Case No: C1/2013/1846

Neutral Citation Number: [2014] EWCA Civ 347
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
ADMINISTRATIVE COURT LIST
(MR JUSTICE HICKINBOTTOM)

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 26th February 2014

B E F O R E:

LORD JUSTICE LAWS

LORD JUSTICE JACKSON

SIR DAVID KEENE

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GERALD DAVID BAYLISS

Appellant/Claimant

-v-

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) PURBECK DISTRICT COUNCIL
(3) PURBECK WINDFARM LLP

Respondents/Defendants

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(DAR Transcript of
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Official Shorthand Writers to the Court)

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MR D EDWARDS QC & MR C ORMONDROYD (instructed by Richard Buxton) appeared on behalf of the Appellant
MR J LITTON QC (instructed by Burges Salmon) appeared on behalf of the Respondents

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J U D G M E N T1. LORD JUSTICE LAWS: I will ask Sir David Keene to give the first

judgment.

2. SIR DAVID KEENE: This is an appeal from a decision by Hickinbottom J dated 13th June 2013 by which the judge dismissed a challenge brought under section 288 of the Town and Country Planning Act 1990 to the decision of a planning Inspector appointed by the Secretary of State. The Inspector had allowed an appeal by a developer, Purbeck Wind Farm LLP, against the planning authority's refusal of planning permission for the construction of a wind farm near Wareham in Dorset. The Inspector's decision followed a nine-day public inquiry in 2012.

3. The unsuccessful section 288 claimant, Mr Bayliss, now the appellant, is a local resident and a supporter of a group opposed to the wind farm, that group being known as "DART". DART was a statutory party at the inquiry.

4. It is worth noting the local planning authority's reasons for its refusal of permission which gave rise to the public inquiry. There were two reasons set out in the decision notice: the first concerned the impact on the visual and residential amenities of dwellings to the south of the appeal site, on the Dorset Scout Camping and Activity Centre and on a public right of way to the north of the site; the second related to noise disturbance at the scout centre.

5. The site itself lies about 800 metres outside the boundary of the Dorset Area of Outstanding Natural Beauty ("AONB"). It will be appreciated from what I have already said that the impact on the AONB of the proposed wind farm did not form part of the planning authority's reasons for refusing permission.

6. The Inspector in his decision letter identified the main issues on the appeal as follows:

> "The main issues are as follows: the effect of the proposed development on the visual amenity of the surrounding area; the effect on the living conditions of nearby occupiers in terms of visual dominance and noise and disturbance; and whether the environmental and economic benefits of the scheme would be sufficient to outweigh any harm that might be caused."

7. As might be expected, the bulk of his decision letter is devoted to those issues. There is extensive coverage of the effects of the proposed development on the residential properties in the neighbourhood of the site and on the scout activity centre. Noise is dealt with in detail, as are the anticipated benefits of the scheme. Other matters, including landscape considerations, are also dealt with, although somewhat more briefly.

8. Early on in his decision, the Inspector set out the policy context relevant to the appeal. That included the National Planning Policy Framework of March 2012, which I shall call "the Framework". The Inspector recorded at paragraph 7 of his decision that:

> "At the inquiry all parties were given the opportunity to comment on the

> implications of the Framework for their cases. I have had regard to these responses in determining the appeal."

9. In considering the section 288 application, Hickinbottom J summarised the relevant legal principles applicable in such cases. No party has suggested that his summary was inaccurate or materially incomplete, and I do not propose to repeat it here: it can be found at [2013] EWHC 1612 (Admin) at paragraph 3. Those principles broadly reflect those relevant in judicial review cases generally, but with some which are more specific to planning cases. Thus, at paragraph 3(vii) the judge rightly noted that:

> "vii) An inspector's decision letter cannot be subjected to the exegesis that might be appropriate for a statute or a deed. It must be read as a whole and in a practical and common sense way, in the knowledge that it is addressed to the parties who will be well aware of the issues and the arguments deployed at the inspector's enquiry, so that it is not necessary to rehearse every argument but only the principal controversial issues."

That passage reflects the approach which the courts have adopted in such cases over many, many years, at least to my knowledge since the case of William Bowyer & Sons Limited v Minister of Housing and Local Government (1968) 20 P and CR 176, where Willis J emphasised that an Inspector's report and decision cannot be expected always to be capable "of satisfying the critical analysis of a school man" (sic) (page 184).

10. The three grounds of appeal relied on by the appellant in this case reflect some of the matters raised in the section 288 challenge in the High Court.

