Neutral Citation Number: [2013] EWHC 946 (Admin)

Case No: CO/6284/2012

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Bristol Civil Justice Centre
2 Redcliffe Street
Bristol BS1 6GR

Date: 25/04/2013

**Before** :

**MR JUSTICE KENNETH PARKER**

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**Between :**

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| **R (on the application of LOUISA BAKER)** | **Claimant** |
| **- and -** | |
| **BATH AND NORTH EAST SOMERSET COUNCIL** | **Defendant** |
| **-and-** | |
| **HINTON ORGANICS LTD** | **Interested Party** |

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**Jeremy Hyam** (instructed by **Richard Buxton Environmental and Public Law**) for the **Claimant**
**Richard Langham** (instructed by **Bath and North East Somerset Council**) for the **Defendant**

Hearing date: 15 April 2013

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# Judgment

**Mr Justice Kenneth Parker :**

## Introduction

1. In this application the Claimant seeks to challenge the decision of the Defendant, Bath and North East Somerset Council ("the Council") not to take enforcement action in respect of a waste composting site operated by the interested party, Hinton Organics Limited ("Hinton"), at Charlton Field Lane, Keynsham. The land upon which the waste composting site is located is designated Green Belt; it is also adjacent to a site of Nature Conservation Interest, within a Nitrate Vulnerable Zone and is close to homes. The Claimant lives near the waste composting facility.

## Planning History

2. The planning history of the relevant site is relatively complex, but may be summarised as follows.

3. A total of six applications have been made in relation to the composting of waste on the site; only three have been determined. The first (97/02626, granted on 11 October 1999) allowed the use to start and required that it should cease ten years after commencement. This permitted use of the site for composting until January 2011.

4. The second planning permission (02/02722, granted on 12 February 2003) permitted an increase in windrow heights to 6m. The third planning permission (04/105, granted on 10 March 2004) permitted the composting of cardboard waste and an increase in HGV movements for the period until February 2005.

5. Hinton continued the usage permitted by the third planning permission after February 2005. Hinton also increased the size of the concrete pad without planning permission: this enabled it to reduce windrow heights to 3m. It also received wood waste.

6. A fourth application (05/00723, made on 9 March 2005) sought permission to continue the third permission for the remainder of the life of the site. A fifth application (05/1993, made on 5 June 2005) sought permission for the enlarged pad and the reception of wood waste for the remainder of the life of the Site.

7. The applications were not considered to be for "Schedule 2 development" because they fell below the then size threshold in paragraph 13 of Schedule 2 of the 1999 EIA Regulations. The Council granted the fourth and fifth applications in November 2006. However on 19 February 2009 Collins J held that paragraph 13 did not properly implement applicable EU law with the result that applications required to be screened. He quashed the planning permissions.

8. Thereafter Hinton continued to operate the site in the manner that would have been permitted by the quashed planning permissions. Before January 2011 Hinton was therefore in breach of conditions in the (still operatimg) first planning permission. After January 2011 (when the first planning permission expired) Hinton has been engaged in development without planning permission, and has failed to comply with the restoration conditions in the first planning permission.

9. The Council made negative screening opinions in relation to the fourth and fifth applications on 7 August 2009. These were quashed by consent because of a defect in authorisation.

10. In about July 2009 the Claimant started judicial review proceedings seeking an order that the Council should take immediate effective enforcement action against the continued use of the site on the ground that it involved unscreened Schedule 2 development. This claim was unsuccessful.

11. The Council made fresh negative screening opinions in relation to the fourth and fifth applications on 4 February 2010.

12. Following the decision of Collins J it became necessary for the EIA Regulations to be amended. By letter dated 18 November 2009 the Secretary of State indicated that, pending amendment, he would be prepared to make positive screening directions (where appropriate) in relation to proposals which were wrongly excluded from screening by the unlawful threshold in paragraph 13 of Schedule 2. The Claimant requested the Secretary of State to make a positive screening direction in relation to the fourth and fifth applications on 15 January 2010.

13. In January 2011 the first planning permission ceased to authorise the active use of the site and restoration conditions came into effect. Hinton made an application, the sixth, to continue the active use of the site (11/0222, made on 5 January 2011). The

Secretary of State accepted that his screening direction should embrace the sixth application.

14. The Secretary of State made a positive screening direction by letter dated 9 March 2012. The direction did not distinguish between the three applications being considered; it applied to both (i) the fourth and fifth applications, which concerned changes to the manner of operation of the site during the life of the first planning permission and (ii) the sixth application, which would, if granted, authorise the entire operation of the site well into the future.

