IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
[2024] EWHC 608 (KB)

No. AC-2023-LON-002551

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 25 January 2024

Before:

MR JUSTICE EYRE

B E T W E E N :

THE KING — Claimant

(on the application of)

PENNINE HOUSE LIMITED

- and -

BRADFORD METROPOLITAN DISTRICT COUNCIL — Defendant

Daniel Stedman Jones and **Christopher Moss** (instructed by **Baker & McKenzie LLP**) appeared on behalf of the **Claimant**

Paul Stinchcombe KC (instructed **by Legal & General Governance, Bradford MDC**) appeared on behalf of the **Defendant**

J U D G M E N T

MR JUSTICE EYRE:

Introduction.

1 The Claimant is the owner of Pennine House, Well Street, Bradford. That property is divided into several hundred apartments.

2 Well Street was pedestrianised in 2015. In July 2023 the Defendant began works to reverse that pedestrianisation. Those works involved the removal of barriers; the removal of flagstones; the restoration of the surface of the roadway; and related works. They were part of the Defendant's Transforming Cities Fund Programme and, within that programme, formed part of the Bradford City Centre Walking and Cycling Improvements. The Defendant described the latter improvements as:

> "Consisting of four interrelated projects comprised of major enhancements to the road and transport network that improve accessibility in and around the City Centre, improve air quality and enhance the general environment through change in travel habits and creating access to employment and leisure opportunities".

3 The change in Well Street was intended to allow buses, taxis and cycles to travel along that road. That was part of a bus route which was being created going around rather than through Bradford City Centre. The route along Well Street is a key feature of the exercise of bypassing the City Centre and is a key link in the route around rather than through the City Centre.

4 The Claimant challenges the lawfulness of the Defendant's actions.

5 This is a rolled-up hearing pursuant to the order of Laing J.

6 Three grounds are put forward by the Claimant: procedural unfairness in relation to consultation; action without proper lawful authority and without providing reasons as required under the Openness of Local Government Bodies Regulations 2014 ("the 2014 Regulations); and reliance on improper powers, the latter being in reality a challenge to the lawfulness of the Defendant's actions.

The History.

7 Well Street was pedestrianised in 2015. That was done in the context of the development of the Broadway Shopping Centre which is opposite Pennine House in Well Street. Traffic Regulation Orders ("TROs") were made at that time. There were also physical works altering the appearance of Well Street. Thus flagstones replaced the metalled tarmacadam surface.

8 There was public consultation about the Transforming Cities Fund Scheme. The consultation ran initially from 28th July 2021 to 22nd September 2021. There was a second phase of consultation running from 22nd June 2022 to 18th August 2022. Those consultation exercises involved the sending of letters to residents (including the tenants of the apartments in Pennine House); stakeholder meetings; a consultation website; and a telephone information line.

9 However, the Claimant's registered office is in London. It does have staff who are present at Pennine House. However, the impression I formed from the papers was that that staff presence was what at the most can be described as a low-key concierge service and is in reality probably rather less than that. The effect is that the Claimant was not aware of the consultation: no letter having been sent to it either at Pennine House or at its registered office.

10 On 6th September 2022 the Executive of the Defendant made a decision. The report leading up to that decision summarised the progress made in the delivery of the Bradford TCF programme; it explained the project funding and timescales and said that it sought:

> "delegation of operational decisions to the Strategic Director in consultation with the Portfolio Holder and … approval to progress projects through to outlining all business cases following an approved Appraisal Framework as defined by the West Yorkshire Combined Authority and the Department of Transport as funding Authorities."

By way of background it is to be noted that the funding for the implementation of the TCF programme is to come from the West Yorkshire Combined Authority ("the WYCA") and potentially the Department of Transport as well.

11 At 1.4 and 1.5, the report said this:

> "1.4 Work has now been completed by BBCE to review and undertake outline design of future project enabling the scheme to be developed to outline (inaudible) submission. Further public consultation has been completed for the overall TCT programme in conjunction with the WYCA, site surveys, traffic modelling and ground (inaudible). Options for each project have been developed in detail. Delivery programmes and outline cost plans have been produced all of which have been frequently discussed with WYCA.
>
> 1.5 The Council has now reached the next gateway of the WYCA assurance process. The scope of each scheme is required to be fixed, the third option is to be developed and the cost plans and programmes confirmed for business case purposes."

12 At 3.1 there was a reference to the consideration of acceleration options to shorten the delivery programme. That was with a view to bringing forward completion of the project so as to have delivered the project by 2025: that being the year in which Bradford is to be City of Culture.

13 Section 6 of the report set out a Legal Appraisal. The relevant passages were:

> "6.1 The proposed project which comprise the TCF fund portfolio to be implemented through the Council's inherent powers as Highway and Traffic Regulation Authority as set out in Appendices 1 to 4.
>
> 6.2(a) :Funds committed to any other projects in advance of the WYCA formal improvements are expended at the Council's risk.
>
> …
>
> 6.5 Executive approvals are required for each finalised project's implementation and spend. This report, project scope and implementation and improvements are subject to confirmation by WYCA that grant funding is available. Any such group change request to WYCA by the Council consequent of a project (inaudible) may or may not be agreed. Subsequently further approvals may be sought by officers of the Executive should any project change be required once WYCA's decisions are known."

14 The Executive was asked to take various steps which it did (and which I will set out when I turn to the Resolutions). There were five Appendices to the report of which appendices 1 and 5 are relevant for current purposes.

15 Appendix 1 addressed the City Centre Cycling and Walking proposals which include the works to Well Street.

16 Appendix 5 set out acceleration options. In respect of the Bradford City Centre Cycling and Walking Improvements the acceleration option was described as the "Well Street Public Transport Corridor - conversion of the current pedestrianised area." It was said that the acceleration options had been identified to minimise the disruption caused by the works programme and to enable the diversion of traffic flows and public transport services. The Executive has been asked to approve those advanced elements together with giving permission to proceed through to completion of the business case for the TCF programme.

