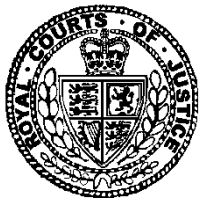

Neutral Citation Number**:** [2019] EWHC 2633 (QB)

Case No: QB2019001302

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2019

Before :

MRS JUSTICE STEYN

- -

Between :

THE QUEEN
on the application of
LOCHAILORT INVESTMENTS LIMITED

Claimant/Applicant

- and -
MENDIP DISTRICT COUNCIL

Defendant/Respondent

- and -

NORTON ST PHILIP PARISH COUNCIL

Interested Party

- -
- -

Richard Ground QC and Ben Du Feu (instructed by **Harrison Grant**) for the **Claimant**
Hashi Mohamed (instructed by **Mendip District Council**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing date: 7 October 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mrs Justice Steyn :

1. This is an application for an interim injunction sought prior to the issue of a claim form. The Applicant seeks an order that:

> "(1) The Respondent must take all steps necessary to cancel the referendum on the draft Norton St Philip Neighbourhood Plan due to be held on 17 October 2019
>
> (2) The Respondent is forbidden (whether by themselves or by instructing or encouraging any other person) from holding a referendum on the Norton St Philip Neighbourhood Plan until the disposal of these judicial review proceedings, or until an order of the court provides otherwise."

2. Schedule 1 to the draft order sought by the Applicant includes an undertaking by the Claimant's solicitor to pay the claim fee and issue the judicial review claim by 4pm on Tuesday 8 October 2019.

The impugned decision

3. In June 2019, Mendip District Council ("the Council") appointed an Independent Examiner ("the Examiner") to examine the draft Norton St Philip Neighbourhood Plan ("NSPNP"). The Council received the Examiner's report on 19 July 2019.

4. The Applicant's solicitors wrote to the Respondent on 2 August 2019, expressing the view that the designation of Local Green Space in Policy 5 of the NSPNP does not meet the basic conditions and therefore the NSPNP cannot lawfully proceed to a referendum. The Applicant asked the Respondent to consider the contents of its letter and the (forthcoming) comments of the Local Plan Inspector on the appropriateness of the Local Green Space designations and, for that purpose, to defer consideration of the NSPNP. Their letter stated, "if the Cabinet decide that the draft NSPNP meets the basic conditions without further modifications, it is highly likely that we will be instructed to issue proceedings in judicial review to challenge that decision". The Applicant did not receive a response to this letter.

5. On 2 September 2019, the Examiner's recommendations and reasons for them were considered by the Respondent at a Cabinet meeting. The Respondent decided to accept the Examiner's conclusions, taking the view that the Neighbourhood Plan (as modified) complies with the legal requirements, and resolved to "proceed to a referendum of all registered electors within the Norton St Philip Neighbourhood Area to establish whether the Plan should form part of the Development Plan for the Mendip District".

6. The Applicant intends to file a claim for judicial review seeking to quash the Respondent's decision of 2 September 2019 that the NSPNP satisfies the basic conditions and should proceed to a referendum ("the Decision").

Procedural background

7. The Applicant's solicitors sent a detailed pre-action protocol letter to the Council on 18 September 2019. The letter stated:

> "The Council is also invited to agree to undertake to postpone the Referendum, pending the outcome of these proceedings. In the event that the Council does not undertake to postpone the Referendum, it is highly likely that we will be instructed to make an application for an interim injunction requiring the Council to postpone the Referendum pending the determination of these proceedings."

8. In accordance with the judicial review pre-action protocol, the Applicant requested a response within 14 days, specifically, by 12pm on 2 October 2019.

9. By an email sent at 06:54 on 2 October 2019 the Council indicated that it intended to defend the claim, would not undertake to postpone the referendum and would resist any application for an interim injunction to prevent the referendum going ahead. By the same email, the Council stated that it would provide a full response to the pre-action protocol letter "later today". In the event, no response to the pre-action protocol letter was sent on 2 October 2019. By an email sent at 21:34 on 2 October the Applicant's solicitors informed the Council that they had been instructed to make an application for an interim injunction and "it is likely that we will make that application tomorrow".