**Events after the screening direction of the Secretary of State on 9 March 2012 to the decision of the Council on 13 February 2013**

15. To summarise the position on 9 March 2012, there were before the Council three live applications for planning permission. In the circumstances that had arisen, if these applications were granted, the planning permissions would operate with retrospective effect. Only after receipt of the screening direction of the Secretary of State on 9 March 2012 was it definitively known that the applications for planning permission related to "EIA development". EU law permitted the grant of retrospective planning permission in respect of EIA development (with the environmental assessment carried out after the development had started), but only in exceptional circumstances: see *R(Ardagh Glass) v Chester City Council* [2010] EWCA 172. The applications for planning permission, because they related to EIA development, could not, of course, be granted without prior consideration of environment information (including an environmental statement): The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the EIA Regulations"), Regulation 3(2).

16. On 17 April 2012 the Council wrote to Hinton explaining the position and attaching a "scoping opinion" which set out the environmental information that Hinton had to provide. The Council allowed Hinton a period of three months in which to produce an environmental statement, warning Hinton that a failure to comply with that requirement could lead to enforcement action.

17. The purported environmental statement submitted by Hinton on 17 September 2012 was inadequate in significant respects. On 31 October 2012 the Council served on Hinton a formal notice under Regulation 19 of the EIA Regulations in which the Council specified in some detail the additional information that was necessary. Hinton was allowed until 17 December 2012 to produce a compliant environmental statement. If Hinton provided a response by that deadline, the planning applications would be considered by the Council on 13 February 2013. The Council told Hinton:

> "If, when the applications are determined, the required information has not been provided, the Council will be obliged to refuse them. If the Council refuses the applications for this reason, I will advise that an enforcement notice be served immediately, requiring the use of the Site to cease. You will obviously be able to appeal against the refusal of planning permission and any enforcement notice to the Secretary of State, but he is no more able to grant planning permission for unassessed EIA development than the Council is." (Letter of 31 October 2012 from the Council's Implementation and Enforcement Manager, Planning and Transport Development)

18. On 17 December 2012 Hinton submitted further environmental information. However, the Council concluded that the environmental statement remained

inadequate, in significant respects. On 24 January 2013 the Council's Senior Legal Adviser, Planning and Environmental Law Team, informed Hinton that the three relevant planning applications would be put before the Council on 13 February 2013. In the light of Council officers' views on the deficiencies in the information, Hinton was told that the officers' report for the meeting on 13 February 2013 would recommend the service of an enforcement notice.

19. Officers did so recommend in their report and the applications for planning permission came before the Council on 13 February 2013. In the recommendation that the Council should forthwith decide the applications, the report stated:

> "The first issue before Members is whether to determine the applications now (by refusing them). If Members determine the applications, a second issue, enforcement action, arises. This is the subject of a separate report.
>
> Officers consider that there are no considerations which suggest that the applications should not be determined now and that all relevant considerations suggest that they should be determined now, viz –
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> Two of the applications were made over 7 years ago. The third was made 2 years ago.
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> The applicant has been given abundant opportunity to submit the information required to empower the Council to grant the applications but has failed to do so, in significant ways.
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> The Regulations do not empower the Council to make further demands for information.
>
> The Council is undoubtedly under an obligation to determine planning applications made to it, despite the existence of the right of appeal against non-determination.
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> The Council is banned from granting planning permission for this development. However the development is actually taking place and not determining the applications is tantamount to permitting it to continue. It will not be possible to take enforcement action until the applications have been determined.
>
> There are justifications for the non-determination of the applications in the period up to 13 February 2013. However none of these justifications apply to the future."

20. However, at the meeting on 13 February 2013 there was discussion as to the length of time that Hinton would be likely to need to remedy the deficiencies in the environmental statement, and whether Hinton should be allowed more time to provide the necessary information. The Council then decided that Hinton should have a further three months to present a complete environmental statement. The issue of whether an enforcement notice should be issued was withdrawn from the agenda.

**The Claimant's Case**

21. Mr Jeremy Hyam, on behalf of the Claimant, submitted, as his primary position, that, on receipt of the screening decision from the Secretary of State, the Council was

legally obliged to issue an enforcement notice. That was the basis of the present application for judicial review, as shown by the pre-action protocol letter of 16 March 2012 (sent within days of the Secretary of State's decision) and the claim form of 15 June 2012 that alleged that the decision of the Council not to take enforcement action was a breach of EU law. However, by the time of the hearing of the claim, the emphasis had distinctly shifted and Mr Hyam's focus was directed more at the Council decisions of 13 February 2013. There was no application before the hearing to amend the claim so as directly to challenge those decisions, but Mr Hyam submitted that the Council's alleged breach of duty was a continuing one and that, if an amendment were needed, he applied for such an amendment on the basis that the Council understood the nature of the challenge and had been able to respond to the Claimant's case even if the emphasis had shifted to later decisions.

