IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2016] EWHC 1008 (QB)

No. HQ13X03891

Royal Courts of Justice
Tuesday, 19th April 2016

Before:

HIS HONOUR JUDGE YELTON
(Sitting as a Judge of the High Court)

B E T W E E N :

(1) CATHERINE COLLINS
(2) ALASTAIR PITBLADO — Claimants

- and -

(1) THANET DISTRICT COUNCIL
(2) KENT COUNTY COUNCIL — Defendants

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THE CLAIMANTS appeared in Person.

MR. J. DE WAAL QC (instructed by DWF LLP) appeared on behalf of the First Defendant.

MR. J. MITCHELL (instructed by BLM LLP) appeared on behalf of the Second Defendant.

J U D G M E N T

(As approved by the Judge)

JUDGE YELTON:

1 This is my judgment, which I am doing from notes only. I have not had the opportunity to reserve judgment and put it in a final written form. But I have taken into account all the documents in the bundles and all the arguments that have been made to me, even if I do not mention them specifically within this judgment. I had the opportunity, because of the indisposition of one of the counsel part way through the case, to have an extra day reading the case; I had some reading time beforehand, and I have had the opportunity to look again at various documents, apart from the references to them that were made in the course of the argument.

2 This is claim brought by Miss C. M. Collins and Mr. A. B. Pitblado against Thanet District Council and Kent County Council. The claim is principally against the Thanet District Council.

3 Mr. Pitblado is, of course, the Official Solicitor to the Supreme Court and is a qualified barrister, and practised at some time in the past. The first claimant, Miss Collins, is a building surveyor and a non-practising solicitor with a great deal of experience in building matters.

4 The background to it is that in May 2012 the claimants purchased some land adjacent to St. Mildred's church at Acol near Birchington. Acol is a small village between Birchington and Minster in the western area of Thanet. At that time the claimants wanted to self-build a house on the land. When the claimants purchased the land they knew that, firstly, it was outside the defined village confines for development purposes and, secondly, that on two occasions previously applications for planning permission had not succeeded and appeals had been dismissed. It is also the case, and was at the time, that many who lived in the locality did not want building on the plot for a variety of reasons, including the irrelevant fact that title had been acquired by the claimants' predecessors in title by adverse possession.

5 It was no doubt because of that history, in other words because there was no planning permission and planning permission had twice been turned down, the claimants had to pay only £26,000 for the land, which in terms of south-east England is a relatively small amount of money.

6 Miss Collins took the view that the National Planning Policy Framework of 2012 revolutionised the position and that planning permission ought, by the time of their purchase, to be granted. She is absolutely fixed in that view and told me so in the course of her oral evidence. I regard that as the most important point in the case but I think it was misconceived.

7 Certainly the new policy, as expressed in the NPPF, gave the claimants hope that their application would succeed, otherwise it was hopeless. However, to my mind that new policy did not mean that the application was bound to or even was likely to succeed. Indeed, para.55 of the NPPF specifically advised local planning authorities to avoid new isolated homes in the countryside. This plot was outside the village area and would have been the last house in the village although it was not way out in the fields.

8 Miss Collins and Mr. Pitblado therefore regard the subsequent refusal of Thanet to grant planning permission as dishonest and cannot see any alternative to that. Dishonesty is, of course, very different in any event from negligence.

9 The claimants say that both local authority's employees were guilty of misfeasance in a public office, the essence of which does indeed involve bad faith. In *Three Rivers District Council v Governor and Company of the Bank of England* [2003] 2 AC 1, it was said that the tort of misfeasance in a public office involved an element of bad faith and arose (1) when a public officer exercised his or her powers specifically intending to injure the claimant or (2) when he or she acted in the knowledge of or with reckless indifference to the illegality of his act and in the knowledge or with reckless indifference to the probability of causing injury to the claimant. I have been referred to that authority of course and have looked at it more than once.

10 The burden of proof is clearly on the claimants to establish that bad faith and, in the course of their written and oral evidence, they use expressions such as "bent" and "a stitch-up".

11 The application for planning permission was dated 21st February 2013. Even before that the claimants had involved their MP, Robert Neill (they live, and lived at the material time, in Bromley so not in the area with which we are concerned) in relation to planning policy, which is perhaps incompatible with their belief that permission was bound to be granted. They had failed to take up pre-planning advice, which may have assisted them and was offered by Thanet.

