Neutral Citation Number: [2022] EWHC 1111 (Admin)

Case No: CO/2347/2021

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 May 2022

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court
Between :

THE QUEEN (on the application of) CHALA ALICE FISKE	**Claimant**
- and -	
TEST VALLEY BOROUGH COUNCIL	**Defendant**
- and-	
WOODINGTON SOLAR LIMITED	**Interested Party**

Mr James Burton (instructed by **Lewis Silkin LLP**) for the **claimant**
Mr Robin Green and Mr Robert Williams (instructed by **Sharpe Pritchard LLP**) for the **defendant**
The interested party did not appear
Hearing dates: 28 April 2022

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Judgment Approved by the court for handing down

This judgment was handed down remotely at 10.00 am on Friday 13 May 2022 by circulation to the parties or their representatives by email and by release to the National Archives.

HH JARMAN QC:

1. In 2017 the defendant as local planning authority (the authority) granted planning permission to the interested party (the developer) for the installation of a ground mounted solar park to include ancillary equipment, inverters, substation, cctv cameras, access tracks and associated landscaping on some 72 hectares of countryside at Woodington Farm, East Wellow. By condition 2 of the 2017 permission, the development should not be carried out other than in complete accordance with approved plans comprising the drawings therein listed. The substation was shown just to the east of 132kV overhead electricity lines, part of the National Grid, which runs across the site. Condition 15 required that prior to commencement of the development, full details of the proposed siting, material and enclosure for the substation as shown on one of the drawings should be submitted and approved by the authority. That showed the substation as what was described as "typical single 33kV GRP housing switchgear" and comprising a rectangular building of about 5.3m by 5.5m and 3m above ground level. The reason given for the condition was to safeguard the visual amenities of the area.

2. By a further grant in 2021, the developer was given permission for site levelling to accommodate a further element of the substation to allow the distribution network operator (DNO) to connect the solar park to the grid. The relevant DNO in this case is Scottish and Southern Electricity (SSE). This element of the substation was specified in the 2021 permission as the DNO substation compound footprint, the installation of a DNO substation compound with associated equipment and infrastructure and connection to the 132kV overhead line including compound enclosure fencing and additional solar PV panels. The

site covered by the application extended to 6.78 hectares. For ease of reference, and to distinguish this part of the substation from that part permitted in the 2017 permission, I shall refer to what was permitted by the 2021 permission as the compound.

3. The 2021 permission contained a condition 2 which is similarly worded to that attached to the earlier permission. The listed drawings showed the maximum height of the equipment as 6.8m with a gantry of 10m to connect to the overhead line. The associated building measures 4.7m by 5.6m with a height of 3.2m. The site layout plan thus incorporated showed this compound as a larger feature than the previously permitted substation and located to the east of the overhead lines and in an area of solar panels permitted in the earlier permission.

4. The 2017 permission has been implemented, but it was not in evidence before me precisely what works have been carried out to achieve such implementation. It was not in dispute before me that implementation of the 2021 permission would mean that it would not be possible to complete the development in accordance with the 2017 permission, rendering such completion in breach of planning control.

5. This potential breach of planning control by granting the 2021 permission was not dealt with in the officer's report to the authority's planning committee or otherwise brought to the attention of members. The claimant, who resides near to the site, challenges the grant of the 2021 permission on the basis that the authority in granting it, failed to have regard to such incompatibility, failed to have regard to the fact that the 2021 permission could not be implemented

without causing a breach of planning control, and failed to grapple with the incompatibly or the consequence of it.

6. The authority denies any such errors. It submits that the essence of the claimant's case is an unwarranted assumption that the developer would implement the 2021 and thus cause a breach of planning control. It further submits that the reason the developer applied for the 2021 permission and how, if at all, it would exploit it, were not obviously material matters to the merits of such an application and therefore did not have to be dealt with in the officer's report or otherwise brought to the attention of the members.

7. The day before the substantive hearing, the authority granted an application by the developer under section 73 of the Town and Country Planning Act 1990 (the Act) to vary the 2017 permission so as to allow the construction of the compound permitted under the 2021 permission. The sections quoted in this judgment are of the Act unless otherwise stated. Mr Green, on behalf of the authority, did not seek to rely upon this variation as providing a complete answer to the challenge, because the six week statutory period to challenge the variation has only just commenced.

8. It is clear from the officers' reports leading to the grant of the 2017 and 2021 permissions that the stated purpose of the development was to allow the energy produced by the solar panels to be connected to the National Grid.

9. The latter report made clear that the permission then sought was associated with the 2021 permission. It stated that following the grant of the 2017 permission, the developer found that the substation incorporated into the design of the permitted development would not be able to become operational as the drawings

had been based on a 33kV substation. The developer applied for variation of the 2017 permission under section 73 of the 1990 Act to revise the permission to include the compound which would allow connection with the overhead lines, which was granted. However as the report went on to say, the compound was significantly larger than the 33kV substation with more extensive impact. The claimant brought a claim for judicial review of this section 73 variation, and the authority agreed to have that quashed. The developer then chose to submit a full stand-alone application for the 132kV compound.

