Neutral Citation Number: [2023] EWHC 1991 (Admin) Case No: CO/573/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
SITTING IN MANCHESTER

Thursday, 3rd August 2023

Before:
MR JUSTICE FORDHAM

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Between:

THE KING (on the application of CITY PORTFOLIO LTD) **Claimant**

- and -

LANCASTER CITY COUNCIL **Defendant**

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Sasha White KC and Charles Bishop (Gateley Legal) for the Claimant
Ian Ponter (Legal Services, Lancaster City Council) for the Defendant

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Determination on Costs

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is a Costs Determination on the papers in a planning judicial review claim: see the Administrative Court Judicial Review Guide 2022 at §25.5. Although this is a paper determination, I am satisfied that it engages the open justice principle and I consider it appropriate that the reasons be promulgated as a judgment in the public domain. It was issued to the parties as a non-confidential determination with no embargo on 31 July 2023 to be handed down, with typos etc corrected, on Thursday 3 August 2023.

Context

2. The disputed costs issues arise out of a claim for judicial review which I had been due to hear, originally fixed for substantive hearing on 1 November 2022, then refixed for hearing on 19 December 2022. The Claimant owns land at Stone Row Head in respect of which it applied to the Defendant for planning permission in November 2020. By a decision on 7 January 2022, the Defendant designated the Lancaster Moor Conservation Area. It did so at speed, based on an emergency report dated 6 January 2022, and without consultation. The catalyst for urgent action was said to be an application dated 13 December 2021 for demolition of the old hospital at Ridge Lea. The designated Conservation Area included within it the hospital at Ridge Lea and the land at Stone Row Head. After a letter before claim (9 January 2022), the Claimant began these judicial review proceedings (17 February 2022). Permission for judicial review was granted on all 6 of the pleaded grounds (4 April 2022).

3. In August 2022 the Defendant carried out a public consultation on the merits of continued designation of the Conservation Area, to inform a decision whether to retain the designation or vary it. The Claimant responded on 19 October 2022. The outcome was a Report recommending that the Conservation Area decision be rescinded, and a varied Conservation Area designated. That recommendation was adopted by decision on 6 December 2022. The varied Conservation Area still includes the hospital at Ridge Lea and the land at Stone Row Head. The documents can be found in the public domain by anyone wanting more contextual background detail. Skeleton arguments had been filed in the judicial review proceedings on 11 October 2022 by the Claimant, and on 18 October 2022 by the Defendant. The Bundle for the hearing included the August 2022 consultation documents and the Report making the recommendation.

4. After the decision on 6 December 2022, the parties filed an agreed statement that the decision under challenge having been withdrawn, the claim for judicial review was now academic. I made an Order – by consent – on 13 December 2022 that the claim be withdrawn, with directions for written submissions on the remaining contested issue of costs. The parties duly and promptly filed their commendably concise submissions in accordance with the directions. After a delay within the Administrative Court in Manchester, the submissions came to me on 10 July 2023. I accessed the authorities being cited and read the papers. Neither party had sought an oral hearing of this costs determination and I did not consider a hearing to be necessary. At stake are the Claimant's legal costs which, in total, are put at £83,294.16. The Claimant says it should have its costs. The Defendant says there should be no order as to costs.

Argument

5. The Claimant submits, in essence as I see it, as follows. It has succeeded. It has obtained a decision on the merits of a Conservation Area, arrived at after a public consultation and on consideration of the product of that consultation. That, in substance, is what it was seeking to achieve by the claim for judicial review. Nothing more could realistically have been achieved by the claim. The grounds argued that a Conservation Area could not lawfully be designated urgently (ground 1), with a truncated process triggered by focusing on the Ridge Lea hospital demolition (ground 5), without public consultation (ground 2) and legally sufficient enquiry (ground 3) to ensure that relevancies were taken into account (ground 4) and a sufficiency of material to support this as a reasonable decision (ground 6). The August 2022 consultation and December 2022 decision secured all of this. The designation was considered on its merits, with a non-truncated process, with public consultation and full enquiry, ensuring that relevancies were taken into account and ensuring a sufficiency of material to support a reasonable decision. The outcome is just as if the claim had succeeded. This was not an independent supervening event. The disputed issue of 'causal link' should be decided in the Claimant's favour. What happened was no coincidence. It was causally linked to the judicial review claim. Why else would it have happened, as it did and when it did. The deficiencies identified in the claim were addressed. The Claimant should recover its costs in full.

