

Case No: CO/560/2016

Neutral Citation Number: [2016] EWHC 1967 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/08/2016

Before :

MR JUSTICE COLLINS

Between :

PS by his litigation friend TS	<u>Claimant</u>
- and -	
Royal Borough of Greenwich	<u>Defendant</u>
- and -	
(1) Enderby Wharf Ltd	<u>Interested</u>
(2) Enderby Riverside Ltd	<u>Parties</u>
(3) Enderby Isle Ltd	

Ms Jenny Wigley (instructed by **Richard Buxton Environmental and Public Law**) for the **claimant**

Mr Thomas Hill, QC and Mr Christiaan Zwart (instructed by **RBG**) for the **defendant**
Mr Paul Tucker, QC and Mr Anthony Gill (instructed by **Nabarro LLP**) for the **interested parties**

Hearing dates: 12th and 13th July 2016

Judgment

Mr Justice Collins:

1. This claim seeks to quash a planning permission granted by the defendant to the interested parties on 23 December 2015. The defendant had resolved to grant permission at a meeting of its planning board on 21 July 2015. There was then a referral to the Mayor of London whose delegated officer decided neither to direct refusal nor to take over the application for his own consideration. He stated that it represented EIA development and he had taken into account the environmental information in reaching his decision. There were further s.106 considerations before permission was finally granted.
2. The history of the development and what was covered by the permission is of fundamental importance. Following an application in 2010, on 30 March 2012 permission had been granted by the defendant to redevelop the Enderby Wharf site to construct a new jetty in the River Thames to provide docking for cruise liners, a cruise liner terminal, a 251 room hotel and 770 residential units. This major development, which included various additional access and parking arrangements, was EIA development. It was then anticipated that there would be some 100 visits by cruise liners with 65 turnaround calls and 35 transit calls. It was recognised that some liners would probably remain for two or three days, hence the reference to turnaround calls. The terminal would cater for those wishing to embark or disembark from the liners or who wished to spend time in London while the liner was in port.
3. There was no challenge to this permission. There were some variations granted in 2014, but they were relatively minor and there is no need to refer to them. The application which led to the decision being challenged was made in March 2015. It covered only a relatively small part of the overall site and proposed that the hotel be replaced with residential buildings, an increase in the size of one of the residential buildings within the previous permission and the erection of a terminal building which was to be larger, apparently by some 81%, than that for which permission had been granted. The size of the terminal building was not intended to cater for more visits by cruise liners. In fact, the contrary was the case since the anticipated visits had been reduced to 55 with 28 turnaround and 27 transit calls.
4. The claim as originally lodged raised a number of grounds relating to the alleged failure of the defendant properly to consider and give effect to the need to ensure that air quality was assured. Permission was refused on paper by Jay J. Following an oral renewal, Dove J granted permission which he limited as follows:-

“The claimant is granted permission to bring a claim for judicial review of the defendant’s decision dated 23rd December 2015 limited to that the defendant’s decision was (arguably) unlawful by the failure to require, or take into account the need for, an assessment of the total cumulative and combined effects on air quality that included the effects of the ship emissions.”

The claimant was required to serve detailed grounds which met this limitation. In her skeleton argument, Ms Wigley has set out four grounds which she submits show that there was the failure identified which Dove J considered arguable in his grant of permission.

