CO/5172/2003

Neutral Citation Number: [2003] EWHC 3381 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Thursday, 18 December 2003

B E F O R E:

MR JUSTICE HARRISON

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THE QUEEN ON THE APPLICATION OF MELANIE TOOLE

(CLAIMANT)

-and-

DURHAM COUNTY COUNCIL

(DEFENDANT)

-and-

PREMIER WASTE MANAGEMENT LIMITED

(INTERESTED PARTY)

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Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

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MS F DARROCH (instructed by Richard Buxton, Cambridge CB1 1JX) appeared on behalf of the CLAIMANT
MR R TAYLOR (instructed by Corporate Legal Services, County Hall, Durham DH1 5UL) appeared on behalf of the DEFENDANT
MR M BRUCE appeared on behalf of the INTERESTED PARTY

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J U D G M E N T
(Approved by the Court)

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1. MR JUSTICE HARRISON: I have had my attention drawn to quite a number of matters this afternoon. Indeed, anybody could be forgiven for thinking that this was the substantive hearing, as opposed to just a permission hearing, as it has lasted the whole day.

2. It involves a claim by Mrs Toole, who lives in a residential estate which is close to a waste transfer station and re-cycling facility at Stainton Grove near Barnard Castle in County Durham.

3. Planning permission was granted for that facility on 4 April 2003. The claimant seeks judicial review of that planning permission on the grounds that it involved defective procedures in that it was not subject to a screening opinion which should have led to an environmental impact assessment.

4. The claim was brought on 6 October 2003 - that is to say, just over six months after the grant of planning permission. CPR 54.5 states:

> "The claim form must be filed -
>
> (a) promptly; and
>
> (b) in any event not later than three months after the grounds to make the claim first arose."

Section 31(6) of the Supreme Court Act 1981 provides:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant -
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

5. My attention was drawn to the three questions which Maurice Kay J posed in R v Secretary of State for Trade and Industry ex parte Greenpeace [2000] ELR 221 as follows:

"First, is there a reasonable objective excuse for applying late? 2. What, if any, is the damage in terms of hardship or prejudice to third-party rights and detriment to good administration which would be occasioned if permission were now to be granted. 3. In any event, does the public interest require that the application should be permitted to proceed?"

6. Following fulfilment of some conditions precedent, work started on this site on 26 August 2003 in implementation of the planning permission. That was about four and a half months after the grant of the permission. It has continued since, and I am told that it has got to the stage where redevelopment is likely to be finished next month. As I understand it, the waste transfer station has been erected, the weigh bridge is up and some areas of hardstanding are there. Access has also been provided. It is clear that substantial works have been carried out.

7. They have been carried out by Premier Waste Management Limited ("Premier Waste"), who are a subsidiary of Durham County Waste Management Company Limited, which is 84 per cent owned by the County Council. Premier Waste are, in effect, a local authority controlled company, but they operate at arm's length from the County Council, as indeed they are required to do as a result of the legislation which gave rise to the need for such companies to be created.

8. Mr Grant, who is the Chief Executive of Durham County Waste Management Limited, has made a witness statement in which he says that no notice or pre-action protocol letter was served on Premier Waste, and that the first indication to them of any challenge being made was when it received the claim form in the first week of October.

9. The position, as derived from his witness statement, is that over £250,000 has been invested in the development to date, although some of that, as I understand it, is funded from elsewhere, whilst also falling upon the public purse.

10. The reasons for the delay in making the claim have been covered very thoroughly by Ms Darroch in her helpful skeleton argument. She refers to the fact, which I accept, that the claimant and the action group with which she is associated have been very active in opposition to this development.

11. Ms Darroch refers to the fact that representations were made to the Scrutiny Committee of the Teesdale District Council in October 2002. I have had my attention drawn to the conclusion of that committee, drawing some adverse conclusions about the nature of the consultation that was involved. Those were representations made, as I said, in October 2002, well before the planning permission was granted in this case. I was also referred to the fact that a complaint had been made to the Ombudsman by letters in January and February and indeed March 2003, again before the planning permission was granted. I am told that the Ombudsman may now be progressing her report, having slowed matters down as a result of the legal process.