12 Thanet say that they weighed up the various considerations and, as a result of that, refused the application. The decision notice by Simon Thomas, the planning manager, is dated 22nd April 2013 and is at p.548. The grounds given were, firstly, the site is outside the built up boundary of the settlement and, secondly, the development would create a feature which would severely harm the character and appearance of the area.

13 The claimants appealed from that decision and their appeal was allowed. On 25th July 2015 the Inspector granted planning permission. His decision is at pp.679-683. He accepted that the appeal site was beyond the confines of any settlement and, in policy terms, was within the countryside. He also accepted that it would obscure some views of the church. At para.4 he postulated the main issue, namely "whether the location of the proposed development in the countryside is acceptable in terms of the effect on character and appearance and the presumption in favour of sustainable development". At para.9 he found that the proposal would not have a materially harmful impact on the character and appearance of the countryside and would be sustainable development. He also found that the innovative design constituted grounds for allowing an exception to the general principle that isolated homes in the countryside should not be permitted, which is set out in para.55 of the NPPF. The design put forward on behalf of the claimants was -- Miss Collins did not like the expression "eco-friendly" but it is a shorthand expression which is understood, and if I say it was "very eco-friendly" that probably does not do justice to its innovative qualities.

14 The claimants then asked the Inspector to make an order for costs in their favour. Costs can only be awarded, in these circumstances, against a party who has behaved unreasonably. The Inspector declined to make such an order saying, at pp.686-687, that the reasons given by Thanet District Council were "not vague, generalised or inaccurate assertions". He specifically said that the reasons for refusal were not unreasonable (see para.8 of his later decision on costs).

15 Miss Collins said that she accepted what the Inspector had said in general terms, but it seems to me that this case is in part, not wholly, an attempt to appeal by the back door against the Inspector's decision not to make an order for costs. But before him the claimants only had to show that the Council behaved unreasonably; before me, on their chosen ground, they have to show bad faith. In fact subsequently, for reasons which I did not find very easy to follow, the claimants decided not to proceed with their project at Acol and sold the land, with the benefit of planning permission, for £110,000. This clearly reflects the effect on value of obtaining planning permission.

16 The claimants, by their amended particulars of claim, say that Luke Blaskett, a planning officer of the first defendant, and Keturah Watts, a graduate transport engineer of the second defendants, were guilty of misfeasance in public office. Luke Blaskett had worked for Thanet District Council at that time for about 6 years and has now been promoted and works for Dover District Council. He therefore had considerable, albeit not very long, experience. Keturah Watts was very young, having recently graduated; was in her first job, and was at that time deputising for a more senior colleague, called James Wraight, who

also gave evidence, as he was on another project. She now works for Swindon Borough Council.

17 The claimants say that their proposed development was clearly sustainable. They say that Luke Blaskett "tortuously and unlawfully" procured a second changed consultation response from Keturah Watts. They assert that his reasoning was false, contrary therefore to the findings of the Inspector. At p.21 in the bundle the claimants set out the allegations of misfeasance, which are serious matters. They say as follows:

> "Mr. Blaskett's email of 18th March was intended, and succeeded, in procuring from the second defendant, Kent County Council, the unlawful adverse consultation response contained in Miss Watts' letter of 21st March. He [that is Mr. Blaskett] did so as the only possible means by which the first defendant could pretend that the development was not a sustainable development. He intended thereby seriously to damage the prospects of the planning application successfully resulting in the grant of planning permission. Despite the facts and matters pleaded above, Mr. Blaskett wished to rebut what could not be lawfully rebutted, namely the Framework's presumption in favour of sustainable development applied in respect of the planning application.
>
> 24. The actions in this regard of Mr. Blaskett and Miss Watts, jointly and of each of them, were manifestly unlawful, maladministrative and unjust. These actions constitute misfeasance in public office (a) because the representations of 21st March 2013 were contrary to the common law principle of fairness, contrary to the principle of legality, outside the scope of powers granted for an improper purpose, namely defeating a planning application irrespective of its merits; (b) because of the targeted malice by Luke Blaskett as a public officer, i.e. conduct specifically intended to injure the economic interest of the first claimant and, as co-owner, the second claimant; (c) because they were taken in bad faith in the sense of the exercise of public power for an improper or ulterior motive and without an honest belief that the acts were lawful; (d) because they were taken in the knowledge that there was no power to take them and they would probably injure the claimants".