11. The first concerns the Inspector's approach to the impact the development would have on the AONB. It is contended on behalf of the appellant that the Inspector failed to have regard to the guidance given in the Framework and in a policy in the unadopted local plan as to the weight to be attached in the decision-making process to harm which would result to the AONB. Mr Edwards QC, on behalf of the appellant, accepts that the weight to be attached to relevant factors in a planning decision is a matter for the decision maker, but he submits that in so doing the decision maker must have regard to any relevant policy guidance that gives one assistance as to weight, if such guidance exists.

12. Paragraph 115 of the Framework, insofar as it is relevant to this appeal, states:

> "Great weight should be given to conserving landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty."

13. The Inspector does not expressly refer in his decision to that paragraph, but Mr Edwards rightly acknowledges that express reference is not required so long as it can be seen that the Inspector adopted in substance the approach there set out. But he argues

that what is required in such cases is not just a simple balancing exercise; the decision maker needs, it is contended, to treat the AONB and the impact on it as something special, as something more than just landscape generally. It is said on behalf of the appellant that the Inspector did not do that in the present case. Nowhere does he use the expression "great weight" in this context; on the contrary, he appears, it is contended, to run together the harm to landscape in general and harm to the AONB. Mr Edwards submits that, while at paragraph 91 of his decision the Inspector refers to the limited impact that the scheme would have on the AONB, he does not go on to attach great weight to the impact which it would have. He contends that it is not enough to refer separately to the impact on the AONB and that more is required of the decision maker.

14. In addition, the appellant places reliance on policy MN24 in the unadopted local plan, which is used for development control purposes and is a material consideration. That policy states that proposals for development or renewable energy schemes will be permitted provided that the impact on the immediate and wider landscape, particularly within the AONB and Heritage Coast, is not detrimental.

15. There can be no doubt that the Inspector did consider the impact of the proposed wind farm on the AONB in some detail, as well as on the landscape more generally. He noted that the appeal site formed part of a long ridge and that the area had been subject to sand and gravel quarrying over many years, with some associated industrial activity. The ridge line, he noted at paragraph 58, performed:

> "... a transitional and separating function between attractive landscape character areas, both inside and out of the AONB, but views of it from the surrounding lower river valleys tend to be heavily modified by forestry, trees around small fields and areas of mature woodland. As a result the turbines would mostly be seen intermittently. Views would be further mitigated by screening planting south of the turbines".

He then went on to turn specifically to the effect on the AONB itself at paragraph 59. He found that:

> "The turbines would be visible from within it as an incongruous and intrusive element on higher ground, particularly from the Purbeck Way alongside the Frome, although roads and railways also impinge on these views. In longer views from higher ground on the Purbeck Ridge such as the important view from Creech Hill, the turbines would be below the horizon and whilst noticeable, would be subsumed by the wider prospect. Although there would be an adverse impact on the natural beauty of the adjacent 'Frome Valley Pasture' part of the Dorset AONB, the impact would be limited."

16. When he came in due course to his balancing exercise between harm and benefits deriving from the proposal, he noted as the first of his factors weighing against the

proposal:

> "A limited degree of harm to landscape considerations, including the natural beauty of the Frome Valley in the AONB."

Ultimately, he concluded that the benefits, in his judgment, outweighed both that and the other detrimental impacts.

17. So one has to ask, in the light of those passages, whether the Inspector did fail to heed the guidance in paragraph 115 of the Framework. The starting point has to be that he expressly states at paragraph 7 of his decision that he has had regard to the submissions made by the parties about the Framework. Therefore, insofar as reliance was placed by the DART group and other objectors on paragraph 115 of the Framework, it is to be assumed that the Inspector took account of that guidance unless his decision letter clearly indicates otherwise.

18. For my part, I cannot see that there is any such contrary indication in his decision letter. There is no doubt that he was not required to use the words "great weight" as if it were some form of incantation. Mr Edwards accepts that. Moreover, that national policy guidance, very brief in nature on this point, has to be interpreted in the light of the obvious point that the effect of a proposal on an AONB will itself vary: it will vary from case to case; it may be trivial, it may be substantial, it may be major. The decision maker is entitled to attach different weights to this factor depending upon the degree of harmful impact anticipated. Indeed, in my view it would be irrational to do otherwise. The adjective "great" in the term "great weight" therefore does not take one very far. Here the Inspector found that the impact on the adjacent part -- and I stress the fact that this was the adjacent part -- of the AONB would be "limited".