17 The Resolution had three elements.

> "(1) That the Executive resolved as follows in relation to transport in the Cities Fund
>
> Programme:
>
> a) a printed proposal showing Appendices 1, 2, 3 and 4 as the Council's current preferred approach to delivering the TCF programme as developed since the approved strategic outline case submission to the WYCA;
>
> b) authorised the strategic director (inaudible) to manage the scheme programme as appropriate to a change of circumstances;
>
> c) Authorise strategic (inaudible) to advertise the necessary legal orders required to facilitate the delivery of the programme and to make any necessary applications to seek planning permission;
>
> d) further update and reports are to be presented to the Executive following a decision on the outcome of the business case by the WYCA."
>
> "(2) That delegated authority be given to the Strategic Director, Place in consultation with the Director of Finance, the Director of Legal Services and the Portfolio Holder:
>
> (a) to progress and develop a scheme proposal through the WYCA's assurance process and undertake a framework of consultation of scheme proposals;
>
> (b) if necessary to approve scope changes to individual projects within the TCF portfolio, reflecting available funding for each project …"
>
> 2(c) related to the issue of requisition notices and 2(d) to the procurement of specialist external services.

Then (3):

> "The Executive resolve in relation to the specific projects within the TCF fund to approve:
>
> (a) the Bradford City Centre Walking and Cycling Improvement Scheme referred to in Appendix 1.
>
> …"

18 On 9th March 2023 the Defendant sent out a further letter to local residents. The copy in the bundle was sent to Apartment 117 Pennine House. The letter was headed "Bradford City

Centre Walking and Cycling Improvement Scheme". It referred to a proposal to reshape the City Centre and then said this:

> "As part of the works Bradford Council are proposing to introduce road closures on Currer Street and Vicar Lane as well as reopen Well Street for buses and taxis. The proposals can be seen on the attached plan. If I could receive any comments you wish to make by 24 March 2023."

I should say that Currer Street and Vicar Lane lead into Well Street.

19 That letter was referred to the Claimant by the tenant of Apartment 117 on 31st March 2023.

20 That was the first time the Claimant heard of the proposals and on 28th April 2023, Mr Craig, a director of the Claimant, emailed the leader of the Defendant Council saying that he was writing on behalf of the Claimant; that he would like to express concerns about the proposed changes to traffic management in and around the premises; that the changes would have a significant impact on the Claimant's property and tenants; that he was surprised to find that the Claimant had not been consulted about these proposed changes despite being a major stakeholder in the area; and that the Claimant –

> "strongly opposes these changes in that they will have a detrimental effect on our business and tenants and as such we would like to request a meeting with the relevant department to raise our concerns in person to discuss possible alternatives to these changes."

21 That email was referred by the leader of the Council to the relevant Council officer who replied on 3rd May expressing surprise and concern that the Claimant had not been aware of the development and referring to the scale of the consultation that had been put in hand.

22 There is a document dated 17th May 2023 in the bundle which is a request for a screening opinion. However, the parties are both agreed that in fact it was sent on 23rd May 2023 and I will turn to that document in more detail rather later in this judgment.

23 There was a meeting on 24th May 2023 between representatives of the Claimant and the Defendant. That took the form of a conference call and there is a dispute as to the effect of what was agreed at that meeting.

24 On 21st June 2023 the Defendant replied to a letter of 9th June 2023 from the Claimant's solicitors. The Claimant's solicitor's letter had referred to the conference call. It said that the Claimant had not been aware of the scheme until a few weeks ago but added:

> "Our client is therefore reassured by your confirmation that you accept our client's representations outside of the consultant period, that these will be afforded due and equal consideration of the process and that our client will not be prejudiced by their representations being made outside of the consultation period."

25 The letter then went on to say:

> "Our client does, therefore, require a reasonable period in which to take advice and submit its representations and in view of this would be grateful if you could confirm in writing to us as soon as possible."

26 The letter then set out five matters of which it sought confirmation. The first matter was the date when proposals for a TRO had been published. The second, related to planning applications and to the current status of any applications. The third matter was whether the Defendant was content to have a public inquiry under the Local Authorities' Traffic Orders (Procedure) England and Wales regulations. The fourth question said this:

> "You indicated on our call that you anticipated that works might commence on 23rd July with substantial completion anticipated in November 2024. Please can

you confirm when you anticipate works will commence on Well Street specifically and provide a detailed timeline of the proposed works from publication of the TRO until completion of the Well Street works."

Then the fifth question asked about details of anticipated vehicle numbers.

27 The Council's reply of 21st June said this in answer to the question about planning applications:

> "The scheme is permitted development undertaken by the Highway Authority and as such no planning permission is required."

28 Then in answer to the question about the commencement of works on Well Street the letter said this:

> "Works within Bradford Centre will commence on 10th July 2023. Works on Well Street are due to be completed on 26th January 2024. TRO timelines are outlined above".

29 On 10th July 2023 fencing works began in Well Street. The Claimant learnt of those works on 12th July 2023 although, as I have already indicated, it had been alerted to the prospect of work starting on 10th July on 21st June.

30 Site clearance works started on 17th July and on 31st July landscaping works in the form of moving flagstones up, resurfacing, and the like began. On the same day the screening opinion was sent by the Council's planning department and I will come to that document in further detail later.

31 Mr Darren Badrock is the Defendant's principal engineer and the project manager for this project. In his first witness statement, he refers at paragraph 19 to the request for a screening opinion and says:

> "This was a belt and braces approach given that the whole scheme had gone through considerable EIA assessment during the consultative and approval stage."

32 In the papers initially before the court there was no further detail provided about what was said to have been a considerable EIA assessment.

33 The supplemental bundle incorporated Mr Badrock's third witness statement of 15th December where he said:

> "A full environmental assessment has been prepared for the scheme and is part of its full business case submission."

