



**In the High Court of Justice
Queen's Bench Division
Planning Court**

CO/1327/2021

In the matter of an application for Judicial Review

THE QUEEN

on the application of

MARK KEIR

Claimant

versus

NATURAL ENGLAND

Defendant

(1) FUSION AND MURPHY JOINT VENTURE

(2) HIGH SPEED TWO (HS2) LIMITED

Interested Parties

Application for permission to apply for Judicial Review and interim relief

NOTIFICATION of the Judge's decision (CPR Part 54.11, 54.12)

Following consideration of the documents lodged by the Claimant, and the representations made by the Defendant and the ~~First~~ Second Interested Party;

Order by the Honourable Mrs Justice Lang DBE

1. The Interested Parties are forthwith restrained from carrying out works or other activities at Jones' Hill Wood, Buckinghamshire, in the Licensed Area, as defined in License WML-OR58, issued by Natural England on 30 March 2021, until the determination of this claim or further order.
2. The application for permission is adjourned to be listed in court as a "rolled up hearing", on notice to the Defendant and Interested Parties, on a date in the week commencing 24 May 2021 or as soon as possible from 8 June 2021 onwards, having regard to the availability of counsel already instructed at the date of this order. If permission to apply for judicial review is granted at that hearing, the Court will proceed immediately to determine the substantive claim.
3. The claim is to be expedited.
4. The Claimant do have permission to rely upon the expert reports of Dominic Woodfield and Robert Milieto.
5. This is an Aarhus Convention claim within the meaning of CPR 45.41. The Claimant's liability for the costs incurred by the Defendant and Interested Parties is limited to £5,000, and the Defendant's liability for the costs incurred by the Claimant is limited to £35,000.
6. Costs reserved.

7. Liberty to apply to vary or discharge this order on 2 days notice to all other parties.

Case management directions

8. The Claimant must lodge, within 7 days of service of this order, an undertaking to pay the appropriate fee if permission to apply for Judicial Review is granted (or complete an Application for Remission of a Fee, if appropriate).
9. The Defendant and any other person served with the claim form who wishes to contest the claim or support it on additional grounds must file and serve detailed grounds for contesting the claim or supporting it on additional grounds and any written evidence, no later than 4.30 pm on 30 April 2021.
10. The Defendant and the Interested Parties must comply with the duty of candour by disclosing all relevant documents, including internal and external correspondence and emails and notes and minutes of meetings, no later than 4.30 pm on 30 April 2021.
11. The Defendant do file and serve a 'Defendant's hearing bundle' comprising its Detailed Grounds, representations to the Court and evidence, in compliance with Administrative Court Office guidance on electronic filing, no later than 4.30 pm on 30 April 2021.
12. The Interested Parties do file and serve an "Interested Parties' hearing bundle' comprising their Detailed Grounds, representations to the Court and evidence, in compliance with Administrative Court Office guidance on electronic filing, no later than 4.30 pm on 30 April 2021.
13. The Claimant is to file and serve a Reply (incorporating but not limited to, the points in response made in the email of Hannah Brown of Richard Buxton Solicitors, sent at 12.33 on 15 April 2021) and any further evidence, no later than 10.00 am on 10 May 2021.
14. The two hearing bundles already filed and served by the Claimant are to stand as the Claimant's hearing bundles, together with a third bundle for the Reply and further evidence, if any.
15. The Claimant must file and serve a skeleton argument no later than 4.30 pm on 14 May 2021.
16. The Defendant and any Interested Party intending to participate in the proceedings must file and serve a skeleton argument no later than 21 May 2021.
17. The Claimant must file an agreed bundle of authorities, not less than 3 days before the date of the hearing.

Listing Directions

18. The application is to be listed for 2 days; the parties to provide a written estimate within 7 days of service of this order if they disagree with that estimate.

Case NOT suitable for hearing by a Deputy High Court Judge

Observations

In determining the application for interim relief, I have applied the principles in *American Cyanamid Company v Ethicon Ltd* [1975] AC 396, modified as appropriate to public law cases. First, the Claimant must demonstrate that there is a serious question to be tried. In judicial review claims, this includes considering whether there is a real prospect of the claim succeeding at the

substantive hearing: see *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin), per Cranston J at [6] and *The Administrative Court Judicial Review Guide 2020*, paragraph 15.10. In my judgment, on the information before me now, the Claimant's grounds meet this threshold.