6. The Defendant submits, in essence as I see it, as follows. The August 2022 consultation and December 2022 decision were freestanding events. They made the judicial review claim academic. The Defendant strongly maintains that the urgent action in January 2022, with the absence of public consultation, was lawful. The Claimant does not stand vindicated on the issue of whether there was a breach of applicable public law duties (discussed in cases like R (Silus Investments SA) v Hounslow LBC [2015] EWHC 358 (Admin) [2015] BLGR 391 §§33-39). The disputed issue of 'causal link' should be decided in the Defendant's favour. It is "clear" that the decision to rescind the original designation of the Conservation Area was "not caused or contributed to by the Claimant's claim". There is no "evidence" adduced by the Claimant of "any causal link" between the judicial review claim and the "outcome" – or "policy outcome" – being the revised Conservation Area with its slightly different boundary. The correct position is demonstrated by evidence. The Report, which contained the recommendation accepted in December 2022, "confirmed" that the "process of further consideration" was "motivated solely by the fact that the urgency surrounding the (entirely lawful) January 2022 decision had not allowed for consultation". Paragraphs 2.3 and 2.4 of that Report provide this evidence and show that the "sole reason" was that the Defendant "then had the opportunity to undertake" a public consultation. What happened had "nothing to do with" the claim for judicial review. There should be no order as to costs.

The Law

7. The parties have cited R (M) v Croydon LBC [2012] EWCA Civ 595 [2012] 1 WLR 2607; R (Tesfay) v SSHD [2016] EWCA Civ 415 [2016] 1 WLR 4853; Accessible Orthodontics (O) Ltd v NHS Commissioning Board [2021] EWHC 44 (2021) 194 Con LR 181 (TCC); R (City of Wolverhampton Council) v SSHD [2022] EWHC 1721 (Admin). These cases provide a secondary discussion – which I have also considered – of other cases such as R (Boxall) v Waltham Forest LBC (2000) 4 CCLR 258 (M §31, Tesfay §6); R (Bahta) v SSHD [2011] EWCA Civ 895 [2011] 5 Costs LR 857 (M §38,

Tesfay §8); R (Emezie) v SSHD [2013] EWCA Civ 733 [2013] 5 Costs LR 685 (Tesfay §10); Speciality Produce Ltd v SS Environment [2014] EWCA Civ 225 [2014] CP Rep 29 (Accessible §25); R (Agyemang) v Haringey LBC [2017] EWCA Civ 1630 (2018) 21 CCLR 101 (Accessible §26); SM (Afghanistan) v SSHD [2018] EWCA Civ 32 (Accessible §27) and R (Parveen) v Redbridge LBC [2020] EWCA Civ 194 [2020] 4 WLR 53.

8. My overriding objective (as in Wolverhampton §1) is to do justice between the parties (M §32(iii)), having undertaken a reasonable and proportionate attempt to analyse the situation (M §36). The legal analysis starts with the general principles regarding costs (CPR44.2(2)(4); Tesfay §5). There is a key question about whether the Defendant is "the unsuccessful party", and the Claimant "the successful party" (CPR44.2(2)(a)) who has "succeeded" on the "case" and in the "claim" (cf. CPR44.2(4)(b) and (5)(d)). A claimant who "obtains all the relief which [they] seek[]" is "the successful party" – being "wholly successful" and "vindicated" – which means they are "entitled" to all their costs "unless there is a good reason to the contrary" (M §§59, 60(i), 61).

9. It is appropriate to think about the "claim", the "issue" and the "outcome". The "outcome" in judicial review – constituting "success" for costs purposes – will often not mean the "ultimate success" (Tesfay §53) of a "new decision" on the merits which is favourable to, rather than "against", the "interests of the claimant" (Tesfay §§57, 67). Often, in judicial review, "the most that can be achieved is an order that the decision-maker reconsider on a correct legal basis", which means that achieving such an outcome usually constitutes "success" (Tesfay §§57, 67), having regard to the remedies which "in effect" the claimant had sought (Tesfay §59). If the new decision is adverse on the merits, the claimant may "stick" by accepting its legality, or "twist" by challenging its legality (Tesfay §67).