5. The claimant lives some 450 meters to the south of the jetty where the ships would dock and be moored. The ship emissions would result from the need for an engine to be kept running while the ship was docked in order to provide electrical power. For reasons that will become clear, the emissions in question are chiefly nitrogen dioxide (NO₂) which are given off from diesel engines by which the ships are powered.
6. I was concerned at the choice of the claimant, who suffers from learning difficulties and so needs the assistance of a litigation friend, to mount this challenge particularly as he had not played any part in the planning process. I asked his solicitors to provide an explanation. In a letter of 14 July 2016, I was informed that the claimant had suffered from pollution caused by a neighbouring business in 2013, and had complained to the defendant. The defendant's view was that there was no statutory nuisance but the claimant or his mother could pursue a claim under s.82 of the Environmental Protection Act 1990. His mother was not happy with this advice and sought unsuccessfully to persuade the local government ombudsman to take action. Thus it is said the claimant had ongoing concerns about air pollution and this explained why he was the claimant. I have been informed by the defendant of the circumstances of the claimant's and his mother's concerns. Suffice to say they have nothing to do with the terminal. It is to be noted that the prevailing wind will not spread pollutants to his address and that in any event any emissions from the ships will not be likely to add to any pollution affecting him to more than a marginal amount. I had real doubts whether he in truth had standing, but that point was not taken. He has been granted legal aid which will I gather not cover all his costs.
7. I have been burdened with an excess of paper. The vast majority of the documentation is unnecessary. The extent of the excess is illustrated by the core bundle which commences with page 6000. The documentation which I have had to consider still runs to some 985 pages of which 227 are comprised by a number of statements filed on behalf of all the parties. There are a number of factual issues which have been raised but, this being a claim for judicial review, it is not for me to decide any issue of fact. It is only if matters which ought to have been taken into account by the defendant were not or there was account taken of immaterial matters that I can find in the claimant's favour in relation to any factual issue. That is of course the usual Wednesbury test. Equally, it is only if the officer's report to the planning board was misleading because of some omission or erroneous assertion that relief can be granted. It is trite law that officer's reports must not be subjected to detailed analysis as if they were statutory provisions and it must always be recognised that they are prepared for a knowledgeable readership: see R v. Mendip DC exp Fabre (2000) 80 PTCR 500 at p521 per Sullivan J and Oxley Farms v. Selby DC [1997] EG 60 (CS) per Judge LJ.
8. The redevelopment of Enderby Wharf to provide a terminal for cruise liners has been considered desirable by the defendant, by the Greater London Authority and by the Port of London Authority for some time. Further, this development will provide housing and will attract tourists and so help the local economy. In the introduction to her skeleton argument, Ms Wigley at paragraph 2 said:-

“It is important to note that the claimant does not object per se to the cruise terminal or to the liners. The claimant is simply concerned that the resulting pollution and health impacts be avoided. The significant air pollution that will inevitably arise from berthing liners could be avoided by the provision of on-

shore power supply so that the ship's engines may be turned off when berthed. This has not been required by the planning permission, and the investment of providing it has not been balanced against the true costs of the development in terms of its impact on air quality.”

9. The grant of permission for the overall development involving what were then considerably more visits by cruise liners in 2012 was the time when the pollution which would result from the berthing of the liners was obviously an issue and was considered in the Environmental Assessment which had then to be made. That permission remains and the permission under attack in this claim does not affect the berthing of the liners nor the pollution to be expected from them. Thus the defendant and the interested parties submit that there was no obligation to consider more than whether the proposal added any pollution by, for example, increased traffic or generators in the extended terminal. It is recognised on the claimant's behalf that any extra pollution would in truth be negligible if account should not be taken of the existing permission which permitted the berthing and when any challenge should have been made. Ms Wigley points out that the relevant emissions from the ships and from the energy centre were not considered in 2012.
10. So far as the ships are concerned, that was because the government's advice through guidance issued by DEFRA made clear that it did not need to be. Its Local Air Quality Management Guidance (TG(09)) identified in relation to ships that the relevant pollutant was Sulphur Dioxide. This was not a material problem since no ship could come up the Thames unless it used fuel with a very low sulphur content of less than 1%. If that fuel was used, the DEFRA Guidance made clear that air quality assessment did not need to be taken further unless there were more than 5000 movements per year. That guidance remains in being and is the appropriate means whereby the UK complies with its obligations under the Air Quality Directive. The TG (09) guidance was extant both at the time of the consideration of the planning application by the Planning Board and on the date when the 2015 permission was issued. It was replaced in London in May 2016 by more generic London Local Air Quality Management Guidance. This does not specify different thresholds, nor pollutants of particular concern for shipping.
11. Possible use of on-shore power was considered by the defendant. It was assessed by the interested parties but was rejected as wholly impractical. There were a number of reasons relied on. Very few cruise ships were able to link up to on-shore power supply and in any event those that did would require an input which differed from that provided by the UK National Grid. Furthermore, the cost to the provider and to any ship was prohibitive. It was noted that EU Directive 1999/32/EC stated that Member States should “encourage the use of shore-side electricity, as the electricity for present day ships is usually provided by auxiliary engines”. That no doubt is desirable if possible since the auxiliary engine will emit NO₂, particularly as it is said that one cruise liner using such an engine would be the equivalent to some 688 diesel lorries. But the officer's report cannot be criticised for advising the Board that in the light of advice obtained from independent experts, to which I must refer, the huge investment needed for shore-side power provision could not be justified and so it was not appropriate for the site.
12. Concerns about the NO₂ emissions were raised when the Mayor of London was considering whether to intervene. It was accepted that the reference to 688 HGVs was

