

MR JUSTICE FORDHAM:

Introduction

1. This is a judicial determination on the papers, pursuant to the mechanism described in the Administrative Court Judicial Review Guide 2022 (the JR Guide) at §24.4 (Consent orders and uncontested hearings) but where it is appropriate, in my judgment, to give reasons by way of a short judgment. The open justice principle applies (JR Guide §24.4.1 fn. 410).

Order

2. In this case, I have made the following Order (20.2.23):

BY CONSENT, IT IS ORDERED THAT: (1) Permission for the claim to proceed is granted and the claim is allowed. (2) The following decisions made by the Defendant are quashed and remitted for reconsideration by the Defendant for the reasons set out in the Schedule of Reasons attached hereto: (i) the Defendant's decision dated 30 September 2022 to grant planning permission pursuant to reference 20/02106/PLF; (ii) the Defendant's decision dated 30 September 2022 to grant listed building consent pursuant to reference 10/02266/PLB. (3)

The Defendant do pay the Claimant's costs, agreed in the sum of £6,708 (inclusive of VAT), within 5 working days of this Order being served on the parties.

The Agreed Statement of Reasons, scheduled to the Order, is as follows:

(1) On 30 September 2022 the Council granted the following: (i) Planning permission pursuant to reference 20/02106/PLF; and (ii) Listed building consent pursuant to reference 20/02266/PLB. (2) Both of the above decisions ("the Decisions") were taken in relation to Listed Coach House, Stable Granary Range and Screen Wall, the Hall, Main Street, Whitgift and in respect to the following description of development: "Alterations and refurbishment of 2 dwelling houses with repairs and conversion of Coach House, stables, granary range to form 2 further dwelling houses, repairs to screen walls, landscaping and parking and garaging facilities". (3) The Claimant issued an application for permission to apply for judicial review proceedings against the Decisions on 10 November 2022, and which is proceeding with the Court under claim number CO/4165/2022 ("the Claim"). (4) The Claimant considers that the Decisions should be quashed pursuant to each of the grounds argued in its Statement of Facts and Grounds. (5) Having considered the Claimant's Statement of Facts and Grounds, the Defendant does not intend to contest the Claim, and concedes to the Decisions being quashed pursuant to Ground 3, namely that the Council failed to grapple with the question of whether the proposed development would cause substantial harm to the listed buildings. The Defendant accepts that its conclusions within the officer reports relating to the Decisions were not clearly articulated and could result in genuine doubt as to whether the officers were concluding that the development would give rise to less than substantial harm or substantial harm to the significance of designated heritage assets. (6) The Interested Party does not intend to contest the Claim and consents to the Decisions being quashed. (7) The Decisions should be quashed with both matters remitted back to the Defendant for redetermination.

Having considered the papers in the case, I have satisfied myself that the agreed quashing orders are appropriate, on the basis of the agreed "Ground 3", for the reasons identified in the Agreed Statement of Reasons.

Permission and Fees

3. The original Consent Order was filed with the Court on 6.1.23. However: (a) it did not include provision for permission for judicial review; and (b) it was not accompanied by any accompanying further fee paid, whether the Consent Order fee (application N244) of £108.00 or the fee of £770.00 for what the JR Guide (Annex 2) calls:

continuing judicial review after permission has been granted

As the Judge dealing with the Consent Order, I raised this with the parties. As a result I have received thoughtful and helpful submissions from the solicitors for Claimant and Defendant. They also took responsibility for keeping the Interested Party (who in the circumstances is unaffected by these wrinkles) fully informed. Their joint position was as follows. (1) Permission for judicial review, which is unmentioned in the JR Guide at §24.4, ought not to be necessary. (2) The fee of £770 is also unnecessary: (a) because permission for judicial review is unnecessary; and (b) in any event because the judicial review is not being “continued” (Annex 2) but ended. (3) Where the JR Guide says “the relevant fee must also be paid” (§24.4.1) that should be taken as a reference to the Consent Order (N244 Application Notice & Consent Order) of £108. (4) If the Court considered permission appropriate and/or a fee payable (whether £108 or £770), a revised Consent Order would be submitted (and the agreed costs order revised to include the fee).

Decision

4. I determined – for the purposes of the present case – that the appropriate course was as follows: the Order did need to include an (agreed) order for permission for judicial review; and did require the fee of £108 to have been paid; but did not require the fee of £770. I will explain why I came to that view. The consequence was that the Defendant issued Form N244 attaching a revised Consent Order, accompanied by the £108 fee. I was informed that the Claimant and the Defendant agreed that the Defendant would settle the court fee (£108) associated with the consent order, which fee does not therefore form part of the overall costs figure specified in the Order.