10. The idea of "success" of a judicial review claim, for the purposes of costs, has been described in subtly different ways. Courts have spoken of whether the claimant "should be regarded as having succeeded" (Tesfay §56). This has been variously described as: the defendant "effectively conceding" that the claimant is "entitled" to the "relief" sought (M §58); the situation where "the claimant obtains" the "relief" sought (M §59); the situation where the claimant can say they have "been vindicated" (M §61); whether the outcome "actually reflect[s] the claimant's claims" (M §60); the claimant having "achieved" what was "sought in" the "claim" (Emezie; Tesfay §10); whether the claimant was "vindicated in the proceedings" in "respects" such as "their position on legal issues" or what they "obtained" (Tesfay §68); whether an outcome did or did not "resolve the issue" of whether the impugned action was unlawful (Agyemang §§20-23; Accessible §26); whether an outcome arose on a basis "different to the grounds of claim" (SM §§22-24; Accessible §27).

11. It is appropriate to think about "the issue of causation" (Parveen §46; Accessible §28) and "why" the defendant acted as it did (Tesfay §62). This has been described as the "causal link between the bringing of the claim and the obtaining of relief" (Parveen §47; Accessible §28), which it may not be "possible" to "determine" without a trial (Parveen §22; Accessible §28). The causal link has also been described as whether the defendant's action did or did not "amount to an acceptance" that the decision challenged by judicial review was "materially flawed" (Tesfay §63). It has been described as a "link" between "the basis" of "the claim" and "the agreed result" (Speciality §27, Accessible §25). There is no causal link where what happened was "entirely

unconnected" (Accessible §30). If the defendant says it has settled the claim for "purely pragmatic reasons", a "clear explanation is required" so that it can be "analysed" (Bahta §63; M §41; Tesfay §8). If a defendant is going to make a concession and avoid costs, this should in principle be done at the pre-action stage (M §§53-55, 61; Bahta §64; Tesfay §8), absent some circumstance which justifies as reasonable a concession made at some a later stage (M §54).

12. It has been said that the "whole purpose" of the principled approach to costs (originating in M, and distinct from Boxall) is to "avoid" an "investigation into which party would have won had the matter gone to trial" (Tesfay §§55, 10; Emezie). It is where the outcome does not "actually reflect the claimant's claims" that it may be sensible to inquire into whether it is "tolerably clear who would have won" (M §§60(iii), 63). I note that it has also been said that establishing "the link between the claim and the agreed relief" means the court "usually" has to be satisfied that "the claimant is likely to have won" (Speciality §29; Accessible §25).

13. One theme which emerges from the case law concerns whether the judicial review claimant can only be successful in costs terms if they have been 'vindicated' on the 'issue' raised in the claim. As it happens, the claimants who obtained the costs orders can be seen to have been 'vindicated' on the 'issue' in the claim in each of these cases: M (where the merits of the corrected age-assessment stood as objective question for the judicial review court: see M §§17, 21-22); Bahta (where the new decisions were treated as recognising a legal entitlement to permission to work: see M §43); and Tesfay (where the withdrawn certificates contained a legally erroneous approach: Tesfay §58). Claimants' costs orders were declined in Agyemang, SM and Parveen, each of which can be seen as cases where the claimant was not 'vindicated' on the 'issue' (Accessible §§26-28). Courts may decline to order claimant's costs unless an outcome is linked to the 'issue' in the claim, so that the claimant stands 'vindicated' in relation to the substantive arguments. The court may look to see whether the outcome secured was causally linked to the "basis" of the claim. But claimant's costs orders in judicial review cases may be appropriate, more broadly, by reference to achieving an 'outcome' sought in a claim (Emezie; Tesfay §10). No case identifies a principle – still less a rigid principle – treating, as a precondition, 'vindication' as to the 'issue' which is the 'basis' of the claim. The 'outcome' may reflect the 'remedy' sought in the claim. That explains why no enquiry is needed as to whether the claimant 'would have won' on the 'issue'. Perhaps the claimant would have lost the claim, but they could still have their costs. One scenario is where the existence of the claim has caused or contributed to action by a defendant, which action matches the outcome sought in the claim. There, a defendant may have to pay the costs of the claim. Action taken for pragmatic reasons needs clear explanation, warrants close analysis, and should in principle be taken promptly at the pre-action stage, if paying a claimant's costs are to be avoided. Ultimately, there is room for individualised case- and fact-specific adjudication as a question of judgment.