34 That environmental assessment was in the papers now before the court. It was an environmental appraisal report revised on 27th July 2022. That report was not prepared for the purpose of a Environment Impact Assessment under the regulations nor for that of deciding whether the works were permitted development. As will be seen, the Defendant has accepted that the works in Well Street are development and that for them to be permitted development there has to be a screening opinion in respect of the Environmental Impact Assessment status of the works. It is not suggested that there was any earlier screening opinion than that of 31st July 2023. It follows that the description of that screening opinion as a belt and braces exercise is one the court cannot accept. It was not something supplementary or voluntary. It was necessary if the Council was to proceed on the footing that the works were permitted development.

35 The claim form was filed on 31st August 2023. That was less than six weeks after 31st July 2023 but more than six weeks after 10th July 2023. Laing J's order providing for this rolled-up hearing was on 27th October 2023.

36 The parties have helpfully agreed the issues to be addressed. There has been further development in the course of argument and I will address the issues in a slightly different form than that set out in the list of issues.

The Nature and Effect of the September 2022 Decision.

37 The Claimant says that this was not the relevant decision about putting the Well Street works into effect. Rather it was, the Claimant says, a very high level decision about moving the project as a whole forward rather than about the actual scheme affecting Well Street let alone a decision as to the commencement of the works there. In characterising the September 2022 decision in that way Mr Stedman-Jones emphasized the provision for changes and variations and also the fact that there was no express approval of Appendix 5. However, I am satisfied that the September 2022 decision was the effective decision as to implementing the scheme and, in particular, as to implementation of the work in Well Street. As I will now explain that conclusion follows from both the language and the context of that decision.

38 The context is that the scheme needed to be funded by the WYCA and potentially the Department of Transport. As a consequence, the Claimant needed to have a scheme for which it could put forward for funding. A strategic outline case had already been submitted. The background was that the Defendant contemplated the possibility that change might be needed if it did not receive full funding at the level which it had sought. However, it is apparent from the document that no other significant change was being contemplated and that the intention was that if funding was provided in the amount sought then the scheme would flow into effect.

39 That conclusion also follows from the language of the decision of September 2022. Appendix 1, as did Appendices 2, 3 and 4, addressed approval of a scheme and at paragraph 10.23 there was a reference to specific projects. Changes were contemplated but only in relation to operational matters or in the event of difficulties arising from a shortfall of funding.

40 Appendix 5 addressed acceleration. That was acceleration in the sense of going ahead with part of the works in the absence of and in advance of the approval of funding from the WYCA that is doing so at the authority's own financial risk. The Well Street works were part of the contemplated accelerated activity but they were part also of the Appendix 1 works. They were a part of those works which it was proposed should go ahead in advance of the approval of funding by the WYCA. However, they part of the overall works and not a separate matter needing separate approval.

41 Accordingly, I am satisfied that the decision made in September 2022 was a decision to proceed with the physical modification of Well Street.

42 I have considered whether the fact that in March 2023 the Defendant sent out a further consultation letter should cause me to reflect on that conclusion derived from the context and language of the September 2022 decision. I am satisfied it does not. I am satisfied that, when properly seen in context, the March 2023 letter was about the contemplated TRO. It was sent in relation to a consultation about that rather than about the scheme as a whole.

Was the Challenge to the September 2022 Decision in Time and if not should there ben an Extension of Time?

43 The first part of that question can be answered very shortly. The time for challenge if a decision runs not from the date when a party knew of the decision but from the date of decision itself. It follows that the claim commenced in August 2023 is out of time.

44 I turn to consider whether time should be extended. Three months from 6th September ran to 6th December 2022. The proceedings were commenced on 31st August 2023. The approach I

have to take was summarised by Swift J. in *R (Coventry Gliding Club Ltd) v Harborough DC* [2019] EWHC 3059 (Admin). I have to apply the *Denton v White* approach namely to assess the seriousness of the default, the reason for it and all the circumstances of the case. I am to do so, however, in the context of a judicial review claim where the public interest in good administration requires such claims to be dealt with expeditiously; where an extension of time will not normally not be given unless there is a good reason for the delay; and having regard to any impact which the granting of an extension of time would have on good public administration in the particular case.

45 Here, the Claimant did not know about the proposals until 31st March 2023 and had not been directly informed of them by the Defendant at any stage before that. Indeed, it was not directly informed by the Claimant and the Defendant at that stage. Even then the Claimant did not know the full extent of the decision which had been made. Moreover, the Claimant believed after the May 2023 meeting that its views were going to be taken into account.

46 However, against that there has been a significant interval since the September 2022 decision. Works have been put in hand and had already begun by the time of the commencement of proceedings on 31st August. It follows that to grant an extension of time would potentially have a significant impact on public administration.

47 In addition as I will explain below the Claimant was not in my view entitled to see the May 2023 meeting as a meeting where it had been assured that everything would be put on hold until its representations had been made.

48 Moreover, it cannot be said that the Claimant acted expeditiously after it acquired knowledge on 31st March 2023. It is not suggested that prompt action was taken by, for example, the Claimant checking the Council's records for itself. Indeed proceedings were not commenced until five months after 31st March 2023.

49 Further there is a degree to which it was incumbent upon the Claimant to keep itself abreast of developments affecting his property. If a corporate landowner chooses to situate its registered office other than at the property it owns and to have a limited presence on site at such property then it can be expected to take at least some steps to keep itself informed of developments in the city where its property is. At the least it is less likely to receive the indulgence of the court if it fails to do that.

50 Looking at matters in the round: an extension of the length that would be necessary to challenge the September 2022 decision cannot be justified.

51 Therefore, that challenge is out of time and time will not be extended.

The Merits of the Challenge to the Adequacy of the pre-September 2022 Consultation.

52 I will nonetheless deal briefly with the merits of this challenge. There are two relevant matters put forward: one is the failure to contact the Claimant directly and the other is the alleged inadequacy of the information provided in the consultation.