10. It is clear from a comparison of the two permissions, that what the latter permits, which the former does not, is a direct connection of the solar park to the overhead lines running across the site. Whilst the 2017 permission established the acceptability of a 72 hectare solar park at the site, what it did not do was establish such acceptability for the compound with a gantry of some 10m in height. The developer attempted to do that by way of an application under section 73 of the 1990 Act, namely an application to develop land without complying with conditions previously attached. Subsection 2 provides that on an application the authority shall consider only the question of what conditions subject to which planning permission should be granted. However, as the authority acknowledged, the development sought in this application was significantly larger with more extensive impact than the substation in the 2017 permission.

11. The statutory scheme contained in planning legislation does not deal with issues of incompatible planning permissions. That gap has been filled with principles developed in case law over the decades. These were not in dispute before me,

as they apply to the facts of this case, and for present purposes may be summarised as follows:

i) There is nothing wrong in principle in an authority granting more than one permission which are incompatible with one another. This allows developers to choose which permission to carry out (see *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527 and *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] 1 AC 132). In the former case Lord Widgery CJ observed at page 1531 that there may be special cases where one application refers to another.

ii) Where, however, development has been carried out under the first of two incompatible permissions, the question is whether it is possible to carry out the development proposed in the second permission, having regard to that which is done or authorised to be done under the permission which has been implemented (per Lord Widgery CJ in *Pilkington* at 1531-2).

iii) If a building operation is not carried out, both externally and internally, fully in accordance with the permission, the whole operation is unlawful, not just that part which deviates from the permission (*Sage v Secretary of State for the Environment* [2003] UKHL 22).

iv) Where development under the original permission has begun, but then development under incompatible permissions is built out so that the development under the original permission cannot be completed, the subsequent development as a whole will be unlawful (*Hillside Parks Ltd v Snowdonia National Park Authority* [2020] EWCA Civ 1440).

v) The reasoning in *Sage* does not mean that if a building is built which conforms to planning permission but is not completed, then the whole building is unlawful. Building may be carried out under two identical permissions one after the other (*R (Robert Hitchins Ltd) v Worcestershire CC* [2015] EWCA Civ 1060 per Richards LJ at paragraph 48).

12. A point which was expressly not decided in *Hillside* is whether all development carried out lawfully under the first permission is rendered unlawful by the mere fact of development then taking place under a second permission which is incompatible with the first. Singh LJ, giving the lead judgment, at paragraph 68 referred to these as potentially important questions which did not need to be decided on that appeal and he preferred to express no view on them.

13. A breach of planning control is defined in section 171A(1) of the 1990 Act as: "(a) carrying out development without the required permission; or (b) failing to comply with any condition or limitation subject to which planning permission has been granted."

14. In the present case, it is not suggested that any development has been carried out under the 2021 permission, it was possible to do so immediately upon grant. Accordingly it is not suggested that there is any unlawful development as things stand. However, Mr Burton, for the claimant, submits that as the whole purpose of applying for the two permissions was to connect the energy from the solar park to the National Grid, the 2017 is unworkable as framed without the 2021 permission, and so by granting the latter which was incompatible with the former, it was inevitable that unlawful development would be carried out under

one or other. This was a consequence which was not considered or grappled with by the authority in its decision whether or not to grant the 2021 permission.

15. Mr Green, however, submitted that the developer had a number of options. The first of these was to carry on to complete the development under the 2017 permission. The evidence before me did not seem to me to deal clearly one way or another with whether it was viable to do so without the direct connection to the overhead lines. I therefor directed that the parties should file position statements on that issue, which (I expressed the hope) could be agreed.

16. In the event, a witness statement by a director of the developer, Timothy Redpath, dated 3 May 2022 was filed on behalf of the authority and further written submissions on its behalf and that of the claimant were filed to deal with this point. Although as pointed out on behalf of the claimant, this statement was not the subject of an express direction, no objection was made to the filing of it, and indeed the further written submissions of Mr Burton seek to rely upon some parts in support of the claimant's case. Regrettably, the claimant and the authority were not able to agree upon such interpretation of this evidence and Mr Green's further submissions also seek to rely upon it in support of the authority's case.

17. In my judgment the evidence of Mr Redpath clarifies issues as to the connection with the National Grid which were not at all clear from the evidence filed by the claimant or the authority for the hearing, and is very helpful in that regard.

18. Mr Redpath explains that at the time of submitting the application for the 2017 permission, the developer had not been informed by SSE of its design requirements for the part of the substation which was necessary to feed the

energy produced by the solar park directly to the 132kV grid. When SSE informed the developer of its design requirements for that part of the substation, that design was incorporated into the application for the 2021 permission, but in a way that also incorporated the 33kV part of the substation which was permitted in the 2017 permission.