18 These allegations are, in my judgment, overblown and wholly unsustainable. I come to that conclusion for the reasons I will go on to deal with. It is important to look in detail at what happened, although I bear in mind Mr. Pitblado's submission that the emails in question have to be seen in the context of everything else that happened.

19 On 5th March 2013 Thanet District Council asked Kent County Council for their views (that is p.499). They were not asking that for any particular view. The statutory framework is as follows: By para.16 of the Town and Country Planning (Development Management Procedure)(England) Order 2010, which has now in fact been superseded, it is said that before granting planning permission in cases within a category set out in Schedule 5, the local planning authority shall consult the person or authority mentioned in relation to that category, and where any development involves development involving the formation, laying out or alteration of any means of access to a highway, the local Highway Authority are the consultees set out in Schedule 5, and the local Highway Authority, of course, is Kent County Council. Paragraph 16(7) of the order says:

> " The local planning authority shall, in determining the application, take into account any representations received from a consultee."

20 The duty to respond, that is on consultees, is set out in s.54 and following of the Planning and Compulsory Purchase Act 2004. The detail is in para.20 of the Order of 2010. Mr. Mitchell, counsel for the second defendant, relies on 20(2) which is set out at p.410 in the bundle, which, in my judgment, clearly provides that there may be more than one document from the local planning authority to the consultees. I come to that conclusion on the reading of para.20(2)(b):

> "The period prescribed [that is the 21 days in which you have to reply] beginning with the day on which-
> (a) the document on which the views of consultees are sought; or
> (b) where there is more than one such document and they are sent on different days, the last of those documents,
> is received by the consultee …".

In any event, I will deal with this in more detail in a moment.

21 On 18th March 2013 Mr. Blaskett visited the site. The correspondence shows that that was when he erected the statutory notices. He clearly had not been before. He may have gone subsequently. He could not remember and it does not, in fact, matter and I am not making any determination about that. On the same day, by coincidence, Keturah Watts wrote to him, at p.509, saying there were no objections. She sent that as an attachment to an email. Within an hour Luke Blaskett replied with his views, having just gone there, and he referred to what he regarded as the sustainability of the site (p.510). Miss Watts replied three days later, also after taking advice from Mr. James Wraight (p.513). He advised her to object (p.514) and at p.517 she, in effect, replaced her earlier response with a negative response. At p.513, where she refers the matter to Mr. Wraight, she said:

> "Having responded to an application, I have received an email from the planner telling me that the site is located in a highly unsustainable location, see below".

She then quotes Mr. Blaskett's email.

> "I was just wondering whether or not it would be possible to actually refuse an application from a highway point of view on this ground or whether we just comment saying it is unsustainable".

I do not regard that as her saying that the Kent County Council could refuse it. It was asking Mr. Wraight, who was a more experienced man, for his view about a number of matters and he came back to her in a perfectly proper way.

22 The claimants say that it was unlawful for Miss Watts to change her mind. I have considerable doubts whether the claimants would have made the same submission had she changed from opposition to support. Mr. Pitblado says that Keturah Watts had neither the duty nor the power to respond on the second occasion. I do not accept that. It seems to me clear that a local authority should not be bound by a response which, on reconsideration, they consider not to be accurate or fair, and I do not see that the scope of the consultation, so far as they are concerned (in their response, in other words), is limited to the narrow issue of the highway access.

23 The underlying principle is that planning law requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise (see s.70(2) of the Town and Country Planning Act 1990 and s.38(6) of the Planning and Compulsory Purchase Act 2004). There is a presumption in favour of sustainable development in the framework that I have set out, but there was an issue in this case as to whether this was sustainable.

24 In the case of *Daventry District Council v Secretary of State and Gladman Developments Ltd.* on 2nd December 2015, Mrs. Justice Lang dealt with this subject in para.13 of her judgment. What she said then, as I have understood it, was not unusual but reflected what had been said in other cases. She said this:

> "The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of

the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> 'If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise.'