53 As to the failure to contact it directly: the Claimant says the Defendant could and should have identified its registered office and could and should have contacted it there. It is said that this was an easy exercise. The Claimant is a neighbouring land owner foreseeably affected by the works and, indeed, the Council's own strategy and its community involvement documents envisaged contacting those who owned potentially affected properties.

54 As to the inadequacy of the information: it is said the information made available in the consultation was not sufficiently clear to enable a proper assessment to be made by a consultee at anything other than the most general level. In particular the criticism is that the

information provided did not contain the kind of material which would enable a proper expert response to be made as opposed to a general, as it were, lay comment.

55 The law is well-known and not in issue. The effect of the decision in *R v North & East Devon Health Authority (ex p Coughlan)* [1991] EWCA Civ 1872, [2001] QB 213 is to adopt the *Gunning* criteria as to what is necessary for a proper consultation. Those criteria apply even if a consultation is not mandated by statute but is being undertaken voluntarily: if a public body engages in consultation then the consultation must be done properly. However, as explained in *Keep the Horton General v Oxfordshire Clinical Commissioning Group* [2019] EWCA Civ 646, the test is one of fairness rather than perfection.

56 Was the consultation here deficient such that it was unfair? For the following reasons I am satisfied that to the extent that the consultation here it was less than perfect there was no unfairness such as to cause it to fall foul of the legal requirement.

57 First, I am satisfied that the Claimant was not obliged to seek out the registered office of the landlords of properties alongside the roads where the works are being undertaken. The Defendant was entitled to assume that if tenants who were notified regarded the works as likely to affect their amenity they would bring the matter to the landlord's attention. If the works were not such as to be potentially affecting the amenity of the tenants then they would not be likely to be adverse to the interest of the landlord. Indeed here the Claimant's argument is that it was affected because of the adverse impact of the works which it says will impinge on the amenity of the tenants in this property. Even when account is taken of what I am told as to the nature of the occupation of the property by short-term tenants , if there were a significant impact on amenity such as to affect the tenants, one would expect at least some of such tenants to have brought the matter to the Claimant's attention. Certainly, it was open to the Defendant to proceed on that basis.

58 In addition, and this is a variant of the point I adverted to earlier, the Defendant was entitled to assume that those who own property in the City will take some steps to inform themselves of matters affected roads and locations where they have properties but where they choose not to have a physical presence. Here the Claimant did have a presence in the City but it does not suggest that it was any part of the role of its staff at Pennine House to check the local papers or local council minutes or the like.

59 Finally, the nature of the works is relevant. The works will have an impact on Pennine House but it is necessary to keep a sense of proportion. There will be a change from a pedestrianised road to one along which buses and taxis and cyclists but no other vehicles will pass. There will be an impact in the course of the performance of the works but the long term impact will be of that limited nature. It is, moreover, a reversion to the situation which appertained before 2015.

60 In those circumstances I am satisfied that there was no unfairness tainting the consultation in the failure to seek out the Claimant's contact details and contact it directly. If that is right and there was no unfairness in the failure to consult the Claimant then the alleged inadequacy of the material which it would have been given becomes irrelevant.

Is there a Further Consultation Challenge?

61 This part of the Claim is advanced in two ways. First, it is said that there was a failure of consultation after the meeting on 24th May 2023. Then it is said that a common law obligation to consult arose by reason of the circumstances after May 2023 when the Defendant had become aware of the Claimant's involvement. The Claimant says that it was given an assurance at the 24th May 2023 meeting that its views would have equal weight with those of others. Also common law fairness required that the Defendant having learnt that the Claimant was opposed to the scheme; that the Claimant had not been consulted

earlier; and that the Claimant was affected by the proposals then a further opportunity should be given to the Claimant for consultation before the scheme began.

62 The Defendant says that discussions in May 2023 were in the context of proposals about the TRO and it was that proposal that was being considered and that proposal in respect of which consultation was offered.

63 In terms of the approach to the finding of fact I adopt the summary of the law set out by Chamberlain J. in the case of *R (F) v Surrey County Council* [2023] EWHC 980 Admin, [2023] 4 WLR 45 at paragraph 50 and I need not recite that here.

64 Potentially the factual dispute is relevant if an assurance was given at that meeting such as, first, to cause the Claimant to delay in making a response to the proposals and, second, to cause the Claimant to believe that the works would not be commenced until it had been given an opportunity for full consultation.

65 The relevant background material against which I must consider the finding of fact is the context of the 9th March 2023 consultation and the subsequent correspondence. In that regard I have already indicated that my view is that the 9 March 2023 letter is most readily seen as part of a consultation about the forthcoming TRO.

66 One of the representatives of the Claimant at the May meeting was Mr Prest. He prepared a note. That was in part a short note recording the meeting although it also seems to have been in part a briefing note prepared in advance. It was far from being and was not intended to be a formal attendance note.

67 Under the heading "Timelines within the consultation process" Mr Prest's note says this:

> "TRO - traffic officer working on them at the moment, have the TROs in place shortly and have them all resolved by June 2024.
>
> …
>
> Procedural - formal representations outside of the consultation period? Process for doing so/equal weight to other comments -consultation does not end - best thing is to send through [to] Chris and Darren (on call) – see if there are informal methods of resolving but also a formal process - pushed up to senior management up to the Council's legislative committee."

68 I have also had regard to what Mr Badrock and Mr Farnell say about that meeting in their witness statements.

69 I bear in mind that the meeting took the form of a conference call where there is to a degree greater scope for misunderstanding and for those taking part being at cross-purposes than in a meeting face-to-face. I accept that it is possible and, indeed, that this was Mr Farnell's understanding, that the Claimant believed that some wider assurance was being given than that merely relating to the TRO. However, I conclude that in circumstances where I am dealing with the matter simply on the papers the Claimant has not established that any such assurance was given.