19. However, the location of substation was in this application to the west of the overhead lines and so in a different location to what had been permitted under the 2017 permission. The reason for that was that the location permitted in the 2017 permission was above an underground utility pipeline and SSE wished to avoid building the substation over that line if it were practical to do so. As it was practical to do so, then the application for the 2021 permission was submitted with both the 33kV and 132kV elements of the substation shown in a new location to the west.

20. Had that new location not been practical, then the substation with both the 33kV and 132kV elements could have been, and still can be, built on land not otherwise designated for any other purpose to the east of the overhead line. The developer had options. It could proceed with the implementation of the 2017 permission, and seek permission for the compound element of the substation under a section 73 application or a full planning permission. It could also identify a private customer, commonly referred to as a corporate off-taker, to take some or all of the energy generated by the solar park and to connect that customer to the park via a private wire network.

21. In my judgment it is clear that that latter is an option for the solar park in the event that the further permissions needed to connect to the grid either are not

forthcoming, or are forthcoming in a way that makes such permission incompatible with the 2017 permissions. However, I accept that the applications for the 2017 and the 2021 permissions were each put on the basis that the intention was to connect the development applied for, if permitted, to the grid, and that the latter was necessary to ensure such connection. Accordingly the private connection would appear to be an unlikely, if viable, option.

22. The second option for the developer was to apply for a variation of condition under section 73 so as to allow space to carry out the development under the 2021 permission. That has now been granted, but is challenged by the claimant who says that the application is an unlawful attempt to sidestep the statutory scheme, just as the earlier section 73 application was.

23. The third option is to apply for a composite planning permission to allow for the solar park with the compound, which is what the claimant says should have happened in the first place. The fourth option is to make a section 73 application to vary the 2021 permission.

24. The question then arises as to whether the potential difficulties arising from the incompatibility of the two permissions should have been considered and grappled with by the authority in deciding whether or not to grant the 2021 permission. By section 70(2), the authority had to deal with the applications for permission having regard to the development plan so far as material and to any other material consideration. Such a consideration is one which serves a planning purpose, and that in turn is one which relates to the character of the land (see for example *R (Wright) v Forest of Dean DC* [2019] UKSC 53).

25. In deciding whether a decision maker has failed to have regard to a material consideration, the approach is that set out by Lord Carnwath in *R (Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3, citing at paragraph 30 his own summary in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin). The issue in the latter case was whether an authority had been obliged to treat the possibility of alternative sites as a material consideration. Lord Carnwath said:

> "17. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it …
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> 18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide (*Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker (*Tesco Stores Ltd v Secretary of State for the Environment and West Oxfordshire District Council* [1995] 1 WLR 759, 780). On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so.

26. At paragraph 32, Lord Carnwath observed that the question was whether visual impacts were expressly or impliedly identified in the Act or the policy as considerations required to be taken into account by the authority "as a matter of legal obligation", or alternatively whether, on the facts of the case, they were "so obviously material" as to require direct consideration.

27. Mr Burton submits that the application for the 2021 permission was associated with the 2017 permission and was made to ensure connection with the National

Grid, and thus amounted to a special case as contemplated in *Pilkington.* I accept those submissions. It follows, he says, that the authority proceeded to consider the application on this basis which would impact upon key planning policies such as whether the development was essential in the countryside, and should have grappled with incompatibility.

28. Mr Green submits that the incompatibility between the two permissions is a matter for the developer to resolve and was not something which the authority needed to consider or to speculate upon. It is not surprising that a project of this magnitude should be an evolving process.

29. In my judgment this was not a matter which the authority was compelled to take into account or grapple with. Although the options were not before the authority in considering whether to grant the 2021 permission, and may have developed since, I accept that this was a matter for the developer. It seems to be common ground that it would be open to the developer to apply for a composite permission for a solar park with the compound element of the substation. It is not difficult to see why a developer, having established the principle of acceptability in planning terms of the solar park under the 2017 permission, should first wish to test such acceptability of the compound in the countryside, before embarking on a far more extensive application. It may be well be however, that the difficulties of incompatibility were simply not considered by the developer when submitting the application for the 2021 permission, and are now having the be addressed.

30. I cannot see that there is a statutory requirement or policy requirement to have regard to such potential consequences in deciding the application for the

compound, or that they were so obviously material as relating to the character of the 6.78 hectares of land comprising the site to which the application related. The authority decided that such use in the countryside was acceptable in planning terms, in the context that such acceptability of a 72 hectare solar park in the countryside had already been established.

31. Accordingly, in my judgment the challenge to the 2021 permission fails. In all the circumstances set out above, the assumption that the developer will seek to implement the 2017 and/or 2021 permission so as to give rise to a breach of planning control is not justified on the evidence. I accept that it was and is for the developer to decide how to develop in a way which does not involve such a breach, and that therefore it was not for the authority to grapple with or speculate upon the potential options.

32. This judgment will be handed down remotely. I should be grateful if counsel would submit a draft order, agreed insofar as this can be achieved, together with written submissions on any points which cannot be agreed, within 14 days of hand down. Any such points, including any application for permission to appeal and any extension of time to apply to the appeal court, will then be determined on the basis of such submissions.