14. The NPPF is a material consideration for these purposes, but it is policy not statute, and does not displace the statutory presumption in favour of the development plan: see NPPF paragraphs 11 to 13 …".

She refers to another preceding authority and, as I said, what she was saying therefore was not new law.

25 Mr. Blaskett made careful and comprehensive notes on the subject at pp.524 and following. These are undated but he did them when working at home. They do not, in my judgment, indicate a fixed intention to refuse the application, rather he sets out all the factors on both sides, including a fair summary of the claimants' case which is set out in their own very full application for planning permission. The notes are, in my judgment, quite inconsistent with the claimants' case.

26 Luke Blaskett suggested that the balance fell against development. The Inspector found that the balance fell in favour. But it is clear that both of them, including the Inspector who of course is entirely independent of Thanet District Council, thought it a balanced case. It was not, and never was, a straightforward and unanswerable case.

27 Mr. Blaskett then compiled a delegated report form on pp.549 and following, which sets out a summary of his thoughts on the application. This is not dated but appears to have been finished on 21st April 2013, the day before Mr. Thomas signed the refusal notification. In that he records Kent County Council's objections as having been made and he sets out the principles involved at pp.550-551. The penultimate paragraph on p.550 is, in my judgment, of importance. He says this:

> "The applicant considers that other material considerations, such as the sustainability of the site, outweigh the conflict with policy H1…".

Policy H1 says that "residential development will only be permitted on sites which are previously developed and on sites within the built up confines". Carrying on:

> "… and contend that the development accords with the NPPF. Other material considerations will be considered throughout this report and balanced against each other before a recommendation is made".

That again is quite inconsistent with a fixed determination to reject.

28 The claimants have so convinced themselves that Thanet behaved dishonestly that they take a number of points which are wholly lacking in merit, one of them being that in one part of this application there is reference to the view being interfered with. They say that Mr. Blaskett made a mistake as between east and west and that was not an error, it was rather indicative of the way in which he approached the matter and he did it deliberately. I am afraid I regard that as a point of no value at all. Another point they take is that in the earlier planning applications, albeit not this one, Thanet took the view -- and it was represented to an Inspector -- that the church was a listed building, whereas in fact it is not and Mr. Blaskett knew in relation to this application it was not. Again I do not regard that, as the claimants say it was, as evidence of dishonesty on the part of Thanet District Council in the distant past. It was a mistake.

29 At p.554 Mr. Blaskett came to his recommendations. He said this:

> "It is considered that the principle of the proposed development is contrary to the Thanet local plan (policies H1 and CC1) being on non-previously developed land within the countryside. Furthermore, it is considered that the development harms the character and appearance of the area, including the setting of a non-designated heritage asset [that is the church] due to its location, height and scale. Whilst the development would be sustainably built, which carries some weight in favour of the development, it would be situated in a highly unsustainable location. Regard has been had for all material considerations. However, the limited benefits of the development are outweighed by the substantial harm caused by it. It is therefore recommended that planning permission be refused".

It seems to me that is a fair way of putting it. Far from being dishonest or acting in bad faith, I consider that Mr. Blaskett behaved perfectly properly in his consideration of this application. I had an opportunity for some considerable time, because he was cross-examined at length (but not excessively), to form an impression of him and I was impressed by his oral evidence. He was able to answer what was asked of him; made it clear when he could not remember; thought about the questions before he answered them, and, because of the mishap which Mr. Mitchell had, Mr. Blaskett had the

misfortune to have his cross-examination interrupted by that and that made it the more difficult for him.

30 I am satisfied that he had no improper or ulterior motive and that he had an honest belief that his acts were lawful as, in my judgment, they indeed were. Mr. Pitblado says that Mr. Blaskett had decided from the beginning that he was going to refuse the application. I do not accept that and the evidence which I have read out, in my judgment, shows that that was not the case.

31 Further, although the opposition by Kent County Council is recorded in the documents I have just been going through, it is clear that Mr. Blaskett himself, independently of Kent County Council, had formed the view that the site was unsustainable. He sets that out in his first email to Keturah Watts in reply to her first response.