10. On 3 October 2019, the Applicant filed the application for an interim injunction which is now before me and sent the papers to the Council that morning.

11. The application was considered by Turner J on 3 October 2019 at a without notice hearing (albeit the Applicant had had informal notice, as I have said). Turner J made an order on 3 October in these terms:

> "1. The Claimant's application for interim relief be adjourned.
>
> 2. The Claimant's application for interim relief be listed for a hearing not before 10.00am on 7 October with a time estimate of 1 hour.
>
> 3. The Defendant do respond to the Claimant's application for interim relief by 2pm on 4 October 2019.
>
> 4. If the Defendant does not respond to the application by 2pm on 4 October 2019, the Claimant's application for interim relief will be granted in the terms in the draft injunction attached to this Order and the hearing listed for 7 October 2019 be vacated."

12. The Council sent a response to the pre-action protocol letter on 3 October 2019. In addition, the Council submitted a response to the application on 4 October 2019, in accordance with paragraph 3 of Turner J's order.

Interim relief

13. The principles governing the grant of interim relief in judicial review proceedings are those contained in *American Cyanamid Company v Ethicon Ltd* [1975] AC 396, modified as appropriate to public law cases.

14. First, the Applicant must demonstrate that there is a serious question to be tried. In judicial review claims, this involves considering whether there is a real prospect of the claim succeeding at the substantive hearing: see *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin), per Cranston J at [6] and *The Administrative Court Judicial Review Guide 2019*, para 15.6.

15. Secondly, the Court should consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

16. In *American Cyanamid* Lord Diplock said at 408F-G:

> "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo."

17. In *Medical Justice,* Cranston J observed that where the balance of convenience lies is the more important issue:

> "12. In judicial review, this consideration varies from its application in private law, because generally speaking damages will not be payable in the event of an unlawful administrative act, nor will a public authority suffer financial loss from being prevented from implementing its policy. The public interest is strong in permitting a public authority to continue to apply its policy when ex hypothesi it is acting in the public interest. That wider public interest cannot be measured simply in terms of the financial or individual consequences to the parties …
>
> 13. The weight to be attached to that wider public interest turns in part on the juridical basis of the policy. As Lord Goff put it in *R v Secretary of State for Transport ex parte Factortame* [1991] 1 AC 603, at 674C to D:
>
> > '…the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, *prima facie*, so firmly based as to justify so exceptional a course being taken.'
>
> Once the application moves beyond primary legislation, the weighing of interests varies. … In my view, if the material on which the court's judgment is to be exercised is government policy, not contained in legislation, that enters as a consideration when determining where the balance of convenience lies."

The merits of the proposed claim

18. On behalf of the Council, Mr Mohamed conceded that there is a serious question to be tried and the real issue is where the balance of convenience lies. Nevertheless, he submitted that it is a weak claim which will not succeed. In those circumstances, I shall address only briefly the question whether the Applicant has demonstrated a real prospect of succeeding at the substantive hearing.

19. Paragraphs 99-101 of the National Planning Policy Framework (2019) which set out national policy on Local Green Space in these terms:

> "99. The designation of land as Local Green Space through local and neighbourhood plans allows communities to identify and protect green areas of particular importance to them. Designating land as Local Green Space should be consistent with the local planning of sustainable development and complement investment in sufficient homes, jobs and other essential services. Local Green Spaces should only be designated when a plan is prepared or updated, and be capable of enduring beyond the end of the plan period.
>
> 100. The Local Green Space designation should only be used where the green space is:
>
> a) in reasonably close proximity to the community it serves;
>
> b) demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and
>
> c) local in character and is not an extensive tract of land.
>
> 101. Policies for managing development within a Local Green Space should be consistent with those for Green Belts." (emphasis added)

20. In support of the application, three grounds were put forward.

21. First, the Applicant contends that the Council has failed to have regard to the requirement that Local Green Spaces should be "capable of enduring beyond the end of the plan period". Mr Ground QC submitted that there is nothing in the Examiner's report to indicate that she considered whether this requirement was met and, despite this omission being drawn to the Council's attention by the Applicant, there is also no evidence that the Council had regard to it when making the decision.