Analysis

14. I agree with the Defendant that its December 2022 merits reconsideration of the question whether (and if so what) land should be designated as a Conservation Area, following the August 2022 public consultation eliciting relevant responses and information, was not action amounting to a "vindication" of the Claimant's position on the "issues" constituting the "basis" of the "claim". The issues in the claim concerned the position in January 2022, in light of the proposed demolition of the Ridge Lea

hospital. The Defendant has never – expressly or by implication – accepted that it acted unlawfully as at January 2022. The August 2022 public consultation and December 2022 merits-evaluation did not, of themselves, vindicate the Claimant on the issues that would have been resolved at the substantive hearing. Like the reasonableness (irrationality) issue in Agyemang (see Accessible §26), the legality "issues" here remained unresolved. On the other hand, costs are not governed by whether I can now say that the Claimant would have won the claim had the substantive hearing taken place. That would be the return to Boxall (Tesfay §55) and the Emezie "wrong test" (Tesfay §10).

15. I agree with the Claimant that the December 2022 merits reconsideration following the August 2022 public consultation did constitute the achievement of the "outcome" which, in substance, was being claimed in the judicial review proceedings. The Claimant is right: this is not only what would have been achieved, but all that could have been achieved, by way of "outcome" of the judicial review. Merits reconsideration is the relevant "success", as identified in Tesfay. True, the 6 December 2022 decision remained one which was adverse to the Claimant's interests. The Claimant accepted its lawfulness, as the "stick" position described in Tesfay. The "outcome" fits, full-square, with what success in judicial review would have achieved. In that important sense, the Claimant is the "successful" party.

16. Next, the Defendant is wrong to focus on its decision "to rescind" the original designation – as the "outcome" or "policy outcome" – and to focus on whether this was "caused or contributed to by the Claimant's claim". That falls into the Tesfay trap of focusing on the "ultimate decision" on the merits, adverse to the Claimant's interests, by which the Defendant rejected the merits representations made by the Defendant in the public consultation. That is the wrong "outcome". The relevant "outcome" is the merits reconsideration with public consultation. So far as concerns causation and causal link, the questions which arise therefore focus not on the 6 December 2022 decision (to make a minor adjustment to the designated Conservation Area), but rather on a pre-August 2022 decision (to conduct a public consultation to inform a reappraisal of the merits of designation).

17. I cannot accept the Defendant's contention that the "process of further consideration" had "nothing to do with" the claim for judicial review and was "wholly unconnected with the litigation" (cf. Accessible §30). The Defendant's written submissions on costs have made points about there being no causal link between the claim and the process of further consideration, and about the process adopted being "motivated solely" by the fact that the previous urgency was no longer present. Those are, unmistakeably, 'submissions'. They are not evidence. There is no witness statement. There is no statement of 'fact', accompanied by a statement of truth. The evidence sought to be relied on is the Report. But that Report itself post-dated the August 2022 public consultation. That consultation itself post-dated the decision to undertake the process of consultation to inform a merits reconsideration. There is no evidence before the Court of that decision at all. A letter dated 10 August 2022, which constituted the public consultation, described the urgent circumstances in January 2022 which had meant that the council was unable to carry out public consultation prior to the designation decision. That letter said the Defendant "now wish to obtain the views of those with an interest". The letter did not purport to give the reasons as to why that decision to undertake that consultation and reconsideration had been taken. There has been no candid disclosure

of documents relating to that decision. The Report says that the January 2022 urgency had meant there was no public consultation. It says that there was no such urgency in August 2022. But those points are entirely consistent with the fact of the claim for judicial review as having caused or contributed to the decision. I agree with the Claimant: this was no coincidence. Against the dearth of evidence, and absence of candid disclosure, there is common sense. The urgency which is said to have thwarted the public consultation which the Defendant wished to undertake did not subside in July or August 2022. It subsided much earlier, after 7 January 2022, once the Conservation Area had been designated. The Council could – at any time – have said 'once the urgency has passed', or 'now that the urgency has passed', 'we will do what we would have wanted to do, and undertake a public consultation to inform a merits consideration'. It was only after permission for judicial review was granted in April 2022, after the Council's substantive defence was due in May 2022, and in the run up to a substantive hearing of the judicial review, that the decision to conduct a public consultation and merits reconsideration came. I cannot accept the submission that this decision was "nothing to do with" the claim.