Second, the Court should consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought. In my judgment, the *status quo* should be maintained, so that the rare species of bats protected by the Conservation of Habitats and Species Regulations 2017 are not disturbed until the determination of the claim, to safeguard against the risk of significant environmental damage, which cannot be compensated for by a monetary remedy if the Claimant succeeds in the claim. In reaching this conclusion, I have taken into account the inconvenience and irrecoverable expense of delay to the works. I have sought to mitigate this by granting a rolled-up hearing with an expedited timetable and hearing date. Counsel's availability is the usual reason for delay in listing, and so I have limited consideration of this factor to those counsel already involved in the case at the date of this order. If the Defendant and Interested Parties have not yet instructed counsel, they will be able to choose counsel who can attend on the dates offered.

Both the Claimant and the Second Interested Party have requested an expedited rolled-up hearing, for speed. The Defendant asked that the claim proceed by way of a permission decision on the papers. However, in my experience, a rolled-up hearing is a much speedier route to a final determination. Even if permission were refused on the papers (which I consider unlikely), the Claimant would probably renew his application at an oral hearing, and if permission were then granted, a substantive hearing would not be ready to be listed for months. Although the rolled-up procedure does require the Defendant to respond fully to the claim at an earlier stage, I note that the Defendant has already provided a detailed response to the grounds, and many of the relevant documents are already available to the Claimant. Therefore I do not consider that is unduly onerous for the Defendant to respond fully, and it is likely to assist the Court in reaching a just decision.

The order has been amended under the slip rule to refer to representations from the Second Interested Party, not the First Interested Party. At the time of drafting this order, I had received a letter on behalf of the Second Interested Party but nothing from the First Interested Party.

After service of this order, I was sent a copy of representations from counsel for the Second Interested Party, which had been inadvertently been omitted from the papers sent to me. I have now considered these representations. The points made in respect of the merits of the claim adopt a similar stance to the Defendant's representations, which I did have the benefit of considering before making my order. I am still not persuaded that the claim is unarguable or has no real prospect of success. On the facts, I do not accept the submission that the application for permission and/or interim relief ought to be refused on the grounds of delay. However, I have adjourned the permission application, and so the Defendant and Interested Parties will have another opportunity to persuade the permission judge otherwise.

In granting interim relief, I expressly weighed in the balance the inconvenience and irrecoverable expense caused by delay to the works, which has been further confirmed by the Second Interested Party's more detailed representations. However, in my judgment, the balance of convenience lies in favour of maintaining the *status quo*, bearing in mind the legal obligation to protect rare species and the fact that harm to rare species may well be irreversible.

In my judgment, the Claimant's expert evidence is reasonably required to resolve the claim which he is presenting. I anticipate that Natural England will rely upon its in-house experts in defence of its decisions, as it typically does. An application by

the Second Interested Party to adduce expert evidence should be considered on its merits, if and when it is made.

As to the costs cap, the Claimant falls within CPR 45.43(2) as he is claiming as an individual, not on behalf of a business or other legal person. Financial support from others is a factor which can justify an increase in the cap under CPR 45.44(4). I accept the Claimant's evidence as to his own means - he is clearly impecunious, and a costs cap in excess of £5,000 would make the proceedings prohibitively expensive for him. The only issue is whether the crowd funding justifies an increase in the cap. I accept his evidence that, although he has been able to fund raise a sum in the region of £35,000 for this claim, these funds have been, and will be, required to meet his own legal costs, and so are not potentially available to meet any adverse costs order. Therefore the costs limit should not be increased.

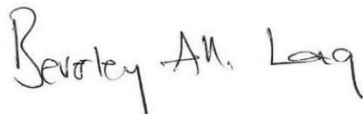
The costs caps have been imposed in respect of the Claimant and Defendant only, as the usual practice is that costs orders are not made in respect of interested parties.

Signed:



Dated: 16.4.21

Amended on 16.4.21



The date of service of this order is calculated from the date in the section below

For completion by the Planning Court

Sent / Handed to the Claimant, Defendant and any Interested Party / the Claimant's, Defendant's, and any Interested Party's solicitors on (date): 16/04/2021

Solicitors: Richard Buxton Solicitors
Ref No. KEI1/1