12. No point was made, as I understand it, to the Ombudsman about the point taken in this court about an environmental impact assessment arising from schedule 2 requirements.

13. I am also told that in January and February 2003, letters were sent to the Government Office of the North East, asking the Secretary of State to call in this application. He declined to do so. There was no mention in that letter of what I will call, if I may, the "schedule 2 environmental impact assessment point".

14. Another matter to which I have been referred is a letter written to the Prime Minister at the end of July 2003, as a result of which there was a letter from the Government Office for the North East on 20 August 2003, in which they stated:

> "Since planning permission has been granted the only option to you is to challenge the decision through the courts. If you are considering this option I would suggest that you firstly seek legal advice."

I am bound to say that that is what may appear to a number of people to be common sense advice which would have occurred to a lot of people (non-lawyers) without having to be told it.

15. There was a letter of 5 August 2003 written by Rebecca Byrne, who, as I understand it, was under legal training at the time but not legally representing the claimant or the local residents. It is, however, plainly written on behalf of the residents of Stainton Grove because it is signed as such. In that letter, there is the first mention of the Town and Country Planning Environmental Impact Assessment Regulations 1999, and in particular, schedule 2, Category 11B(ii), which is the very statutory provision under which this claim is now brought.

16. I would accept Ms Darroch's point that the gravamen of the preceding part of that letter is very much geared towards wildlife and nature conservation matters, but the fact of the matter is that that letter does identify the very statutory provision upon which this claim is now made. That letter was dated 5 August 2003.

17. As I have said, there was the letter from the Government Office for the North East on 20 August 2003. I am told by Ms Darroch that the claimant instructed solicitors on 28 August. I think the solicitors, Richard Buxton, refer to the first week of September, but nothing really turns upon that. There was then a letter before action on 3 September 2003. Ms Darroch makes the point that there was no reply to that letter for some three weeks, following which the claim was submitted on 6 October.

18. Ms Darroch drew my attention to the fact that there had been a request for expedition, as indeed there was. That request was contained in the special form which is required for urgent consideration in which there is a section asking whether interim relief is sought.

19. In the completed form, it was stated that expedition was being sought but that interim relief was not being sought at that time. As a result of that, the matter was dealt with by Davis J on 9 October 2003. It was therefore dealt with as a matter of expedition within three days of the claim being put in. Permission was refused on the ground of delay.

20. Davis J, in giving his reasons, referred to the fact that the claim was said to require urgent consideration, but that no interim injunction was sought.

21. That is, I hope, a reasonably accurate chronology of what has happened in this case. Ms Darroch submitted that the answer to the first of the three questions posed by Maurice Kay J which I mentioned earlier, namely: is there a reasonable objective excuse for applying late?, should be answered in the affirmative. She submitted that it was plain that the claimant and others had no knowledge of the legal remedy which was available to them, but that they could not be accused of sleeping on matters and that they could not be accused of delay after they knew that they had some form of redress.

22. She referred me to R v University College London ex parte Ringer [1995] ELR 213, in which Sedley J (as he then was) said that the discretion to enlarge time beyond the ordinary three months is one which would be sympathetically approached by the court where the applicant in the meantime has not been sleeping on her rights but has been attempting to canvass them by other legitimate means.

23. So far as the second question is concerned, namely hardship, prejudice and detriment to good administration, Ms Darroch referred to what she described as the clear, defined link between Premier Waste and the County Council, and suggested that it was very hard - indeed I think she said "inconceivable to think" - that Premier Waste would not have known about the challenge.

24. She referred to the fact that the development had continued apace, that urgent consideration had been sought for the consideration of the claim but that an interim injunction had not been sought. There was no knowing, says Ms Darroch, how much of the £250,000 was spent before Premier Waste had knowledge of the claim. She submitted that the detriment, such as it is, was so bound up, or intertwined, with the substantive application that both those matters ought to be heard at the same time.

25. So far as the third question is concerned, namely, does the public interest require that the application should be permitted to proceed?, she submitted that the environmental impact has never properly been considered in this case as it should be considered under the Directive, and therefore it was in the public interest that the opportunity for that to be done should be taken.

