In the High Court of Justice
Queen's Bench Division
Administrative Court

CO Ref:
CO/3081/2020

In the matter of an application for Judicial Review

The Queen on the application of SUSAN CARTER

[Claimant]

Versus

(1) DOWNS COMMITTEE

(2) BRISTOL CITY COUNCIL

[Defendants]

and

(1) THE SOCIETY OF MERCHANT VENTURERS

(2) (2) BRISTOL, CLIFTON AND WEST OF ENGLAND ZOOLOGICAL SOCIETY

[Interested Parties]

Application for permission to apply for Judicial Review

NOTIFICATION of the Judge's decision

Following consideration of all of the documents lodged by the Claimant and the Acknowledgements of service (and amended grounds of resistance) filed by the Defendants and the First Interested Party

Order by His Honour Judge Cotter QC

IT IS ORDERED

1. There be permission on the single ground that the First Defendant had no power to authorise the First Interested Party's licence to the Second Defendant, or the Second Defendant's sub-licence to the second Interested Party as the grant of a licence for car parking on the Downs is contrary to the express terms of the 1861 Act

2. Permission is refused on all other grounds.

3. The parties are to liaise and seek to agree directions through to an expedited/urgent hearing. In the event of disagreement the parties respective positions are to be notified to the court within seven days of the service of this order.

4. Paragraph 2(b) of the Order is varied/amended to provide that the costs cap of £35,000 includes VAT (this part of the order being made of the Court's own motion ; with consequential entitlement to apply to seek to vary it or set it aside).

Brief reasons

The Claimant is a member of Downs for People, a pressure group which opposes an area of Clifton Down ("the Downs") being used as an overflow car park by the Second Interested Party . She seeks permission to challenge:

(i) the decision of the First Defendant, on 1st July 2019 to grant a licence of land forming part of Clifton Down to the Second Defendant and
(ii) The decision of the Second Defendant, on the same date to grant a 20 year sub-licence of the said land to the second interested Party)

The amended statement of grounds is too long and descends into unnecessary detail. Also the grounds are not clearly enumerated. In my judgment they can be reduced to a single arguable point (arguability being the threshold for the grant of permission)

The First Interested Party has been the freehold owner of the Downs since 1672, and remains so to this day). The First Defendant, is a creature of statute with powers and duties set out in the Clifton and Durdham Downs (Bristol) Act 1861. Its clear and sole purpose is to manage the Downs.

It appears that the use of a section of the Downs by the Second Interested party as a car park began in the late 1960s with the grant/authorisation of a licence. The first recorded licence was for six days in 1969 and use has grown incrementally since then. In 2019 the part of the Downs in question, 1.34 hectares or 3.3 acres, was used on 22 days. The average use was by 159 cars so a total 3499 cars parked there. The Second Interested Party ropes off the area designated for parking and puts up temporary signage. The land remains enclosed on days when the car park is not in use.

The 1861 Act states that the Downs shall for ever hereafter remain open and unenclosed and as a place for the public resort and recreation of the citizens and inhabitants of Bristol. It is arguable that the use of part of the Downs for car parking means that it is no longer open, unenclosed and available for recreation because: (i) the area of the car park is roped off; (ii) land on which cars are parked is not open and unenclosed. As a result the First defendant (which has the statutory responsibility for management of the Downs under section 10 of the Act) did not have the power to authorise car parking. Although there has been parking use by the Second Interested Party for many years there is no claim to a prescriptive right and it appears that the decision should be considered in isolation. The strongest element of the First Defendant's response is the power under afforded by section 11(3) ; but in my view it remains arguable that this would not cover the provision of a designated cordoned off/inaccessible area of parking for the benefit of premises that are not on the Downs (and in this regard it matters not if the third party is a zoo or a supermarket).

It is also arguable that the decision of the First Defendant is susceptible to judicial review given the public function with which it is entrusted (indeed was specifically created to carry out) and there is an additional factor (the need to ensure public use) which takes the agreement beyond an ordinary private contract.

The balance of the grounds are unarguable.

As against the First Defendant it is stated that it had no power to charge. There are at two answers to this claim. Firstly, the First Defendant itself did not charge (and there is no reason why it could not receive funds from the Second Defendant). Secondly, even if it did, it had power to do so under section 12 of the 1861 Act. There has also been unacceptable delay in advancing this ground. My order that the time for bringing a claim

be extended to 1st September 2020 did not apply to the new grounds of claim. This ground could and should have brought when the claim was first made.

There appear to be four grounds set out in relation to the Second Defendant's decision. None have sufficient merit to deserve permission.

It is argued that the Second Defendant's officer had no authority to enter into the sub-licence. However, it is clear that the power came from the Council's constitution and the delegated authority was in accordance with the Property Scheme of Delegations within the Officer Scheme of Delegation

It is also argued that the Claimant had a right to be consulted by the Second Defendant before the grant of the sub-licence. This is unarguable as the case does not fall within one of the strictly confined circumstances which the common law recognises as giving rise to a duty to consult as recently reiterated in **R (MP) v Secretary of State for Health and Social Care** [2020] EWCA Civ 1634 . There was no statutory duty or practice of consultation about parking on the Downs (which has taken place for many years). There has also been unacceptable delay in advancing this ground.

The Claimant also argues that the Second Defendant did not take planning policy into account before granting the sub-licence. This argument is misconceived as the Second Defendant had no duty to re-determine or question the entirely different function of determining planning merits. That decision had been taken and the Second Defendant was entitled to rely on it.

Finally it is argued that the Second Defendant had no vires to grant a sub-licence to the Zoo. This ground must fail as the Council has these powers under at least five statutory provisions as set out at paragraphs 26-30 within the summary grounds of resistance.

Other matters

The Court of Appeal has recently confirmed that the Aarhus costs cap of £35,000 includes VAT: **R (Friends of the Earth Ltd v Secretary of State for Transport** [2021]

There is no reason why the single remaining ground could not be determined at a relatively short hearing (no more than half a day) in the near future. If the parties were able to agree directions for any further evidence/skeletons such in time it could be listed as early as the 9th April 2021 (if this date is not convenient the parties are to provide dates of availability for the rest of April and May).

Note

If permission has been granted on some grounds but refused on others, you may request that the decision to refuse permission be reconsidered at a hearing by filing and serving a completed form 86B within 7 days of the service on you of this order. The reconsideration hearing will be fixed in due course. However, if all parties agree - and time estimates for substantive hearing allow - the reconsideration hearing may take place immediately before the substantive hearing. The Administrative Court Office must be notified as soon as possible after the service and filing of form 86B that the parties agree to this course.

Listing Directions

The application is to be listed for 3 hours; counsel to provide a written time estimate within 7 days

of service of this order if counsel disagrees with this direction.

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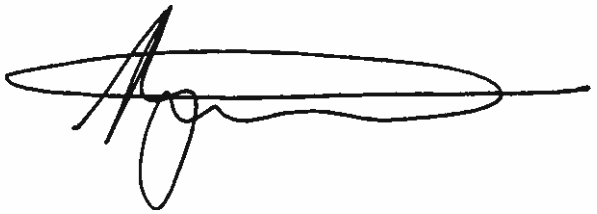

Signed:

His Honour Judge Cotter QC

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

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For completion by the Administrative Court Office

Sent / ~~Handed~~ to the claimant, defendant and any interested party / the claimant's, defendants, and any interested party's solicitors on (date): 22/3/21

Solicitors:
Ref No.