18. The authorities spell out that "a clear explanation" is needed from a defendant, and that close scrutiny will be appropriate (Bahta §63; M §41; Tesfaye §8; Wolverhampton §5(i)). Moreover, the duty of candour is recognised as applicable at all stages in judicial review proceedings. In the Wolverhampton case I explained that I was able to rely on a clear statement which had been made by a solicitor, on a question of fact, the solicitor having had sight of the contemporaneous documents, all in light of the duty of candour (Wolverhampton §8(vii)(viii)). In the present case the Defendant has decided to make a submission, by reference to the contents of a Report. As I have explained, that provides no evidence or factual material as to what it was that led to the Defendant's decision to undertake the August 2022 consultation. Against that backdrop there are the facts that the judicial review proceedings had been commenced, that permission for judicial review had been granted in April 2022, and that there was a live legal challenge due for substantive consideration by this Court of whether or not there should have been a public consultation to inform a merits evaluation. That was the clear and obvious backcloth against which the public consultation was launched. I am unable to accept the submission that that had "nothing to do with" the claim. I conclude that there was a causal link between the claim and the decision to undertake the public consultation.

19. So, this is a case where (i) the Claimant has secured the "outcome" sought in the claim and (ii) there is a causal link between the claim and the decision to undertake the merits reconsideration with public consultation. The question that remains is whether a defendant who chooses to accommodate the judicial review claimant's grievance – causally linked to the fact of the claim but without accepting that the claimant is correct on the issues raised in the claim – should find itself liable to pay the claimant's costs and, if so, in full. In my judgment, the answer to that question is itself a fact-specific and case-specific answer. The starting point is that what the Court is likely to need is a clear explanation and candid disclosure. There is then the policy consideration clearly identified in the case-law, that a defendant who wishes to accommodate a grievance through voluntary action should in principle be expected and incentivised to do so at the earliest possible stage. The cases speak clearly about the pre-action stage for concessions to be made. The question is whether there is good reason why the Defendant could have been permitted a later stage.

20. In my judgment, this is a case where the Defendant could have avoided a costs order, notwithstanding a clear missed opportunity at the pre-action stage, had it identified public consultation and merits reconsideration as a response to the claim for judicial review. It would have been open to the Claimant in its letter before claim of 9 January 2022 to identify public consultation and merits reconsideration, in the context of whether to revoke and/or replace the conservation area designation, as a course which the Defendant could adopt. The Claimant did not do so. When the judicial review proceedings were commenced on 17 February 2022 the Defendant had the opportunity to reflect on the position at that stage (when filing its Acknowledgment of Service on 11 March 2022), the urgency previously relied on having already clearly dissipated, in the context of the grievance being put forward in the claim. Suppose the Defendant had at that stage – as it clearly could have done – identified post-decision public consultation as an appropriate way forward, to inform a merits reconsideration in the context of whether to retain, vary or revoke the Conservation Area designation. That would not, in my judgment, at that stage in the special circumstances of this case have justified what is sometimes called 'penalisation' in costs (M §§53, 55). On the contrary, in all the circumstances, there would then in my judgment have been a good reason for a more generous approach in the light of what reasonableness required (M §54).

21. On the facts and in the circumstances of the present case, it would not in my judgment do justice between the parties to visit the Defendant with an order for the Claimant's costs in relation to the period before 11 March 2022. In all the circumstances, the order which does justice between the parties in this particular case, following a reasonable and proportionate analysis, is as follows. The Defendant shall pay the Claimant's costs of the judicial review proceedings incurred after 11 March 2022, on the standard basis, to be the subject of a detailed assessment if not agreed. That is the Order I will make.

3.8.23