C1/2011/2931

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

ADMINISTRATIVE COURT (Case No: CO/3797/2011)

BETWEEN:

SEAN FEENEY

(Appellant)

and

(1) OXFORD CITY COUNCIL

(2) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

(Respondents)

RESPONSE TO THE APPELLANT'S SKELETON ARGUMENT FOR PERMISSION TO APPEAL

This response assumes the court has had an opportunity to read the material suggested in the appellant's skeleton argument

1. The purpose of this submission is to invite the Court to refuse permission to appeal on the grounds that there is no real prospect of success and no other compelling reason why permission to appeal should be granted.

THE ABSENCE OF LEGAL CONTROVERSY

2. There is no dispute about the Law on the only ground of appeal the Appellant seeks to advance. The legal framework is set out with admirable clarity in the Appellant's Skeleton Argument up to para 42

3. The entire premise of this appeal is that the Appellant simply disagrees with the way the Law has been applied by the Judge in the Court below to the facts of this case and, behind that, lies a failure of the Appellant to recognise the correct factual basis upon which the decision to adopt the Core Strategy was taken by the council. This gives rise to no issue of law at all.

THE ISSUE

4. The only issue identified by the appellant in this appeal is whether the Judge erred in his approach to the requirements of Article 6(3) of the Habitats Directive. That contention is based on the proposition that the Judge upheld a decision of the Respondent Council to adapt a Core Strategy ("CS") in circumstances where the CS would "*....defer investigation into possible effects…"* of a major development allocation on a Special Area of Conservation ("SAC").[1]

[1] See p.6 of the Appellant's Notice Form N161

5. Contrary to this, the reality of the position (as found by the Judge and previous to that as confirmed by Natural England, The Wildlife Trust, the Core Strategy Inspectors and the Council) is that the CS does not defer anything at all to a later stage.

6. This misconceived factual assertion – that the CS defers to a later stage an enquiry into the possible impacts of a major development on the integrity of a SAC – provides the foundation for all the legal submissions which follow.

7. When this basic factual error is understood, it may be seen that the subsequent legal submissions are irrelevant and/or have no real prospect of success.

THE APPROACH OF THE JUDGE

8. The judgment is careful, detailed and thorough. The Judge sets out the law with regard to this ground of appeal at J19-28 inclusive and it is to be noted that nowhere is it suggested he misunderstood those legal principles or failed to include anything of relevance.

9. He then sets out the factual background pertinent to this ground of appeal at J39 to 77 inclusive and, again, it is important to note that it is not argued that anything of importance has been omitted or wrongly

understood. It is important to note J74 where Policy CS6 is quoted and, in particular, paragraphs 3.4-4.3 where the qualifying wording appears.

THE RESPONDENT'S POSITION

10. With that legal and factual background in play it is then necessary to summarise the Respondent Council's position in this way:

(i) it is only necessary to move to Stage 3 (consideration of alternative solutions and IROPI) where the conclusion at Stage 2 is that harm cannot be ruled out;

(ii) whether harm can or cannot be ruled out (Stage 2) is a question of fact for the competent authority;

(iii) the Council found as a fact that the introduction of the qualifying wording excluded the possibility of harm so that the plan met the requirements of the Directive;

(iv) that was a finding of fact which it was open to the Council to make and which it did make;

(v) no one has sought (or seeks) to challenge the rationality of the Council in making that finding of fact;

(vi) having excluded the possibility of harm at Stage 2 it was then legally unnecessary and irrelevant to embark upon a Stage 3 enquiry as to alternative solutions and IROPI.

11. Thus, the suggestion that the CS "*defers"* a consideration of adverse effects to a later stage is factually incorrect and this appeal (based as it is on that premise) has no real prospect of success.

THE APPELLANT'S SUBMISSIONS

12. In the Skeleton Argument, the Appellant then addresses the same argument in a number of different ways. For completeness, it is necessary to consider all of them from paragraph 44 onwards, albeit briefly.

13. Paragraphs 44 and 45 ignores the reality as found by the Judge [J88] (and others) and invites the Court to consider this appeal on the basis that the Council approved the plan whilst being in a state of uncertainty about its likely effects on the SAC.