22. Secondly, the Applicant contends that the Council has also failed to have regard to the national policy that designating land as Local Green Space should be consistent with the local planning of sustainable development. Again, Mr Ground submitted that this is evident from the omission of any consideration of this aspect of the policy in the Examiner's report or the Council's decision.

23. Thirdly, the Applicant contends that the Council failed to understand the test for designation of Local Green Space. Mr Ground drew attention to the Mendip District Local Plan Inspector's Interim Note dated 10 September 2019 in which the Inspector addressed the Council's designation of Local Green Space at paragraphs 31 to 44. The sample considered by the Inspector included the sites which are the subject of the proposed claim. The Inspector considered the meaning of the NPPF and advised that

> "34…the bar for LGS designation is set at a very high level. I therefore consider that it is clear from national policy that LGS designation should be the exception rather than the rule. …
>
> 36. Para 76 of *the Framework* [para 99 of the NPPF 2019] places LGS designation in the context of provision of sufficient homes, jobs and other essential services. Therefore, LGS designation has to be integral to the proper planning for the future of communities, and not an isolated exercise to put a stop on the organic growth of towns and villages, which would be contrary to national policy.
>
> …
>
> 40. The methodology set out in the Council's Background Paper – 'Designation of Local Green Spaces' [Document SD20] omits the 'headline' element of *the Framework*, that LGS designation will not be appropriate for most green areas of open space, and nowhere in this document does that message come through. Although the document describes each site subject to proposed LGS designation, often in some detail, the criterion of being demonstrably special to the local community is not sufficiently rigorous to comply with national policy, and the resultant distribution of LGS designations in several instances can be said to apply to sites which can be described as commonplace (which I do view as a negative term) rather than of a limited and special nature.
>
> 41. I recognise that many if not all the proposed LGS designations are important to local communities; but this is a lower bar than being 'special' and of 'particular local significance'."

24. The Inspector advised at para 44:

> "Consequently, I suggest that the Council has two options:
>
> Option 1: To delete the LGS designations from the Policies Map and remove references to LGS designation where they appear in the Plan. Taking the above factors into account, the Council could then undertake a comprehensive review of LGS methodology and assessment …

> Option 2: To revisit the methodology and designations, taking on board the considerations I have highlighted above. …"

25. Mr Ground submitted that the Inspector's view that the Council has not properly understood or applied national policy is important. In particular, although the Inspector was advising with respect to the Local Plan rather than the Neighbourhood Plan, the Inspector was applying the same national policy to the same sites and he had before him all the Neighbourhood Plan evidence. In response, Mr Mohamed submitted that the Local Plan and Neighbourhood Plan processes are quite distinct. In this regard he relied on *Woodcock Holdings Ltd v SSCLG* [2015] EWHC 1173 (Admin), albeit he acknowledged that case did not concern Local Green Space.

26. I reject Mr Mohamed's contention that the claim is weak. The Respondent has not, at this stage, sought to answer the Applicant's first two grounds and they demonstrate that (on the materials before me) the Applicant has a real prospect of succeeding at the substantive hearing. The Applicant's third ground provides further support for my view that the merits threshold is clearly met.

Balance of convenience

27. I turn then to consider where the balance of convenience lies in this case. It was common ground that damages would not be an adequate remedy for either party.

28. An important factor is the general public interest in permitting a public authority to continue to act in the manner which it considers to be in the public interest. In considering the strength of this public interest in this case, it is important to consider the legislative framework.

29. Section 61N of the Town and Country Planning Act 1990 makes provision regarding legal challenges in relation to neighbourhood development orders. The section provides for challenges to be made by judicial review at three discrete stages of the process.

30. The Court of Appeal considered s.61N in *R (Oyston Estates Ltd) v Fylde Borough Council* [2019] EWCA Civ 1152. Lindblom LJ (with whom Rose and Lewison LJJ agreed) rejected the appellant's central contention that s.61N is "permissive", enabling a claimant to choose at which stage of the process to bring a challenge: see [28] and [29]. He observed:

> "37. … The differential time limits, each relating to a particular stage of the plan process, are plainly intended to achieve two things: first, to enable claims to be brought straight away when the grievance in question arises; and second, to prevent them being put off to a later stage of the process, or its end – thus avoiding the cost, disruption and uncertainty of challenges that could and should have been made sooner.
>
> …
>
> 39. The provisions of section 61N are designed to avoid a waste of time and resources in the final stages of the process, when