**Discussion**

22. In my view, Mr Hyam's primary position is an extreme one. It would entail that wherever there was EIA development unsupported by a relevant grant of planning permission that had properly taken account of environmental information a planning authority was required by EU law to take immediate enforcement action.

23. The starting point is Article 2(1) of Directive 2011/92 EU on the assessment of the effects of certain public and private projects on the environment ("the EIA Directive"), which provides:

> "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location, are made subject to a requirement for development consent and an assessment with regard to their efforts. These projects are defined in Article 4."

24. The following principles then emerge from the relevant case law:

i) It is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment. Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided by Directive 85/337 (see Case C-201/02 *Wells v Secretary of State* [2004], at paragraphs 64-65, referring to Case C-72/95 *Kraaijeveld and others* [1996] ECR 5403, paragraph 61, and Case C-435/97 WWF and others [1999] ECR 1-5613 at paragraph 70);

ii) While Community law cannot preclude the applicable national laws from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned with the opportunity to circumvent the community rules or to dispense with applying them, and that it should remain the exception (see Case C-215/06 *Commission v Ireland*, at paragraph 57).

iii) In certain circumstances, inaction by a planning authority may defeat the purpose of the Directive. For example, in *Ardagh Glass Ltd v Chester City*

*Council* [2009] EWHC 745 (Admin) the failure by the Council to issue an enforcement notice would, by reason of time limits, have conferred an effective "immunity" from the proper application of the Directive (see paragraph 110 by HHJ Mole QC; and see also, in a similar context, *R(on the application of Hood) v Redcar and Cleveland Borough Council* [2013] EWCA Civ 86, by Richards LJ at paragraph 22).

25. However, it does not seem to me that these principles imposed a duty on the Council under EU law immediately to issue an enforcement notice in the circumstances that I have described. It is now established that the grant of retrospective planning permission in respect of an EIA development is permissible under the Directive if there are exceptional circumstances (see *Ardagh*, referred to above). I take that to mean that a particularly compelling case must be made out for such retrospective permission. Furthermore the decision-maker, including a local planning authority, has to consider whether granting permission would give the developer an advantage he ought to be denied, and whether the public can be given an equal opportunity to form and advance their views (see *Ardagh*, by Sullivan LJ at paragraph 28). These are plainly important safeguards to secure the effective application of EU law. There were before the Council three live applications for retrospective planning permission in this case, and, in the light of these safeguards, I am not able to accept that the Council was simply compelled to issue an enforcement notice without giving in effect any substantive consideration to the applications, beyond noting that no environmental statement had by the date of the screening direction been produced. If such a course had been followed, Hinton would have had justifiable cause to object, because, as observed earlier, it was not until receipt of the screening direction that the development was definitively recognised as EIA development and the need for an environmental statement was established.

26. It is also notable, as Mr Richard Langham, on behalf of the Council, pointed out, that the issue of an enforcement notice would not have precluded Hinton from seeking to produce, in the enforcement procedure, an environmental statement in order to obtain retrospective planning permission. In a putative appeal against such an enforcement notice Hinton would have had the right to contend that in respect of any breach of planning control which might be constituted by the matters stated on the notice planning permission should be granted (section 174(2)(a) of the Town and Country Planning Act 1990). Regulation 25 of the EIA Regulations (under the heading "Unauthorised development") sets out the procedure to be followed where the appeal relates to an unauthorised EIA development. If the Secretary of State is minded to grant planning permission under section 177 of the 1990 Act, he has to take the environmental information into consideration. If the appeal is made without an environmental statement, the Secretary of State is obliged to give the Appellant the opportunity of submitting an environmental statement within a period specified by the Secretary of State. To that extent a decision by the Council to deal substantively with the applications for retrospective planning permissions, and to allow time for submitting an environmental statement, did not give Hinton any opportunity that it would not have enjoyed had it been subject to an immediate enforcement notice. On the other hand it appears to me to be conducive to an efficient procedure if the Council, as the local planning authority with local expertise and knowledge, first considered the planning applications on their merits, with the benefit of an environmental statement.

27. Plainly, if the Council was to proceed substantively to consider the applications, as I conclude that it was entitled to do, Hinton, in accordance with the EIA Regulations, had to produce an environmental statement, and had to be given a reasonable time in

which to do so. I did not understand Mr Hyam to be submitting that the initial three month period was as such unreasonable.