70 I come back to the facts and the context which I have already given. The context in part was that the March 2023 letter provided for a consultation period running up to a date in March which had passed by the time Mr Craig contacted the Council. That letter envisaged asking for comments by 24th March. I am satisfied that when seen in that context the indication which the Council believed it was giving was that it would take account of the Claimant's comments in relation to the TRO even though they were being made after 24th March 2023. Certainly the Council was not suggested that it would re-wind the September 2022 decision

or put implementation of that decision on hold pending the Claimant's input into the process.

71 Notwithstanding what was said at the meeting did common law fairness require the process to be put on hold pending consultation with the Claimant at this point? The Defendant was by now aware of the Claimant's existence. It was aware of a potential impact on the Claimant. It was aware of the Claimant's concerns. Moreover, it was aware that the Claimant had not been contacted before and, indeed, had apologised for that in Mr Badrock's letter. However, I have already concluded that the failure to consult the Claimant directly earlier did not amount to a failure of fairness. In those circumstances common law fairness as at the period from May to July 2023 did not require the Defendant to put the scheme on hold until the Claimant had given its views on the scheme. The requirement of fairness was satisfied by giving the Claimant an opportunity to provide its views in advance of the TRO. That has not affected commencement of the physical works.

The Challenge based on the 2014 Regulations.

72 The relevant provisions begins with Regulation 7 which provides:

> "7.1 The decision-making officer must produce a written record of any decision which falls within paragraph (2).
>
> (2) A decision falls within this paragraph if it would otherwise have been taken by the relevant local government body, or a committee, sub-committee of that body or a joint committee in which that body participates, but it has been delegated to an officer of that body either—
>
> (a) under a specific express authorisation; or
>
> (b) under a general authorisation to officers to take such decisions and, the effect of the decision is to—
>
> (i) grant a permission or licence;
>
> (ii) affect the rights of an individual; or
>
> (iii) award a contract or incur expenditure [materially affecting the Authority's financial position].
>
> (3) The written record must be produced as soon as reasonably practicable after the decision-making officer has made the decision and must contain the following information…"

Regulation 6 makes various definitions defining background papers and also defining the decision-making officer as an officer who makes a decision under Regulation 7(2). Regulation 8 provides for publication of the decision and background papers.

73 The effect of the decision of Garnham J in *Newey, R (On the Application of) v South Hams District Council* [2018] EWHC 1872 Admin is that a decision affecting a person's right to enjoyment of their property is a decision affecting that person's rights for the purposes of the 2014 Regulations. The Claimant says that Resolution 10.1 in September 2022 effected a general authorisation for the purposes of the regulations and resolution 10.2 a specific authorisation. The decision to commence the works was, the Claimant says, a decision falling within the scope of the Regulations and that the requirements were not met.

74 At one point I understood the Claimant to be saying that the decision as to consultation in the spring of 2023 was under 10.2 but, as I have already explained, the consultation there was about the TRO and so does not advance matters here.

75 I come back to the decision to commence works which was the main focus of the Claimant's challenge. That, again, turns on the nature of the September 2022 decision and the nature of the authority given by Resolution 10.1. The September 2022 decision was the operative decision and at 10.1 was authorising the implementation and management of the works which had been decided upon in September 2022. The Executive decision made in July 2023 or thereabouts was one as to the timing and not the nature of the works to be undertaken in Well Street. At most it was part of a general authorisation about implementation. It was not, therefore, an exercise of specific authority. It was not in reality a decision of the kind with which the 2014 Regulations were concerned. Those regulations are not about the implementation or timing of operations which the relevant public body had already decided to put into effect.

76 The more significant point is that a decision as to starting the works on a particular date rather than another date is not a decision affecting the Claimant's rights. The Claimant was and is concerned about the general impact of the works on Well Street and on Pennine House. It was not concerned about whether those works start on 31st July or 1st August or some other date. It is the performing of the works which is cause for concern not the date on which they begin. It follows that to the extent the decision is a decision to start the works on 31st July it is not a decision affecting the Claimant's rights and so is not a decision within the scope of the 2014 regulation.

77 I note in passing, though this does not form a reason for my decision, that it might be open to debate whether the Claimant is an individual for the purpose of the 2014 Regulations. The regulations do not define "individual" but certainly it would be open to argument whether a company was an individual for the purpose of the regulations. However, I have not been addressed on that issue and so I assume without deciding the point that the Claimant is within the scope of the regulations if there had been a decision affecting its rights for the purpose of the regulations which I have concluded there was not.

The Lawfulness of the Claimant's Actions in July 2023.

78 In the course of argument Mr Stinchcombe KC for the Defendant accepted that the works begun in July 2023 were development. In particular, that that is the position in respect of the landscaping works; the conversion of the roadway; the erection of a cycle track; the installation of barriers; and the like. That was an entirely proper and almost inevitable concession.

79 The documentation before me shows that the Defendant proceeded throughout on the footing that the works were development albeit permitted development. Works are development if they are improvement works which may have significant adverse effects on the environment. That is a low hurdle and so that the relevant works were development.

80 The questions, therefore, become as follows. First, whether the works commenced on 31st July were within the Defendant's powers under the Highways Act. Second, whether they were permitted development. Those require consideration of whether the works were works of improvement and whether the requirements of the Town and Country Planning (General Permitted Development) (England) Order 2015 were met.

81 I am satisfied that the lawfulness of 31st July 2023 actions were properly put in issue in the Statement of Facts and Grounds and Mr Stinchcombe again sensibly accepted that.

82 The first question, therefore, is whether what was done was within the Defendant's powers under the Highways Act.

Section 62(2) provides:

> "Without prejudice to the powers of improvement specifically conferred on highway authorities by the following provisions of this Part of this Act, any such authority may, subject to subsection (3) below, carry out, in relation to a highway maintainable at the public expense by them, any work (including the provision of equipment) for the improvement of the highway."