> the draft neighbourhood plan is sufficiently mature and the local planning authority has made a decision or taken action that has to be published. Subsection (2) enables, and also requires, a party aggrieved by the authority's consideration of the examiner's report and wants to test its lawfulness before the court, to bring a challenge promptly at that stage – within six weeks of the publication of the authority's decision, before the plan is put to a referendum and then proceeds beyond that. In the same way, subsection (3) enables, and also requires, a party aggrieved by "anything relating to a referendum" to bring its case before the court within six weeks of the result being declared. In both cases the opportunity is given, and the obligation imposed, to begin a challenge at the appropriate stage in the process: under subsection (2), before the referendum is held; under subsection (3), before the plan is actually made. Subsections (2) and (3) are thus conducive to legal certainty in the neighbourhood plan process, as well as to efficiency and fairness. They make it possible for legal issues arising towards the end of the plan process to be raised and resolved before the making of the plan. As the judge said, this is consistent with good administration." (emphasis added)

31. The Court of Appeal in *Oyston* recognised that

> "44. … there will be cases where a claim is issued under section 61N(2) or (3) and, in spite of that, the local planning authority decides to go ahead with the remaining steps in the process, and even to make the plan, while the claim is still before the court. Section 61N does not prevent the authority from doing that."

32. This may be the case if the authority takes the view "the challenge is unlikely to succeed, and that the balance of risk falls in favour of moving on with the process before the claim is heard" (*Oyston* at [45]). There may also be cases where interim relief to prevent the authority taking steps in the process is refused, as the Court of Appeal noted had occurred in *R (Gladman Developments Ltd) v Aylesbury District Council* [2014] EWHC 4323 (Admin). Nevertheless, the Court of Appeal specifically recognised that it "is open to a claimant to seek interim relief – such as an order restraining the authority from taking further steps in the process before the court's decision is given"; and gave an example of a case where the authority was prepared to give an undertaking to the same effect.

33. Mr Mohamed submitted that no court has granted an interim injunction, such as that sought by the Applicant, to prevent a local authority holding a referendum. He urged me to follow *Gladman* in which Stewart J refused an interim injunction to prevent a referendum being held. However, as Stewart J observed, "Any application for an interim injunction must be determined on the merits of the individual case". In *Gladman*, the defendant had filed evidence showing that two applications for outline planning permission, in respect of 211 dwellings and 100 dwellings, were in the process of being determined by the Secretary of State. There was a real risk that if an injunction was granted the Secretary of State would accord little weight to the

Neighbourhood Plan when determining whether to permit those substantial developments.

34. The circumstances of this case are very different to *Gladman*. The Council has not submitted any evidence. The Council has not suggested that there are any applications pending, such as those which were considered pertinent in *Gladman*, which I ought to take into account, or otherwise drawn attention to any prejudice that would be caused by postponing the referendum until the claim is determined.

35. I consider that the cost, disruption and uncertainty of proceeding with a referendum, in circumstances where the lawfulness of doing so is the subject of a challenge that has reasonable prospects of success, are matters which, in the circumstances of this case, weigh in favour of granting the injunction sought.

36. Mr Mohamed submitted that if the referendum goes ahead and then subsequently the Council's decision were to be found to be unlawful, there would be no prejudice to the Applicant because the result of the referendum would be quashed. However, in such circumstances, the Applicant would have the additional burden of persuading the court to quash the result of the referendum. In addition, I accept Mr Ground's submission that it would cause greater confusion amongst voters if a referendum result were to be quashed, despite the lack of any irregularity in the referendum, *per se*, than if it were postponed pending a legal challenge.

37. Both parties sought to contend that the preservation of the status quo is a factor in their favour. In my judgment, the status quo is the position at present, before the planned referendum has taken place. The contrary position is not arguable. Accordingly, preservation of the status quo also favours granting the injunction sought.

Conclusion

38. For the reasons that I have given, I find that the Applicant's challenge to the lawfulness of the decision has a real prospect of succeeding at the substantive hearing and the balance of convenience lies in favour of granting the interim order sought. Accordingly, I grant the application.