32 I was impressed by Miss Watts as a witness, although she was handicapped by her lack of experience at that time. She took the view that she had not thought through the first response but she then took into account the reply of Mr. Blaskett, whom she did not know, and the advice of Mr. Wraight. I am entirely satisfied that she acted honestly throughout, as with Mr. Blaskett.

33 In any event, I regard the input of Kent County Council into this as irrelevant. It is clear from Mr. Blaskett's own views on the site's sustainability that he would have recommended rejection even if he had relied only on Keturah Watts' first reply.

34 There is yet another problem in relation to special damages even if I am wrong about everything else (obviously in saying "everything else" is that the claim should be dismissed), and that is the case of *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, which Mr. de Waal QC, counsel for the first defendant, relies on as authority for the proposition that proof of special damage was an essential part of misfeasance in a public office. The claimants claim the costs of their time in preparing for the appeal, and that is where the claim comes from, but I agree with the submission of counsel for the first defendant that that is not a head of special damage.

35 So for the reasons that I have set out, I shall dismiss the claim.

36 There is one other matter which I want to say, which is this, that the case was originally listed for two to three days. In fact, and without anybody being too wordy or anything of that sort, and even apart from the enforced interruption caused by Mr. Mitchell's health problem, the case took about five days in all. It seems to me in those circumstances if an order for costs be made, and I will hear representations about that in a minute, I appreciate that planning had taken

place on the basis that it was going to be two to three days. I do not regard the five days that was in fact spent on it as being unreasonable bearing in mind the importance of the allegations made and the considerable quantity of paperwork in the case.

LATER

37 Having given judgment in the case, half an hour or so ago, I am now asked to make an order for costs in favour of the first and second defendants which is not resisted and seems to me to be right. I am asked to order a payment on account, which I have not yet come to in detail. But more importantly, from the point of view of the defendants, I am asked to make an order for indemnity as opposed to standard costs.

38 It is quite right, as Mr. Pitblado says, that the costs rules were changed from 1st April 2013 in a number of different respects. But, in my judgment, and I have had to deal with this issue on a number of occasions previously, nothing has changed as to the circumstances in which an order for indemnity as opposed to standard costs should be made. The previous authorities remain in force. How it is applied at the end of the day, because it now has to be applied taking into account the matters set out in the new 44.3(5), is a matter for the costs judge but the principle seems to me to remain and it does not seem to me to be proportionate to adjourn the matter for further time but rather I should conclude it today.

39 The Court of Appeal has been very careful not to set out any basis upon which first instance judges should make indemnity cost orders as opposed to standard cost orders, although there have been a number of authorities, all of which bear out the general principle that indemnity costs should not be ordered unless the matter is out of the ordinary in one respect or another, because the "ordinary" order for costs, if you like, is an order for standard costs. Mr. Justice Tomlinson in 2006, in the earlier litigation of *Three Rivers District Council v Bank of England*, set out a series of I think common sense propositions as to matters that a court should consider in deciding whether or not to make an order for indemnity costs. The discretion, he said, is extremely wide, which is really what the Court of Appeal has said. Secondly, there must be some conduct or circumstance which takes the case out of the norm. I agree with that and that again is a common thread running through the cases.

> "Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation … but rather unreasonableness.

> The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings … [and in particular] … as whether it was reasonable for the claimant to raise and pursue particular allegations …
>
> Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails."

This is important:

> "A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross examination."

Cross-examination was hostile in the sense that that was what was being suggested. It was not hostile in the sense of being unreasonable cross-examination.

40 They seem to me to be important factors. If you look at the matters set out in para.(8) of Mr. Justice Tomlinson's list:

> "(a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;
>
> (b) … despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end."

in my judgment, are well met in this case because it seems to me that the key to this is what I said in the course of my judgment. The claimants took the view that their application for planning permission was unanswerable, which in my view it was not, and therefore they took the view that if it was rejected it could only be because of dishonesty. That was an unreasonable view to take. In those circumstances, in my judgment, there should be an order for indemnity costs in favour of both defendants.

41 As to the amounts, my immediate view is that it should be £25,000 per defendant.

LATER

42 In my view, inevitably there is a certain amount of rough justice when making an order for payment on account. In my judgment, and I have heard what is said on all sides, the figure that I originally came to of £25,000 per defendant is the proper one at this point. Payable in 14 days.

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