But then (3) says:

> "Notwithstanding subsection (2) above, but without prejudice to any enactment not contained in this Part of this Act, work of any of the following descriptions shall be carried out only under the powers specifically conferred by the following provisions of this Part of this Act, and not under this section …"

and then (3) lists a number of particular works, division of carriageways, construction of cycle tracks, provision of barriers and the like which fall within that and so can only be carried out not under section 62 but under the powers of the following sections.

Then (4) provides:

> "A highway authority may alter or remove any works executed by them under this section."

83 The following sections of Part V of the Highways Act address specific powers for the construction of cycle tracks, division of carriageways and the like. Some at least of those following sections set out particular requirements which must be satisfied for the lawful exercise of the powers which those sections give.

84 The Claimant says that the Defendant simply invokes section 62 but that this does not assist the Defendant because the works, or at least some of them fall, within the scope of the following sections and the Defendant has not either invoked those sections, still less set out the ways in which it has met the requirements imposed by them.

85 Lawfulness is a matter of substance, not form. It is not a matter of some form of magical incantation. It is not normally necessary in order for a public body to act lawfully for it formally to say that it is acting under section X of Y statute. However, where the lawfulness of a public body's action is properly put in issue then that body must "give chapter and verse"; must show that it is acting within its powers; and must show that it has met any relevant preconditions for the exercise of the power in question. There is a range of circumstances in which the court has to consider whether the lawfulness of a public body's actions have been put in question and the detail which is needed to establish lawfulness. Where on the scale is this case?

86 I am satisfied that the Claimant has not put the Defendant's powers in issue save in the most general sense. It is necessary for the Claimant to go further than to say that there are particular requirements for some elements of the works. It must at least raise an issue that the Defendant has not satisfied the requirements of the particular sections which provide the relevant powers. At least it must do in circumstances such as those here where it is accepted that there is a statutory power in general terms under particular sections to perform the works in question. If the Claimant had raised the issue of lawfulness to a sufficient level then the burden would be on the Defendant to prove that it had complied with any requirement or precondition but a mere general denial of the existence of a power is not sufficient to put the lawfulness of the actions in question. In particular that is so as it is not suggested there is any particular requirement vis-à-vis the Claimant by way of notice or consultation or compensation or the like which has not been satisfied

87 Therefore, the challenge to the lawfulness under the Highways Act fails. .

88 The next question is whether the works in question are works of improvement. Schedule 2(A) of the General Permitted Development Order ("the GPDO") addresses permitted development and carrying out by the Highway Authority of:

> "(a) on land within the boundaries of a road, of any works required for the maintenance or improvement of the road, where such works involve development by virtue of section 55(2)(b)…; or
>
> (b) … required for maintenance or improvement of the highway."

89 It is common ground here that the land in question is within the boundaries of the road.

90 It is then necessary to look back at Article 3 of the GPDO.

> "(1) Subject to the provisions of this Order…planning permission is hereby granted for the classes of development described as permitted development in Schedule 2."
>
> Then:
>
> "(10) Subject to paragraph (12), Schedule 1 development or Schedule 2 development within the meaning of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations") is not permitted by this Order unless –
>
> > (a) the local planning authority has adopted a screening opinion under regulation 6 of those Regulations that the development is not EIA development within the meaning of those Regulations …
>
> "(11) Where the local authority has adopted a screening opinion under the EIA Regulations that the development is EIA development…that development is treated for the purposes of paragraph (10) as development which is not permitted by this order."

91 For completeness, section 329 of the Highways Act defines improvement as –

> "… the doing of any act under powers conferred by Part V of this Act and includes the erection, maintenance, alteration and removal of traffic signs, and the freeing of a highway or road-ferry from tolls …"

92 The Claimant through Mr Moss says that the works here are not improvement and, therefore, cannot be permitted development. It is said that is because they fall at the first hurdle as being outside Schedule 2, paragraph A: it not being suggested that they are works of maintenance. The Claimant says the works are not works of improvement because they effect changes to the nature of the highway. For example, the flagstones which were there before the 31st July 2023 are being removed and the road converted into a road along which buses can travel and there are related works.

93 There is no substance in this argument. Whether particular works are improvement is a matter for the planning judgement of the Defendant subject to the works in question being capable in law of being an improvement. So the questions are whether these works are capable in law of being an improvement and whether it was rationally open to the Defendant a matter of planning judgement to conclude that they were in fact an improvement. Here the road works were clearly capable in law of being improvement. The nature of the highway is

not being changed. It remains a highway. It is one on which the surface is now more suitable for vehicles than it was before but that is not a change in its nature. In any event I do not accept that changing the nature of the surface cannot be an improvement of a highway. Indeed such a change will frequently will be a work of improvement. Thus the metalling of an un-metalled road is clearly a work of improvement of the highway. It follows that these works were capable in law of being an improvement to the highway and there is simply no basis for saying that they cannot as a matter of rational planning judgement be seen as an improvement. If it is open to the Defendant to decide that Well Road ought to be a route entered by buses then changes to make it easier for buses to drive along that road is clearly capable as a matter of rational planning judgment of being regarded as an improvement.

94 I turn now to the question of whether it was open to the Defendant to proceed on the basis that the works commenced on 31st July were a permitted development.

95 I have already set out the requirements of the GPDO. It is necessary also to consider the requirements of the EIA regulations. Regulation 2 deals with interpretation and provides that EIA has the meaning given to it by Regulation 4 and that

> "EIA application" means –
>
> (a) an application for planning permission for EIA development; or
>
> (b) a subsequent application in respect of EIA development;
>
> 'EIA development' means development which is either –
>
> (a) Schedule 1 development; or
>
> (b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

A screening opinion is defined as being –

> "… a written statement of the opinion of the relevant planning authority as to whether development is EIA development."

96 Under regulation 3, the relevant planning authority –

> "… must not grant planning permission or subsequent consent for… EIA development unless an EIA has been carried out in respect of that development."

