nothing remains for Hendy.

30. Ultimately the parties may reach the conclusion that this may not be the type of case in which it is appropriate to sort out some difficult problems given that, in order to do so, Hendy and the Defendant may have to engage in the payment of significant legal costs which will not be recovered.

31. In the result, the order which I make has two stages. First, I direct that the parties have liberty to apply as to further directions as to costs. Any such application must be made within 14 days of the date of the order giving effect to this judgment. If no party has made such an application within the specified time limit I direct that the Claimant shall pay to the Defendant the costs of and incidental to the preparation of the Defendant's AOS which are assessed in the sum of £4,491. If the liberty to apply provision is invoked there will have to be a further hearing at which all the issues arising can be addressed.

32. I would be grateful if the parties could agree a form of order to give effect to this judgment.