19. So did he fail to reflect the policy approach to the protection of AONB? I am not persuaded that there was any such failure on his part. It has to be borne in mind that the designation of land as an AONB and its significance is not novel. The concept and the importance of this national approved designation are well known and well understood in the planning world. That, in my view, is why the Inspector referred explicitly and separately to the effect on the AONB in his decision as something to be taken into account above and beyond the impact on landscape generally. As Hickinbottom J said in his judgment at paragraph 17:

> "... paragraph 59 makes clear that the Inspector had well in mind the special nature of the AONB and harm the development may have upon it. The only reason for him considering harm to the AONB discretely was that he understood that such harm was to be inherently given particular weight as required by the NPPF."

(The "NPPF" being of course what I have referred to as the Framework).

20. As for the unadopted local plan policy, MN24, the Inspector evidently had that in mind since he refers to it and quotes its terms at paragraph 8 of his decision. However,

that policy, a non-statutory one, had to be read in conjunction with the more recent replacement, Purbeck Core Strategy ("PCS"), which has a different emphasis. It allows in paragraph 8.16.6, as the Inspector noted, for large or small scale energy development in or near the AONB provided that "there is no significant environmental or visual detriment to the area concerned". That phraseology recognises that detriment will be a matter of degree, and the Inspector here seems to have formed the judgment that the detriment of this proposal to the Dorset AONB would not be significant.

21. When spelling out his conclusion on this first ground of challenge, Hickinbottom J observed that the claimant's problem (and I quote from paragraph 19 of his judgment):

> "... is not that the Inspector approached his task incorrectly, but rather he did not consider the harm to the AONB to be a powerful factor in all of the circumstances of this case. As I have indicated, that was unsurprising: it effectively reflected the position of the parties (including DART) in their closing submissions."

I agree with that passage, which puts the matter very succinctly.

22. The second ground of appeal advanced by the appellant concerns the way in which the Inspector dealt with the topic of "wind resource" in the Purbeck area.

23. In the course of dealing with the anticipated output from the proposed wind turbines, the Inspector had said at paragraph 85 of his decision:

> "I give little weight to arguments that the wind resource in Dorset is insufficient to justify the development; quite apart from the prevailing conditions that I experienced during the time the Inquiry sat, the developer has established that the development would be viable based on measurements taken on site over a considerable time. The Council does not dispute that Purbeck has the best wind resource in Dorset."

24. It is that final sentence which has given rise to this second ground of challenge. It is contended by the appellant that that proposition as to the best wind resource was not put to the District Council's witness who dealt with this topic, and, as a matter of fact, that does not appear to be in dispute. It is not said that this proposition was so put in the course of cross-examination or by the Inspector. There has been some suggestion that the Inspector may have derived that proposition from the evidence-in-chief of the Council's witness, Mr Godfrey, who produced a plan showing Purbeck as a district to have a higher energy density (that is to say, related to square kilometres) than other parts of Dorset. Mr Godfrey has put in a witness statement in which he says that if he had been asked, he would have said that West Dorset has higher wind speeds than the Purbeck district.

25. Consequently, Mr Edwards argues that the Inspector erred and that that the error was a material one. He submits that the Inspector should not have taken that factor into account. The Inspector, it is submitted, clearly thought that this was relevant, but he

was wrong so to do.

26. Hickinbottom J did not accept those arguments. At paragraph 27 of his judgment he said this:

> "On any view, this development would make a meaningful contribution to renewable electricity; and, if there were other areas in Dorset or other parts of South West England where the wind was such that developments there might make bigger contribution, then that was irrelevant to the Inspector's planning determination. He was not making a relative assessment. Looked at in the full context of the decision letter as a whole, I am entirely unpersuaded that, by referring to Purbeck having 'the best wind resource in Dorset', the Inspector gave that point any real weight."

27. Again, I agree with the judge. The first part of that quotation is fully borne out by the Inspector's findings. He had concluded that there was a clear shortfall in the supply of electricity in Dorset from local renewable sources and "urgent need" for new sources of renewable energy in the county (paragraph 87). He found that the proposed wind farm would supply "a significant amount of renewable energy" and make a meaningful contribution to renewable electricity in Dorset.