97 4(1)(a) provides that:

> "The Environmental Impact Assessment…is a process consisting of –
>
> (a) the preparation of an environmental statement …"

98 Regulation 5 states:

> "(1) Subject to paragraph (3) and regulation 63, the occurrence of an event mentioned in paragraph (2) shall determine for the purpose of these Regulations that development is EIA development.
>
> (2) …
>
> (b) the adoption by the relevant planning authority of a screening opinion to the effect that the development is EIA development."
>
> …
>
> (5) where a screening opinion is adopted the reasons for that must be set out and that if it is –
>
> "determined that the proposed development is not EIA development, state any features of the proposed development and measures envisaged to avoid, or prevent what might otherwise have been, significant adverse effects on the environment."

99 6(1) says:

> "A person who is minded to carry out development may request the relevant planning authority to adopt a screening opinion."

100 Then 15 provides:

> "(1) A person who is minded to make an EIA application may ask the relevant planning authority to state in writing their opinion as to the scope and level of detail of the information to be provided in the environmental statement (a 'scoping opinion')."

101 The effect of those provisions, therefore, is that development is EIA development if it is a Schedule 2 development which is likely to have significant effects on the environment by virtue of its nature, size or location. If development is EIA development then it is not permitted development and an Environmental Impact Assessment is needed. If the development is not EIA development then there is no need for the Environmental Impact Assessment and hence no need for an environmental statement.

102 I revert to the document from Sweco dated 16th May 2023 but sent on 23rd May. That was a request for a screening opinion sent to the Defendant's Department of Place. I read the first two paragraphs:

> "Sweco has been instructed by [the Defendant] to formally request a screening opinion under Regulation 6 of the EIA Regulations. The purpose of the request is to determine whether the proposed development at Bradford City Centre constitutes EIA development as defined by those Regulations.
>
> [The Defendant] as the relevant Highways Authority, is proposing to use their permitted development rights as granted under the GDPO … An EIA Screening must be adopted by he LPA to establish that the improvement works are not EIA development as per Regulation 3(10) of the GPDO."

103 The document sets out proposed views on environmental effects and then in the Summary it says this:

> "The screening assessment has identified significant adverse effects on the environment and not considered likely either alone or cumulatively with other developments."

It concluded:

> "Based on the information provided it is, therefore, considered that **the proposed development does not constitute nor comprise "EIA Development" as defined by the EIA Regulations** (original emphasis).
>
> We trust you have sufficient information to determine whether the proposed development is "EIA Development" as defined by the Regulations. We look forward to receiving a formal screening opinion …"

104 Then on 31st July the screening opinion was sent. That begins with saying this:

> "The Council has adopted a screening opinion under Regulation 6 of the EIA Regulations that the above development constitutes EIA development within the meaning of Regulation 2 of the EIA Regulations for the following reasons …"

Next, it refers to it being an urban planning project. Then it says this:

> "The proposed scheme therefore constitutes `Schedule 2 development' for the purpose of the EIA Regulations and the proposal needs to be screened to determine if it is likely to have significant effects on the environment and hence whether an environment assessment is required."

105 Then it sets out the characteristics of the development and under the heading "Pollution and Nuisance" it says:

> "Noise and vibration expected from construction activity. The impact incurred is not expected to be significant or long term.
>
> Planning conditions can be imposed to ensure there will be no significant risk from land contamination to the future users of land and neighbouring land or to controlled waters."

106 Then at 3, "Types and Characteristics of the Potential Impact" it says

> "(a) Nature of impact- The development is unlikely to lead to significant dust/ air pollution. No significant noise impacts are foreseen subject to planning conditions detailing construction management arrangements. No adverse implications for water quality or the groundwater flow regime are foreseen subject to the agreement of appropriate drainage details through the planning application process.
>
> …
>
> (d) Probability of impact - The impacts associated with construction are to be localised and can be adequately controlled by planning conditions.
>
> …
>
> (e) Expected onset, duration, frequency and reversibility of the impact - The majority of the impacts associated with the development will be short term and can be controlled by planning conditions ….

…

(g) Possibility of reducing the impact - The majority of impacts are primarily localised and as such can be controlled via planning conditions."

107 Then the conclusion was:

"Having completed the planning and screening exercise, for the reasons given above and in the attached matrix the Planning Authority considers that the proposed development is not likely to have significant effects on the environment. Accordingly, an Environmental Impact Assessment is not required.

Under Regulation 15 of the EIA Regulation you are entitled to request a Scoping Opinion from the Council which will set out our opinion on what information should be provided in an environmental statement."

108 I bear in mind the approach which I must make to the reading of the screening opinion. That is to be akin to the approach taken to officers' reports in respect of planning matters. I am to approach it in a non-legalistic manner. I am to bear in mind that the officer is addressing an informed audience; I am to take a realistic and non-technical view, avoiding pedantry and obsession with grammar; I am to read the document without undue rigour and with reasonable benevolence. The exercise in which I am to engage is not one of marking the document as if were a composition and giving marks out of ten for language or structure rather it is one of seeing whether the relevant issues have been properly addressed and a coherent and rational decision reached.

109 There are a number of puzzling features of the document. It begins by saying that the Council has adopted a screening opinion that the development constitutes EIA development. It then repeatedly refers either to the planning process or to planning conditions which necessarily cannot be imposed if the works are permitted development and as such do not need planning permission. It then, in the penultimate paragraph, says that an Environmental Impact Assessment is not required. However, in the last paragraph it refers to what information should be provided in the environmental statement doing so in circumstances where an environmental statement would not be necessary if the development was not EIA development.

110 Mr Stinchcombe invited me to see the last paragraph as being otiose. He said that I should look at the structure of the document in the way I have just described. He submitted that what the structure shows is that the Council officer is considering that the development is potentially EIA development but then coming to a conclusion that it was not. I accept that that was the intention of the document and I accept that is what the writer of the document believed that she was doing. It says that far from clearly but that is the intention which appears from the document. However, the language and the form adopted do not give any confidence that there was proper consideration of the exercise in which the officer was engaged. It is almost as if some form of template has been used without thought. That might be the explanation for the presence of the last paragraph. The alternative explanation for the presence of the last paragraph is that the officer in fact thought it was an EIA development or that the officer did not realise that an environment statement was not needed because it was not EIA development.