14. Paragraph 46 misunderstands the qualifying wording. The qualifying wording does not have the effect of postponing or evading a consideration of the effects of the development on the SAC as the Appellant wrongly asserts. Rather the qualifying wording defines, prescribes and delineates

the permissible extent of development by reference to that which can be proved to cause no harm to the SAC.

15. Paragraph 47, again, wrongly assumes harm cannot be ruled out at the CS stage and that it is therefore necessary to proceed to a Stage 3 consideration of alternatives and IROPI. The complaint is then that the qualifying wording unlawfully defers the assessment of alternatives to a later date. This submission has no real prospect of success because the obligation to assess alternatives (Stage 3) only arises where the initial Stage 2 consideration cannot rule out the likelihood or risk of harm. The Judge found that Stage 3 did not arise because the qualifying wording satisfied Stage 2 [J90/91]. It was within the Council's competence to make that assessment and no one challenges the rationality of the Council's finding of fact. In a case where Stage 3 never arose for consideration, a complaint about unlawfully deferring a consideration of alternative solutions is legally irrelevant.

16. Paragraph 49 unfairly characterises the effect of Policy CS6 by describing it as:

> "*…a <u>generally</u> worded policy <u>supposedly</u> preventing harmful effects on the SAC…"*

In fact the policy is specific in its language and its efficacy in preventing any harmful effects on the SAC and has been endorsed as such by Natural England, The Wildlife Trust, the CS Inspectors, the Council and the Judge. The remainder of paragraph 49 addresses some loosely worded policy which may provide some equivocal protection to a SAC. That argument is irrelevant to this appeal since Policy CS6 has an entirely different effect. Beyond that the paragraph again confuses a policy approach which defers assessment with one which (as here) categorically eliminates the possibility of harm at the CS stage.

17. Paragraphs 50/51 again invite the Court to proceed on the basis that risk has not been eliminated and uncertainty of effects remains. That is to invent a factual context for this appeal which does not exist.

18. The Respondent does not address the hypothetical scenarios.

19. Paragraph 57 is wrong to suggest the only matter which may constitute an "*alternative solution"* as a matter of Law is "*another particularised development"*. " Do nothing" can, in some circumstances, be an alternative solution to which regard must be had in this context.

20. Paragraph 58 again proceeds on the assumption that the Northern Gateway (Policy CS6) proposal will cause harm and that the task was

therefore to consider whether there might be "*…any less harmful alternatives…"*. This further reflects the Appellant's erroneous approach which continually fails to appreciate that harm – any possibility of harm – has been eliminated by the structure of the language of Policy CS6.

21. Paragraph 59 suggests the Defendant's duty was to ascertain "*…the maximum amount of a certain type or types of development…"* which might be acceptable. An example of "*up to 25,000m^2 of Class B use"* is given. This approach exposes the central fallacy behind this application for permission to appeal. It implies the Council were in a position to identify a fixed quantity of development which would not cause harm to the SAC and which would therefore be permitted by the policy. The SAC however is a dynamic eco system with a hydrological regime in a constant state of flux. The CS recognised that it would be impossible to prescribe a fixed quantity of development years in advance of an application coming forward and that the appropriate time to impose such a rigid limitation on development would be at the planning application stage when all parties were in a much higher state of knowledge. This is exactly the split level approach anticipated in Commission v. UK as endorsed and applied by the Judge [J92]. His approach there is unimpeachable.

22. Finally paragraphs 62 and 63 then introduce a new and entirely different argument which was not advanced before the Judge, namely: that the CS was not sound because the qualifying wording meant the extent of allocated development was uncertain. Permission should not be granted to allow such an argument to be advanced for the first time at appeal and in any event, as a new and separate challenge, it is statute barred by reason of S113(4) Planning and Compulsory Purchase Act 2004.

23. For all these reasons the Respondent Council suggests permission to appeal should be refused.

Anthony Crean Q.C.

6th December 2011
No 5 Chambers
Birmingham – London – Bristol

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