



Case No: C1/2012/1387(A)

Neutral Citation Number: [2013] EWCA Civ 87
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(HIS HONOUR JUDGE MACKIE QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 31st January 2013

Before:

LORD JUSTICE SULLIVAN

Between:

THE QUEEN ON THE APPLICATION OF EVANS

Appellant

- and -

**SECRETARY OF STATE FOR COMMUNITIES AND
LOCAL GOVERNMENT AND ORS**

Respondent

(DAR Transcript of
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Mr Paul Stookes (instructed by Richard Buxton Environmental and Public Law) appeared on behalf of the **Appellant**.

The **Respondent** did not appear and was not represented

Judgment

(As Approved)

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Lord Justice Sullivan:

1. On 23 October 2012 Mummery LJ ordered that the applicant's application for permission to appeal the decision of HHJ Mackie QC refusing to grant his application for permission to apply for judicial review should be adjourned to a full court of three Lord Justices, one with planning experience, with the appeal to follow immediately afterwards if permission was granted. Mummery LJ also ordered that the applicant's application for a protective costs order be refused.
2. In these proceedings the applicant challenges the lawfulness of a negative screening direction by the Secretary of State to the effect that a proposed development by the third respondent is not an EIA development. The application for permission to apply for judicial review was refused on the papers. It was refused again by HHJ Mackie on the renewed application and the application for permission to appeal was refused by Elias LJ on the papers.
3. The application for permission to appeal to this court was renewed. In his judgment on the renewed application, reported at [2012] EWCA Civ 1616, Mummery LJ said that it was unsatisfactory that he had been given material at the last minute. He considered that the appeal would fail and so he did not grant permission to appeal but he went on to say this :

“On the other hand, I do not think it would be fair for me to refuse permission to appeal when a more extended argument might persuade three judges that there is more in this case than I think there is.”

So he made the order to which I have referred.

4. So far as the application for a protective costs order was concerned, he said this :

“It follows finally that I do not make a protective costs order, as I do not think this appeal is going to succeed and it would not be right to do that.”

5. The applicant invites this court to reconsider the issue of the protective costs order. In a nutshell the applicant says that he cannot afford the risk of exposure to the likely costs of the rolled-up hearing and, if he is not granted protection by way of a protective costs order, then he will have no option but to withdraw his application for permission to appeal. Accordingly he invites the court to reconsider Mummery LJ's order refusing a protective costs order.
6. There is no reason to disbelieve the applicant when he says that he cannot risk the costs of a rolled-up hearing and that, if he is not granted protection by way of a protective costs order, then he will have no option but to withdraw his application.

7. Subject to the court having jurisdiction to reconsider the matter, the terms of a draft protective costs order have been agreed between the Secretary of State and the applicant. The District Council, although formally one of the respondents, has not played any active part in the proceedings. Persimmon Homes objected to the grant of a protective costs order before the High Court, but because the application for permission to apply for judicial review was refused, the judge did not have to deal with that issue and Persimmon have not made any further representations.
8. In these circumstances, and subject to the question of the court having jurisdiction to do so, it seems to me that the court should revisit the question of whether or not a protective costs order should be granted. It is not for me to consider the merits of the substantive application for permission to apply for judicial review. They will be considered by the full court in the middle of next month in accordance with the order made by Mummery LJ if the proceedings are not withdrawn by the applicant. Although Mummery LJ was of the view that the appeal would fail, he did not think it would be fair to refuse permission to appeal, because he recognised that a more extended argument might persuade three judges that there was more to the case than he thought there was. He refused a protective costs order because he thought that the appeal would not succeed, but the applicant is entitled to say that this aspect of Mummery LJ's order effectively takes away with one hand that which the Lord Justice had given with the other. Mummery LJ recognised that a more extended argument might persuade three Lord Justices, but the reality is that they would be persuaded only if the applicant is prepared to face an unacceptable risk of costs liability. That is because whether or not the more extended argument is persuasive is going to be determined at a rolled-up hearing where the appeal will follow if permission to appeal is granted. In those circumstances both the applicant and the respondent would have to prepare for a full appeal, so the applicant will be exposed to a costs liability in respect of a full appeal and not simply an application for permission to appeal.
9. Since Mummery LJ concluded that permission to appeal should not be refused because the full court might reach a different view on the merits, in my judgment it would be wrong to prevent the applicant from putting the matter before the full court by depriving him of the costs protection that he needs in order to enable him to put the extended argument before the full court. So, if I have jurisdiction to do so, I would grant a protective costs order.
10. So far as jurisdiction is concerned, I have received a helpful note from Mr Stookes. It is important to bear in mind that the renewed application for permission to appeal has been adjourned. In these circumstances, even though procedural orders have been made, in this case not to grant a protective costs order, it does seem to me that it is open to the court at any time to revisit those procedural decisions if it is satisfied that it is necessary to do so in order to enable the adjourned application for permission to appeal to have a fair hearing. There is a further point that Mr Stookes makes in his note, and that is to say that a decision to grant or refuse a protective costs order is not a 'once and for all' decision. The court has a continuing discretion to review the need for a protective costs order and may make or indeed withdraw an order at any

stage in the proceedings if it thinks it appropriate to do so (see paragraph 74(1) of R(Corner House Research) v SSTI [2005] EWCA Civ 192.

11. In my judgment the implications of ordering a rolled-up hearing in terms of the applicant's exposure to the risk of costs was not addressed by Mummery LJ in his short judgment. Having had the benefit of fuller argument on this topic, I am satisfied that, since there is to be a rolled-up hearing, a protective costs order is required in order to enable the applicant to participate in that hearing.
12. So, for those reasons, I grant the application for a protective costs order in the terms of the draft consent order that has been agreed, subject to the issue of jurisdiction, between the Treasury Solicitor and the applicant's solicitors.

Order: Application granted