111 The real difficulty comes when considering not what the intention of the author of the document was but whether the conclusion that the works in question are not EIA development is a rational one. I remind myself that the test is one of *Wednesbury* unreasonableness. There is a high hurdle to be surmounted before the court can conclude that there is irrationality particularly bearing in mind the benevolence with which the

document is to be read. However, I am driven to the conclusion that, even taking account of those caveats, this screening opinion is fundamentally flawed. There are repeated references to the effects of the work being controlled by planning conditions. It is said that the control by planning conditions is a reason why the impacts can be seen as being, for example, in 3(d) it says that the impact from the construction works can be adequately controlled by planning conditions. It cannot safely be said that those are mere slips or that they did not affect the conclusion reached by the author of the document. That is particularly so in light of the problems with the language and structure to which I have already referred. One inadvertent reference to a planning condition in an otherwise compelling and coherently written document might well be explicable as a slip. Repeated references in a document which does not give confidence that the issues have been properly addressed cannot be so explained.

112 I have to conclude that on any sensible interpretation the document is setting out a screening opinion which sets out as the reason the development is not EIA development that its effects can be controlled by planning conditions. It follows that the document was prepared on a false basis and that the author was proceeding on a false basis namely that account could be taken of the potential scope for planning conditions. That means that the screening opinion was not reached through a rational analysis or, putting it a slightly different way, it was reached on the basis of taking account of irrelevant and incorrect considerations.

113 It was not open in those circumstances to the Defendant rationally to conclude that it received a screening opinion to the effect that the works were not EIA development. As a consequence of that it was not open to the Defendant rationally to proceed on the basis that the works were permitted development. That is because the requirements of the GPDO have not been satisfied. It follows necessarily from those matters that the commencement of the landscaping works on 31st July 2023 was unlawful. Those were works which it was not at that stage open to the Defendant to treat as permitted development and nor did the works have planning permission.

114 For completeness I have considered whether this aspect of the challenge is in time. It is a challenge to a planning conclusion. I also bear in mind that the claim as formulated was a challenge to the 12th July commencement of the works. However, I am satisfied that this challenge was encompassed in the Statement of Facts and Grounds and that it is within time as to 31st July decision which was the decision to commence the works on the impermissible footing that the works were permitted development.

115 It is also significant when considering the rationality and lawfulness of the Defendant's approach that the screening opinion only came on 31st July. I accept for these purposes that it was at least open to a Defendant to proceed on the basis that the fencing and initial works were works which were not works of development. There might be some scope for argument about that but the landscaping works were clearly works of development. The fact that the screening opinion came on 31st July when the works were actually commencing is indicative that the Defendant had failed to apply its mind to the need to go through the pre-conditions for establishing whether the works were permitted development.

The Senior Courts Act 1981.

116 I turn to consider the effect of section 31 of the Senior Courts Act. Under section 31(2A) I must refuse to grant relief if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred; and then section 31(3C) and (D) in essence apply the same test to grant of permission.

117 I have to apply those provisions realistically looking at what is likely to happen in the real world. Nonetheless, the test is whether the court is satisfied that it is highly likely that the

outcome would not have been substantially different. Here I have no doubt that the Defendant was entitled to regard the scheme as a whole as beneficial. That, however, does not mean that some aspects of the scheme will not have significant adverse effects. It does not mean that some aspects of the scheme will not be permitted development and the way to address those matters is through a planning process. The facts that the works are not permitted development does not mean that they cannot take place but that the assessment and justification of them must be through the planning process potentially with conditions being imposed. Indeed, the September 2022 decision and the background documents to that envisage there might be need for a planning applications at some stage.

118 I cannot say that it is highly likely that if the matter had been properly addressed in July 2023 (namely on the footing that if the works were permitted development then planning conditions could not be imposed) then the screening opinion would have been in the same terms with the conclusion that the works were not EIA development because they were unlikely to have significant adverse effect. The whole rationale of the screening opinion was that there would be effects but that they could be controlled by planning conditions. There is at least a real possibility that a proper assessment in July 2023 would have caused the Defendant to take the approach that there were matters which needed to be addressed through the planning process and which did not amount to permitted development.

119 Mr Stinchcombe said, well, much of this could be controlled by contractual conditions. He said that the Council had a registered contractor (and that is referred to in the Sweco letter) and could impose conditions on how the contractor did its work. That may be a relevant factor but it was not one that can be said to have been taken into account in the screening opinion. It cannot be said that that consideration of the Defendant's powers over its contractors would have led necessarily or even on a highly likely basis to the conclusion there were not significant adverse effects from the works. In that regard there is force in the point made on behalf of the Claimant that there is a difference between control through the planning process and control through contractual conditions and that it is the former which permitted development escapes.

Conclusion.

120 The effect of all that is as follows. The challenge in ground one to the September 2022 decision is out of time and I decline to grant an extension for that challenge where, in any event, that ground is not established. The challenge in the second limb of ground one as to procedural unfairness in 2023 is sufficiently arguable for grant of permission but does not succeed on full analysis. I doubt whether ground two in fact was sufficiently arguable for the grant of permission but, in any event, it is not made out. Ground three fails on the question of whether the works were improvement within the Highways Act. It, however, succeeds on the basis that it was not open to the Defendant to proceed on 31st July 2023 on the basis that the works were permitted development.

121 It is important that all concerned understands that I am not saying that it would not be open to the Defendant ultimately to proceed on the basis that the works are permitted development. However, that would require a proper assessment of the position under the EIA Regulations and a proper and rational screening opinion. It is also possible that even if the works are not permitted development they will be properly permitted under the planning process. However, neither of those are matters which are before me today. The position today is that as at 31st July 2023 the necessary requirements for the lawful performance of the works have not been made out.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge.