Planning – Environmental Impact Assessment – Duty to give reasons

Jedwell v Denbighshire County Council & Others [2015] and [2016]

The Planning Team acted for the owner of Syrior near Corwen in North Wales who applied to Denbighshire County Council to erect two 46 metre-high wind turbines on his farm to generate power for the farming business and the surplus energy to be fed into the National Grid.

The Council on a narrow majority approved the Application. That decision followed a negative determination (known as a screening opinion) made in 2012 that an Environmental Impact Assessment was not required to be carried out by the client as it was unlikely to have significant effects on the environment. If an EIA had been required it would have addressed such issues as cumulative impact on the landscape arising from the proposed wind turbines and other consented turbines in the valley.

The granting of planning permission was challenged by Mr Jedwell, by way of judicial review and the matter was considered by the then newly created Planning Court, on a number of grounds including;

"that the reasoning in that screening opinion was inadequate; that the inadequacy was not cured by subsequent events and that in consequence the grant of planning permission was itself invalid."

In Wales, as opposed to England, a decision not to require an EIA does not require the officer making that decision to provide his or her reasons for arriving at that determination. Nevertheless European case law provides authority that reasons for a negative opinion should be provided because it is European law that reasons be provided for both positive (when an EIA is required) or negative decisions.

The Council said in its defence that it was inconceivable that the officer conducting the screening exercise had not taken into effect cumulative effects and that in Wales there was no duty for reasons to be provided.

The decision in the Planning Court was that the Council had been in breach of its EU law duty to give reasons for the screening opinion following a request for them and that the contemporaneous notes of the Planning officer were inadequate. Nevertheless the officer had subsequently and properly explained her reasoning in a later witness statement and the Judge declined to allow her to be called to give evidence to the Court to be cross-examined.

Mr Jedwell appealed against that decision to the Court of Appeal which decided that the refusal of the Planning Court to allow cross-examination of the Planning Officer, and instead rely on the witness statement written some time after the decision and indeed after the granting of the planning permission was a procedural irregularity. The Court therefore ordered the matter to be returned to the Planning Court and for the Planning Officer to attend and give evidence as to the contemporaneous reasoning on her EIA decision.

The Court of Appeal, commenting on the witness statement provided by the Planning Officer, said that her statement had not cured the earlier deficiency of not having provided adequate reasons. The reasoning of the Court was that, "the contents of the planning officer's witness statement had not been disclosed before the resident (Mr Jedwell) issued his claim form."

The Court went on to say that, "if a reasonable time had elapsed but proceedings had not been commenced, the local authority might still cure any deficiency by supplying further reasons before the commencement of proceedings."

The Court of Appeal held that the Planning Officer should have been cross-examined and the case sent back to the Planning Court so she could be called as a witness and be cross-examined and for that Court to also make a decision on remedy, e.g. to quash the planning permission.

The Planning Court Judge on having heard the evidence presented by the Planning Officer concluded that she had taken into account cumulative effects and declined to quash the permission, instead merely granted a declaration that the Council was in breach of its EU law duty to provide reasons on request.

Hickinbottom J in accepting the Council and Interested Party's argument held that a breach of duty to have given reasons which arises separately from the decision to grant planning permission does not necessarily lead to a presumption that a planning permission must be quashed.

The Interested Party, was represented by a barrister at Kings Chambers.