a fair comparison, but the point was made that the emissions would be at a height not at ground level and, since the emissions were hot and fast, they would be dispersed better than emissions from car exhausts. The GLA ordered a report on the air quality issue which was to consider the reports relied on by the defendant in deciding in favour of permission. This report upheld the conclusions of the report relied on by the defendant. It concluded that the impacts of the ship emissions would be said to give rise to moderate adverse effects at worst if they were to be the subject of a new planning application and assessed using the latest techniques and data. But the application under consideration was air quality neutral. It did recommend mitigation measures to ensure that emissions from vehicles attending the site should be kept to a minimum.

13. The defendant in 2001 published an Air Quality Action Plan with a promise to continue to prevent air pollution and seek ameliorating measures. For pollutants including NO₂ the defendant had designated the borough to be an Air Quality Management Area (AQMA). In a screening and updating assessment in July 2015 which included identification of any matters that had changed which might lead to risk of an air quality objective being exceeded, the approach for shipping followed the DEFRA guidance to which I have already referred.
14. In an endeavour to counter the case against her based on the absence in the development of any amendment to the berthing arrangements approved in the 2012 permission, Ms Wigley submitted that it was apparent from what was said by the interested parties in making the application that the variations were needed in order to make the visits by cruise liners possible. The need for a hotel was not likely to result since those who might otherwise have used it would stay on board the ship. Further, the terminal building would if enlarged be more fit for its purpose. No doubt and for understandable reasons the positive benefits of the development were emphasised, including the provision of a substantial number of new homes. Thus Ms Wigley has presented a fall back argument. But the evidence given by Mr Margason on behalf of the interested parties makes it clear that, if this permission were to be quashed, they would, having already spent a great deal of money implementing the 2012 and 2014 permissions, proceed with them. Thus fall back does not arise as an issue. The interested parties have a permission which can be implemented. Thus, it is submitted on their behalf, this claim will achieve nothing for the claimant. I shall have to consider the effect of that when considering whether, even if I were persuaded by any of Ms Wigley's submissions, relief should in the exercise of discretion be granted.
15. Since this was development which was within the EIA Directive, consideration had to be given to an Environmental Statement (ES). This process starts with a request for a Scoping Opinion in which the planning authority states the scope of the EIA. The request in December 2014 did not include emissions from the liners as material potential effects on air quality because the development did not affect the off-shore mooring.
16. On 11 February 2015 the defendant issued a scoping opinion. Under the heading 'Air Quality' it stated:-

“The EIA should investigate in detail the effects of ships engines running while docked on nearby sensitive premises.

The docking of vehicles for longer periods may lead to increased emissions (e.g. if the motor is kept running/other on board equipment). The potential effects should be appropriately assessed in the ES. It should also be noted that the noise associated with cruise ships is to be assessed (page 23 of the EIA scoping report) and therefore it is considered appropriate that emissions associated with cruise ships also be assessed.”

The word ‘vehicles’ in the first sentence of the second paragraph cited above is a mistake, it would seem, for vessels.

17. A full ES was provided in March 2015. It noted that legislative changes, which included the limitation to very low sulphur content of fuel, would have a direct impact on the operational requirements of vessels mooring at the terminal and so ‘there is a need for the development of an expanded terminal with a greater focus on embarking and disembarking.’ This has had significant impact on the design of the site, viability and development of the cruise terminal. It then identified the changes in the terminal building. Paragraphs 77 and 78 state:-

“77. In relation to the potential for effects of cruise ships berthing at the jetty, based on the information regarding the use of the Enderby Wharf terminal by cruise liners, and current guidance, the potential effects on local air quality and the proposed land use are likely to be insignificant and therefore, no further assessment to sulphur dioxide emissions from cruise liners is considered to be required to inform the assessment of environmental effects of the Proposed Development.

78. Predictions of NO₂, PM₁₀ and PM_{2.5} concentrations at existing receptors in the vicinity of the Proposed Development and local road network have shown that there would be low and very low changes in pollutant concentrations between ‘Without Development’ and ‘With Development’ scenarios. The impact of the additional emissions from road sources at Enderby Wharf during operation of the Proposed Development to sensitive receptors is therefore considered to be **negligible.**”

This is clearly recognising that the development did not change the ability of ships to moor at the wharf as had been decided in 2012.

In dealing specifically with air quality, the same approach is made.

18. But the ES repeated and identified as material the TG(09) guidance which stated that the key pollutant from ships was SO₂ associated with emissions from large ships and that if ships were using fuel with less than 1% sulphur content it would not be necessary to take an air quality assessment further. That is obviously relevant to the overall consideration of pollution created by the ships and explains why that did not need to be taken further.
19. Ms Wigley complains that a consideration of the overall effect on air quality including the emissions from ships was wrongly not dealt with in the ES. This was because it was properly not considered to have been required by the development in question which did not cover the ships or their mooring. But the defendant was aware of the objections raised by many of those who did object that the overall effect

including the emissions from the ships would have adverse air quality impacts. Accordingly, Royal Haskoning DHV (RHDHV) were instructed in June 2015 to produce a report covering this aspect. This was not nor was it intended to stand as an ES report, but it was understandably considered desirable to meet if possible concerns about pollution. RHDHV reported on 14 July 2015. It detailed the air dispersion undertaken to assess the potential impacts of NO₂, SO₂ and particulate matter (PM₁₀ and PM_{2.5}) from the cruise liners that would be hotelled at the berth. Concentrations were predicted at existing and proposed human receptor locations in the vicinity of the terminal. The predicted pollutant concentrations were compared to the relevant ambient air quality objectives. The modelling for short-term objectives was based on the assumption that emissions occurred continuously throughout the year. For annual mean concentrations, this was properly regarded as overly conservative for several reasons, including the assumption that all 55 visits modelled were for a full 48 hours per visit. The conclusion was that there were no exceedances of the short-term NO₂ save at three receptors and one of the long-term NO₂. This was put to the Board in an addendum report so that it was considered in reaching a decision. It is also to be noted that the Borough of Tower Hamlets had raised objections based on pollutants from the ships but its concerns were allayed.

20. On the claimant's behalf a number of witness statements have been produced challenging the way in which the issue of air quality has been dealt with. Mr Hardwick, who did engage with the planning board, and who spoke at the hearing on 21 July 2015 argues that there has been a failure to assess the multiple sources of pollution along the river to which the emissions from the ships and the traffic using the terminal would contribute. I fully understand his concerns, but it is necessary when considering lawfulness to focus on the nature of the application. The matters raised by Mr Hardwick which obviously carry some weight were material to the original decision in 2012 to grant permission.
21. There are two detailed statements from Claire Holman, the present chair of the Institution of Air Quality Management. She asserts it was inappropriate to use the DEFRA guidance. It does not and it should deal with NO₂. She then gives detailed figures which she submits show that there would be an unacceptable increase of NO₂ pollution from the ships. There is contrary evidence in statements on behalf of the defendant and interested parties. This being judicial review, it is entirely inappropriate for me to seek to decide which evidence should be relied on. Suffice to say that I am entirely satisfied that the defendant was entitled to rely on the reports produced to it and with the reliance placed on the DEFRA guidance. Furthermore, the overall pollution including that from the ships was not material in considering the decision which is attacked in this case. It follows that I do not intend to burden this judgment with a detailed analysis of the contrary evidence in the various statements which have been produced and the voluminous material which is not relevant and should not have been put before me.
22. Ms Wigley has submitted that there was a breach of statutory duty in that the defendant failed properly to interpret and apply two particular provisions. Policy E(c) of the defendant's core strategy policy provides:-