28. But of even greater importance on this ground of appeal, the judge was undoubtedly right to say that the Inspector was not making a relative assessment. The planning appeal here was not concerned with competing proposals, one in West Dorset and one on the appeal site. The Inspector had no alternative site or alternative proposal before him, nor did he have evidence about the impact that such an alternative might have had in planning terms upon landscape, AONB, noise, residential properties or any other of those material matters. He simply had to decide whether this appeal proposal was acceptable in planning terms. Whether West Dorset had a better wind resource than Purbeck ultimately did not matter, it was irrelevant, and since the Inspector was not conducting a comparative exercise, the proposition now challenged could not have affected his final decision. I say that because ultimately the Inspector found that the energy benefit from this particular proposal outweighed the harm. That was what mattered. That conclusion did not depend upon whether Purbeck had the best wind resource in Dorset, or the second best, or the third best; it was a site-specific conclusion. There is, in my view, therefore nothing in this particular ground.

29. I turn to the third ground of appeal. As put forward this morning, this ground concerns that sentence in paragraph 85 which I have already cited about on-site wind measurements.

30. Mr Edwards stresses that the developer had not made available to either the Council or the objectors the on-site wind data which they had available to them, and yet the Inspector relied upon the conclusion formed by the developer about the viability of the proposed wind turbines. The Inspector did not himself have any data available to him that was not available to the Council or the objectors, and it is not suggested that he

had.

31. The developer had declined to release the detailed wind data. Mr Edwards accepts that some operators do regard such data as commercially sensitive, as seems to have been the case here. He also acknowledges that the Inspector was aware that that data had not been made available to the Council or the objectors, but he submits that the Inspector failed to acknowledge the controversy over the refusal to disclose this data and that that vitiates his decision.

32. Mr Edwards is right that the decision letter does not expressly refer to the developer's refusal to provide on-site wind data. But, as he recognises, the Inspector cannot have been unaware of this. It was something which was referred to and complained about by DART in its closing submissions at paragraph 4.1 and by the Council in its submissions at paragraph 29. The controversy was referred to by the developer in its closing submissions at paragraphs 3.47 and 3.49.

33. The reality is that there was other wind data available, albeit on a broader geographical basis, and it was that data which was used by the Council and by the objectors. The Inspector would have been well aware that such detailed on-site wind data is often regarded as commercially sensitive, as was the case here.

34. I cannot, for my part, see that the Inspector was required to refer expressly to the developer's refusal to disclose the detailed data. But, in any event, this seems to me to be an almost academic dispute. The wind data, detailed or less detailed, performed a particular function. It was an input into the capacity factor; that is to say, the percentage of the maximum theoretical output of the turbines which would actually be achieved in practice. That reflects the wind experienced on site, and so any wind data is feeding in to that assessment of the capacity data, which in turn indicates the real life output which could be expected. In the present case the developer had, at the inquiry, put forward a figure of 30 per cent for the capacity factor, the Council suggested a figure of 19 to 20 per cent, and DART in its closing submissions also put forward the figure of 20 per cent as a capacity factor. What the Inspector did at paragraph 86 of his decision was to say this:

> "I do not give a great deal of credit to the proposition that the capacity factor would be only 20 per cent, as opposed to the around 30 per cent figure provided by the appellant, or that there would be no CO2 savings at all. The larger more modern turbines proposed are very different to earlier generations, and in any case wind resource is generally acknowledged to be very variable. There is nothing in planning policy to indicate a cut-off point at which load factors are unacceptably inefficient. The question of subsidies raised by many is for central government. It is evident that adjustments are likely in the future as onshore wind capacity targets are approached. When and if that occurs the viability of the scheme may change, but that is not a matter for my consideration."

35. That last proposition about the viability of the scheme is undoubtedly correct as a matter of planning policy, and it had been rightly agreed between the Council and the developer beforehand that viability was not a material consideration.

36. So in the end it seems to me that this third ground really becomes: did the Inspector err in how he dealt with the issue of the capacity factor? He does not seem to have expressly opted for either of the two figures put forward, the 20 per cent or the 30 per cent, but on an inherently uncertain and variable matter like that, he was not required to do so. He certainly seems to have favoured the upper end of that range rather than the lower, given his reference to the more modern turbines proposed. He was, of course, entitled to reach that view. That no doubt helped towards his finding that the scheme would supply a significant amount of renewable energy. Given his finding that there was a very significant shortfall in the supply of renewable energy in the area, that was sufficient to justify his conclusion that the limited degree of harm that would be caused would be outweighed by the environmental and economic benefits. He did not need to quantify those benefits more precisely than he did.

37. I can therefore see no validity in this ground of appeal. In my view, Hickinbottom J was right to conclude that there was no error of law in the Inspector's decision. Despite Mr Edwards' considerable persuasiveness this morning, I would dismiss this appeal.

38. LORD JUSTICE JACKON: I agree.

39. LORD JUSTICE LAWS: So do I.