28. For these reasons I reject Mr Hyam's primary submission.

29. Mr Hyam was, however, on much stronger ground in attacking the Council's decision of 13 February 2013. By that time Hinton had had since 17 April 2012 to present a compliant environmental statement, that is, a period of about 14 months. In September and December 2012 Hinton had produced statements that were significantly deficient. As far as I can see, Hinton offered no real explanation, convincing or otherwise, for its significant failure. Council officers before the meeting on 13 February 2013, as explained above, believed that there was no justification for allowing Hinton any further opportunity to present a compliant environmental statement, and recommended that the planning applications should simply be refused, such refusal to be followed by an enforcement notice. It appears to me that to allow Hinton such a further opportunity would run a real risk of acting inconsistently with the principles identified at paragraph 24 above, especially against a background in which planning permission for the operation of the site had expired in January 2011 (that is, over two years before), and Hinton had continued from that time to operate the facility without planning permission and without what from March 2012 had been known to be an essential requirement, namely, a compliant environmental statement.

30. However, for these proceedings, Ms Anthea Hoey, a chartered town planner and principal planner in the Exeter office of Atkins Ltd made a witness statement. In August 2012 the Council had instructed Ms Hoey to give advice on the three relevant planning applications, and in September 2012 she had been appointed to act as the case officer for the applications. In that role she was plainly much involved in the procedures for obtaining from Hinton a compliant environmental statement.

31. In her witness statement Ms Hoey explains in greater detail what occurred at the meeting on 13 February 2013. Mr Nick Stubbs, an environmental consultant, attended. Hinton had instructed him shortly before the meeting. Mr Stubbs emphasised to the Council that Hinton was anxious to remedy the deficiencies in the environmental information. Mr Stubbs said that the Council's ecologist had only recently requested additional information, which could be provided. Ms Hoey was asked how long it would take for Hinton to remedy the deficiencies in the information and she gave her opinion of three months, an opinion that was accepted by the Council as an appropriate period.

32. It appears that the Council then proceeded on the basis that, with the appointment of Mr Stubbs, and the encouraging attitude now shown by Hinton, there was a real probability that Hinton would present a compliant environmental statement by the proposed new deadline. Refusal of permission and the issue of an enforcement notice on the other hand would not be likely to bring the unauthorised site operation to an end, because Hinton, particularly as it had now appointed an appropriately competent consultant and was showing determination to produce a compliant statement, would be likely to appeal any such notice to the Secretary of State, thus staying the effect of the notice. As already explained, on any such appeal Hinton would be entitled, and required, to produce a compliant statement in order to support an application for retrospective planning permission.

33. Although it might not be considered strictly relevant, Ms Hoey in her second witness statement in these proceedings states that after an immediate burst of energy on the part of Hinton and its new consultant, Hinton presented a finalised version of the

additional environmental information on 2 April 2013, that is, well before the new deadline. She states:

> "While I have some criticisms of the information which has been provided, I consider that, taken together, the information provided in September 2012, December 2012 and April 2013 and my observation enables the actual significant environmental effects of the present development at the Composting Site (and thus the significant environmental effects which are likely in the future) to be known and assessed."

34. Notwithstanding my initial misgivings, having considered this further evidence, I conclude that the Council reached a fair, reasonable and proportionate decision on the relevant issue. Given the position on 13 February 2013, there was objectively a real probability that Hinton, notwithstanding its past failure, would produce a compliant environmental statement. The deadline set was not a lengthy one and was reasonable in the circumstances. On balance it remained an efficient course for the local planning authority substantively to determine the planning applications in the first instance, in the light of a compliant environmental statement that was likely to be forthcoming. The issue of an enforcement notice would not be likely to bring the unauthorised operations to an end, but would be likely only to transfer the planning applications, supported by such environmental statement, to the Secretary of State.

35. The decision, being a reasonable and proportionate response to the situation that had arisen, was not, in my view, in conflict with the principles set out at paragraph 24 above. The decision was, therefore, lawful. I should, however, perhaps add that Hinton might be considered somewhat fortunate that the Council in this case took the decision that it did. Another Council might perhaps have given somewhat greater weight to the negative matters that I have set out at paragraph 29 above, and might simply have refused the planning permissions, an outcome which, in my view, the developer would have had real difficulty in challenging in any proceedings for judicial review.

36. In the circumstances I conclude that the application for judicial review was properly arguable, I formally grant permission but, for the reasons set out in this judgment, I dismiss the substantive claim.