Permission

5. As to permission, I am conscious that Orders can sometimes be made in judicial review without or prior to granting permission. Interim remedies and anonymity are examples. But I would not want to make an order for a final judicial review remedy without recording a simultaneous grant of permission. There is no problem with the tests for permission being met. After all, if the final substantive remedy is agreed and the Court is satisfied as to its appropriateness, crossing the arguability threshold and avoiding discretionary bars is inherent. Section 31(3) of the Senior Courts Act 1981 provides:

No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court.

The reference to “leave” is to permission for judicial review. The Administrative Court Lawyer at Leeds was, in my judgment quite right, to identify permission for judicial review as appropriate for inclusion.

Fee

6. The ACO Lawyer was also quite right to raise with me the question about fees to which I now turn. The question is whether the inclusion of the grant of permission (§9 above) takes the parties into the teeth of incurring the £770 fee. I am aware that this is sometimes regarded as a ‘permission-granted’ fee, rather than a ‘continuation’ fee. The empowering legislation (Courts Act 2003 s.92) speaks simply of fees “in respect of” anything “dealt with” by the Court. The Fees Order (SI 2008 No. 1053) says:

Where the court has made an order giving permission to proceed with a claim for judicial review, there is payable by the claimant within 7 days of service on the claimant of that order ... £770.

The Administrative Court Listing Policy (see JR Guide at Annex 2) says at §15:

Once permission is granted, the claimant must pay the relevant fee for continuation within the statutory time limit. If the fee is not paid within the time permitted, the case will be closed and will not be listed.

7. I am also aware of the practice when the permission-stage judge directs a “rolled-up” hearing, to require an “undertaking” from or on behalf of the Claimant that, if permission is granted at the rolled-up hearing, the £770 fee will be paid. The Listing Policy (Guide Annex 4) says this at §15:

Where a rolled-up hearing has been ordered, the claimant must give an undertaking to pay the continuation fee if permission is ultimately granted. If the undertaking is not given, the case will be closed and will not be listed.

I am conscious that, in the event, permission could be granted and the substantive order made at the same “rolled-up” hearing, at the same time, by the same Judge. In that situation, the proceedings are treated as “continued” post-permission until final order only for what may be a very short period on the same day, for the time it takes the Judge to order permission and then whatever substantive order is made. However, I think there is a significant and substantial difference between: on the one hand, permission being deferred to what everyone – including the Court – has to handle and prepare for as a substantive hearing; and, on the other hand, an agreed substantive order being made to “end a claim” (§24.4.1) at the permission-stage by the permission-judge.

8. I decided I would not, in the exercise of my judgment and discretion, insist on an equivalent “undertaking” to pay what the Listing Policy calls the £770 “continuation” fee, as a precondition to my dealing with a Consent Order as the permission Judge at the permission-stage. Nor would I take the course of granting permission as a first step, and then not declining to deal with the Consent Order, to allow a period for insistence on the £770 fee, before then reconsidering the papers. In the present case, if – as I regard plainly appropriate – I grant permission, as the permission-stage Judge and at the permission-stage, and make the final Order at the same time, the case has then come to an “end” (Guide §24.4.1). The threat and consequence of default described in the Listing Guide at §15 make no sense. Nor does the requirement in the Fees Order, that the £770 fee be paid “within 7 days” of service of the Order in which permission has been granted. Where the JR Guide refers to “the relevant fee being paid” (§24.4.1), I think that is to be read as referring to the Consent Order fee (£108). The Guide is describing dealing with a “draft agreed order”, in a passage which is not about whether or not permission is being or has been granted. Annex 2 to the Guide,

and the Listing Policy at Annex 4, unmistakably describe the £770 fee as being for “continuing” judicial review. Furthermore, on a common sense basis, I see the £770 fee as being referable in some way to what the Court does with a case, independently of permission. I am a permission-stage Judge presented with papers and considering them and an agreed order, assisted by a brief joint statement. The Court has to deal with receipt of the consent order, but the Form N244 and £108 fee covers that. Unlike a rolled-up hearing, the Court Office’s function and the Judge’s function are materially no more arduous than dealing with permission on the papers. Indeed, where the issues have narrowed to the point of agreement, with a supportive brief Agreed Schedule, the task is if anything less arduous than faces the paper permission Judge. For all these reasons, I do not think that the £770 fee, given its design and function, is – or in any event in the present case should be – required.

Caveat

9. It is right to record this caveat. I am making a case-specific determination, not to require the £770 fee in the present case. I did not hear contested argument; I did not insist on legal researches to be undertaken or authorities identified; still less conduct a hearing. I took the view that where this case has settled, putting the parties to unnecessary further expense did not promote but rather undermined the interests of justice and the overriding objective, in the present case. I acknowledge that the position may be the subject of clarification elsewhere.

20.2.23