R (oao) River Thames Society (1) and Lady Berkeley (2) v. First Secretary of State and others

Transcript information
Transcript Date:
22.09.2006
Court of First Instance:
High Court
Type:
Interlocutory (substitution of claimant and PCO)
Judge(s):
Underhill J

CO/2214/2006

Neutral Citation Number: [2006] EWHC 2829 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

Royal Courts of Justice

Strand

London WC2

Friday, 22 September 2006

B E F O R E:

MR JUSTICE UNDERHILL

THE QUEEN ON THE APPLICATION OF RIVER THAMES SOCIETY

(Claimant)

LADY BERKELEY

(Prospective Substitute Claimant)

-v-

FIRST SECRETARY OF STATE

(First Defendant)

ROYAL BOROUGH OF KENSINGTON AND CHELSEA

(Second Defendant)

LONDON BOROUGH HAMMERSMITH AND FULHAM

(Third Defendant)

CIRCADIAN LTD

(Fourth Defendant)

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(Official Shorthand Writers to the Court)

MR R DRABBLE QC and MR A GOODMAN (instructed by Richard Buxton of Cambridge) appeared on behalf of the CLAIMANT

MR P BROWN and (instructed by Treasury Solicitor) appeared on behalf of the First Defendant

MISS M COOKE appeared on behalf of the Fourth Defendant

J U D G M E N T

(As Approved by the Court)

1. MR JUSTICE UNDERHILL: By these proceedings, commenced on 13 March 2006, the River Thames Society applied under Section 288 of the Town & Country Planning Act 1990 to challenge a grant of planning consent by the First Secretary of State, the first defendant. The consent relates to a proposal by Circadian Ltd, the fourth defendant, to redevelop the site of the old Lots Road Power Station on the riverside in Chelsea.

2. There are two applications before me today. The first is an application by Dido, Lady Berkeley to be substituted as the claimant in place of the Society. The application is made in the following circumstances. Lady Berkeley is vice-chairman of the Society. She is also associated with other environmental and amenity groups interested in the protection of the Thames. Both she, in her own right, and the Society appeared before the inspector to oppose the development. The Society's application under Section 288 was made on her initiative but on the authority of a decision of the chairman of the Society. At a subsequent meeting of the Society it was decided that it should withdraw from the proceedings. The decision does not, on the evidence, reflect any lack of sympathy with the challenge, and indeed the evidence is that the Society has since made a grant of some £750 to support it. Rather, it reflects a policy of not becoming involved in legal proceedings, coupled with some scepticism as to their likely outcome. In those circumstances the Society wishes to withdraw, although formal notice of discontinuance has not yet been served; but Lady Berkeley wishes to take the proceedings over.

3. On the face of it, the rules governing such an application are those set out under Section 1 of Part 19 of the Civil Procedure Rules. But, as both Mr Drabble QC for Lady Berkeley and Miss Cooke for the fourth defendant pointed out - though for very different reasons - the language of the relevant provisions is hard to apply to public law proceedings. Looking in particular at the wording of Rule 19.2 (4), which governs substitution and is in the following terms

"the court may order a new party to be substituted for an existing one if -

(a) the existing party's interest or liability has passed to the new party; and

(b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings",

the concept of the original claimant having an "interest" which has "passed" to the would-be claimant is inapt. While in one sense claimants in public law proceedings - whether in the form of conventional judicial review proceedings or other statutory challenges of the kind with which we are here concerned - are of course required to have an "interest" in the dispute, it is an interest of a very different kind, and the term is used in a very different sense, from a private law interest; and it is hard to see how such an interest can be "passed" to another person. Nor, I might add, does a defendant in public law proceedings normally have a "liability" which can be passed. It is fairly clear to me that what the draftsman had in mind was private law rights and obligations, which are indeed capable of being "passed" by being devolved or assigned.

4. Yet if it followed that a claimant could never be substituted in public law cases it is not difficult to envisage circumstances in which the result would be most unjust. Take the example of an unincorporated pressure group where judicial review proceedings have been taken in the name of a particular individual, say the chairman, but while the proceedings are pending he dies: it seems to me inconceivable that another member of the group would not be permitted to

be substituted as a party. Indeed the same in my view would be the case even if the original claimant simply had second thoughts and no longer wished to be involved but other members of the group wished to pursue the challenge originally made in his name. I am told, and it comes as no surprise, that there are many instances in public law cases of such substitution taking place, although I have been referred to no authority where the formal basis of the substitution has been discussed save Eco Energy, to which I refer below. It is, I suppose, arguable that cases of this kind could be accommodated within the provisions of Section 1 of CPR 19 by a benign construction of the concept of the passing of an interest. But in my view, that would be stretching language beyond breaking point. I prefer - accepting Mr Drabble's eventual submission - to conclude that Part 19 is, though no doubt by oversight, simply not intended to cover public law cases and that the power of substitution which I believe must exist depends on the inherent jurisdiction of the court - it being understood that such jurisdiction would be exercised, so far as possible, in accordance with the principles appearing in Part 19 and the cases relation to it and its predecessor Rules.

5. In reaching that conclusion, I have had regard to the decision of the Court of Appeal in Eco Energy (GB) Ltd v First Secretary of State [2004] EWCA Civ 1566. In that case the Court of Appeal was primarily concerned with whether the original claimant, which was a company, was "the person aggrieved" within the meaning of Section 288 (1). It held that it was not. It then had to consider an application on behalf of an individual applicant associated with the company, who unquestionably was a person aggrieved, to be substituted for the company with a view to continuing the challenge. Lord Justice Buxton, in the leading judgment, made some observations as to why such substitution would not be right on the facts of the case: I return to these below. He also addressed a submission to the effect that the substitution could and should be ordered under Rule 19.5, which is the special rule governing the case where substitution would deprive the defendant of the benefit of a limitation defence. He rejected that argument primarily on the ground that Section 288 (3) did not fall within the language of Rule 19.5. Logically that conclusion might have seemed to call for consideration of whether substitution should therefore proceed under Rule 19.2, which is the general rule from which Rule 19.5 is a carved-out exception; but counsel does not appear to have argued it in that way, and Lord Justice Buxton was accordingly not required to address the wider issue of whether the CPR 19 regime applied at all. I am not therefore in the end much assisted by Eco Energy on this aspect, though it may be that the general tendency of the reasons given by Lord Justice Buxton for holding that the case did not fall within Rule 19.5 gives some further indirect support to my conclusion that Part 19 does not apply in public law cases at all.

6. On the basis therefore that I have jurisdiction to order substitution, albeit not under Rule 19.2, should I do so? Miss Cooke, in her able submissions for the fourth defendant, submits that I should not, because to do so would be undermining the intended preclusive effect of Section 288 (3) read with Section 284 (1) of the 1990 Act. Notwithstanding that Lady Berkeley was a vice-chairman of the Society, she is a separate person and indeed had appeared before the inspector in her own right. She, like any other interested party, was obliged, following the promulgation of the Secretary of State's decision, to make up her mind whether or not to apply to the court within the six-week period. She did not do so, and she cannot now piggy-back on someone else's claim. Miss Cooke relies on some observations of Lord Justice Buxton in Eco Energy. At paragraph 23 he said this:

"There is a threshold difficulty about that claim [that is, the claim for substitution] which is that if Mr Clark appears now, or should have appeared before Collins J, as the party, he would be miles out of time for bringing any complaint under Section 288. As Miss Natalie Lieven, who appeared on behalf of the Secretary of State, pointed out to us, such a move would undermine the very strong scheme of Section 288, which places emphasis on finality. True it is that on the facts of this case Mr Clark could suggest that he was simply succeeding to a claim originally

made, wrongly, by EE Ltd. But not only is it important under Section 288 that applications be made rapidly, but also it is important that persons affected by planning permissions should know who it is they are dealing with. I would not in any event in a Section 288 case be minded to permit such a substitution."

I asked Miss Cooke whether her argument would not equally exclude a case of the kind discussed in paragraph 4 above, where justice seems to require substitution even though it occurs outside the six-week time limit required under the statutory scheme, and whether Lord Justice Buxton's observations could not be read as applying to such a case. She submitted that a case of that kind could be distinguished because the original and would-be substitute claimants would, in substance if not in legal form, represent the same interest, namely that of the pressure group. The identity of the person in whose name that interest was vested from time to time was of no significance. In the present case, by contrast, although Lady Berkeley and the Society were no doubt in the same camp, they were not substantially identical. The very fact that the Society had made a deliberate decision to withdraw from proceedings while Lady Berkeley wishes them to be continued demonstrates that.

7. Although I do not find the point easy, on balance I do not accept those submissions. It seems to me that there can be no bright line indicating exactly where there begins to be a sufficient identity of interest between the original claimant and the person seeking to be substituted so that the policy of Section 288 can be said not to be being substantially undermined. Here, while the case is not as strong as in the paradigm discussed above, it is still very far from being a case of a stranger who has failed to apply in time seeking to take opportunistic advantage of someone else's claim. Lady Berkeley was a vice-chairman of the Society and, on the evidence, the proceedings were taken at her instigation. It is reasonable to assume that if the Society had not taken them she would have done. The Society is, as I have mentioned, helping to fund the claim, at least to a modest extent. The relationship in those circumstances could hardly be closer, and in my view it suffices. The case is different from that considered by Lord Justice Buxton in Eco Energy, because there the original claimant had no locus. In such a case the defendant would indeed suffer a real prejudice by having a claimant who did have locus substituted after the six-week period for a claimant against whose claim he had a complete answer. It is not so here.

8. Thus it seems to me that to allow the substitution in this case would create no conflict with the principle underlying the preclusive provisions of Section 288 (3), Section 288 (4) and Section 284 (1) of the 1990 Act, and I am prepared to do so.

9. I turn therefore to the second application before me, which is an application on behalf of Lady Berkeley for a protective costs order. It is common ground that the relevant principles appear in R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600. I need not set out here the convenient summary of the relevant principles which appears in paragraph 74 of the judgment of the court.

10. In my judgment this is not a proper case for such an order. My principal reason is that the issues which the claimant seeks to raise by this application do not appear to me to be of general public importance, or at least sufficiently so, to justify the making of what remains a very exceptional order. The decision sought to be challenged by the proceedings relates to a specific local development, albeit that the development is a large one and on a fairly prominent site in London. Mr Drabble sought to persuade me that the grounds of challenge raised issues of general importance about the relationship between the so-called Blue Ribbon Network policies and other policies contained in the London Plan, and that the resolution of those issues would assist in other developments. I am not convinced by this. I regard the grounds of challenge as principally concerned with the particular reasoning adopted by the inspector in this case.

11. I have also taken into account the fact that the claimants' possible exposure to costs does not seem to me, on the evidence, such as to represent an insurmountable barrier to access to justice. The Secretary of State has estimated his likely costs at £12,000. For reasons which I can understand, Mr Brown, for the Secretary of State, resisted an attempt by me to encourage him to undertake formally not to claim more. I proceed on the basis that that is a responsible and reliable estimate, and indeed the fact that it has been publicly given will weigh heavily with the court on ordinary Woolfian principles if an application is subsequently made for costs in a larger amount. As for potential liability for the developers' costs, both Mr Brown and Miss Cooke point out - and Mr Drabble does not dispute. That it is in practice extremely rare for developers to obtain their costs of appearing to resist the Section 288 (1) challenge. Again their public acknowledgement to this effect will be to a considerable extent self-reinforcing. In my judgment therefore the claimants' total maximum exposure can be estimated with reasonable confidence at about £12,000. That is not a negligible sum. But nor is it in my judgment so high that a private individual with, as the evidence shows, some committed supporters might not reasonably be expected to take the risk of having to pay it, even bearing in mind her liability for her own costs of obtaining advice and representation - which is being provided at less than commercial rates but not pro bono. Lady Berkeley has chosen not to put in evidence about her financial position. I respect that decision and do not accept Mr Brown's submission that it is by itself fatal to her application. But it does mean that I am in the dark about how much such a potential liability would "hurt". The evidence shows that at least £2,000 has so far been pledged by supporters. There is no solid evidence on which I can assess what further such support may be available, but given the prominence of the site and the degree of opposition expressed to the development it would not be right to assume that £2,000 is the limit of the further financial support that may be available.

12. Those financial factors are of course relevant to factors (iv) and (v) identified by the court in R (Corner House), but they are also relevant to the claimants' slightly tentative reliance on the Public Participation Directive 2003/35/EC, which gives effect in the European Union to the terms of the Århus Convention. A copy of the Directive was not put before me. I understand however that it requires Member States to ensure that access to legal measures to enforce certain specified environmental obligations "is not prohibitively expensive". It is not clear that that obligation in fact applies to the obligations with which we are concerned here, or in any event that it has any bearing on a potential liability for costs as opposed to the costs that would have to be expended by a claimant: I understand that itself to be a contentious issue. But to the extent that the Directive may apply, or in any event to the extent that it is relied on by way of background, I do not find that access to justice here would be "prohibitively expensive" without a protective costs order being made.

13. A number of other points were raised by Mr Brown but, having reached the decision on the basis of factors identified, I do not need to review these further. I should however state expressly that I have not needed to make any assessment of the merits of the application itself though I was briefly addressed on it by Mr Drabble and Mr Brown. I have simply proceeded on the basis that there is here an arguable case.