26. These cases where there has been significant delay where the claimant is not a legally qualified person and has not instructed solicitors for a significant period of time, are always very difficult to deal with because one naturally has a degree of sympathy with a person in a position such as the claimant is in this situation.

27. I would entirely accept that the claimant and those involved with her have actively been taking steps in opposition to this development over a period of time. The trouble is that they have not been taking any steps in what I would describe as a "legally meaningful way", by which I mean steps which could be taken in order to ensure that the planning permission after it was granted would be quashed.

28. As I have mentioned, the advice that was given by the Government Office for the North East on 20 August 2003 that, because planning permission had been given, the only option was to challenge the decision through the courts, is almost a statement of the blindingly obvious. This is a situation where solicitors were instructed at a later date. I

am sure the solicitors would have been instructed earlier if it had been realised that there was this possibility to go for judicial review.

29. In cases, though, involving the grant of planning permission it is particularly important that any legal challenge is made at an early stage. The reason for that is that there is a requirement for certainty for everybody, including the developer who is quite entitled to go ahead and implement his planning permission. Thus it is important that, if somebody is going to challenge a planning permission, the challenge should be made promptly.

30. In this case there was a delay of six months. That is a very significant delay. If I were to go back to the first question, namely is there a reasonable objective excuse for applying late, I am afraid my answer to that, with great regret, is "no".

31. As Mr Taylor put it on behalf of the County Council, ignorance of a remedy is not a reasonable explanation. It can lead to a situation where a planning permission, or any other decision for that matter, could be challenged at a significantly late stage by somebody saying, "I am sorry, I did not know that judicial review existed". The law cannot usually permit such an excuse in a situation where there has to be certainty.

32. Not only would I answer that first question in the negative, but there is prejudice and detriment to good administration in this case. There is, first of all, prejudice to the implementation and administration of the waste management strategy which is a matter of public interest. Rather more importantly, there is also prejudice arising from the fact that a great deal of time and money has been expended on the development that has reached the stage that it has.

33. Having said that, I appreciate and accept the point that has been mentioned that some, probably quite a bit, of the development would have been carried out after Premier Waste were on notice that the matter was being challenged in early October. But the development did continue and the claimant did not apply for an interim injunction. It was an option which was open, although I realise that there are difficulties associated with that remedy. I bear that in mind as well. Nevertheless, looking at the matter as a whole, for the reasons I have mentioned, there is, in my view, prejudice and detriment to good administration.

34. So far as the third question is concerned, namely whether the public interest requires that the application should be permitted to proceed, there are really two sides of the coin. I understand and sympathise with the point raised by Ms Darroch that it is in the public interest that the matter should be dealt with in the way in which statute says it should be dealt with, assuming that the claimant is right on the legal points. By the same token, there is the public interest in the waste management strategy. Indeed, I was told about the urgency of the situation which pertained prior to this planning application being considered. So there are two sides of the coin, both of which are perfectly reasonable points to be made. If this had been a marginal decision, I would have taken into account the merits of the legal grounds of challenge because, if they were so strong that the claimant would have stood a good chance of winning, they could provide a reason for extending time.

35. I am not going to go through and rehearse the arguments which I have heard relating to the schedule 2 points relating to the area of the land, and also whether this is an installation for the disposal of waste. I think it is right to say that, if I were to disregard the issue of delay, those points are arguable points, but they do not seem to me to be of such a strength that they should override such a significant delay as is involved in this case.

36. What I will call the waste management point, is, if I may say so with great respect, a bad point, and I certainly would not have granted permission on that.

37. So I have taken the merits of the legal arguments into account in the way which I have described very briefly, but I am quite clear that the delay here is of an order that time should not be extended and permission should not be granted.

38. Although I know it will come as a great disappointment to the claimant and those involved in her action group, I am afraid that my decision is, therefore, that this application must be dismissed.

39. Are there any consequential matters? No?

40. MS DARROCH: May I have a legal aid costs order?

41. MR JUSTICE HARRISON: Yes. That is not quite the terminology, but I know what you mean and the associate knows what it is. I do not have the exact form to hand. Is the certificate with the file?

42. MS DARROCH: It is my Lord.

43. MR JUSTICE HARRISON: Yes you may. Thank you very much.