“Development proposals with the potential to result in any significant impact on air quality will be resisted unless measures to minimise the impact of air

pollutants are included. Such planning applications should be accompanied by an assessment of the likely impact of the development on air quality.”

In addition, policy 7.14 of the London Plan provides, so far as material, that particularly in AQMAs development should be air quality neutral and should not lead to further deterioration of poor air quality. The officer’s report refers to those. This submission cannot succeed since it is clear that not only was this considered but the reports obtained indicated that there was no significant increase in air pollution from the development and indeed that even with the ships’ emissions there would be no unacceptable increase in pollution. The submission that these policies required consideration of the total emissions is not sustainable since it is clear that the effect of a development is what matters.

23. A somewhat similar submission is made in relation to some paragraphs of the NPPF. Particular reliance is placed on paragraphs 120 and 124. 120 requires that “the effects (including cumulative effects) of pollution on health...and the potential sensitivity of the area of proposed development to adverse effects from pollution, should be taken into account.” And paragraph 124 requires that “planning decision should ensure that any new development in AQMAs is consistent with the local air quality action plan.” The simple answer to this submission is that the defendant did take into account of the effect of the development and the reference to “cumulative effects” in paragraph 120 does not mean more than that a particular development’s effect must be measured against the existing background pollution. Not only was that done but consideration of the overall effect including the ship’s emissions was, albeit as the officer’s report correctly stated, not needed, taken into account. And there was compliance with paragraph 124.
24. Complaint is made that in a June 2015 RHDVH report it had been said that there needed to be a review of the accumulative effect from the vessel fume stack within the localised region around the terminal particularly if the vessels were going to remain for up to 48 hours. That it was said was not put to the Board. But, as I have shown, that was considered and the Board were appraised of the findings of RHDVH albeit those findings were not in fact needed to determine the application.
25. There is finally an attack on the ES in that it did not include information of the emissions from the ships. At the time of the scoping opinion, the defendant was unaware of the mandatory requirement to use fuel with less than 0.1% sulphur content. That came into force on 1 January 2015 after the screening report in December 2014. The subsequent inclusion of ship emissions in reports by RHDVH were not and were not intended to be regarded as environmental information for the purposes of the ESs. In any event, whatever their label, they were taken into account and there is no reason to quash simply because the information, which was not in any event material to a proper consideration of the planning application, was not contained in an ES.
26. For the reasons I have given, which do not deal in detail with all the evidence and material which I consider to be immaterial, I am satisfied that the decision under attack was not unlawful.
27. Even if I were persuaded that there were errors, I would have to consider whether relief should be granted. Section 31(2A) of the Senior Courts Act 1981 provides:-

“The High Court –

(a) must refuse to grant relief on an application for judicial review.....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.”

The court has always had a discretion in deciding whether notwithstanding any unlawfulness in a decision relief should be granted. But that has been exercised, submits Ms Wigley, on a narrower basis than ‘highly likely’, namely would the decision necessarily have been the same. Section 31(2A) makes mandatory what was discretionary but does not remove the power to exercise discretion in a particular case. The submission seems to depend on arguing that the wording of s.31(2A) in using the past tense looks back to the time of the decision and does not include any future material and means the situation before the amendments were made resulting in s.31(2A). There is certainly scope for arguing that s.31(2A) should be narrowly construed, but in that case there is no need to consider those details. It is clear to me that outcome for the claimant would have been no different since, if he succeeded, the 2012 permission would go ahead and the same emissions from the ships would occur. Thus whether under s.31(2A) or in the exercise of my discretion I would have refused relief.

28. It follows that this claim must be dismissed.