Neutral Citation Number: [2023] EWHC 3255 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
AC-2023-LON-000377

Royal Courts of Justice
Strand, London, WC2A 2LL

18 October 2023

Before :

SIR DUNCAN OUSELEY
Sitting as a High Court Judge

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Between :

FRIENDS OF THE EARTH LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendant**
-and-	
WEST CUMBRIA MINING LIMITED	
-and-	**Interested Parties**
CUMBRIA COUNTY COUNCIL	

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TOBY FISHER and ALEX SHATTOCK (instructed by **LEIGH DAY**) for the **Claimant**
RICHARD HONEY KC, RICHARD MOULES and NICK GRANT (instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **Defendant**

Hearing dates: 17 October 2023

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Sir Duncan Ouseley:

1. On 7 April 2022, the Secretary of State for Levelling Up, Housing and Communities granted planning permission for the mining of coking coal at Whitehaven in Cumbria, with associated infrastructure. He had called the application in for his own decision. A Public Inquiry was held by an Inspector at which Friends of the Earth Ltd, FoE, the Claimants, were participants. The Inspector submitted a lengthy report to the Secretary of State, setting out the arguments of the parties, his conclusions on them and his recommendation that conditional planning permission be granted. The Secretary of State, in a 15 page Decision Letter, accepted the conclusions of the Inspector, with possible minor and immaterial exceptions, and his recommendation that conditional planning permission be granted.

2. FOE, and another participant at the Public Inquiry, challenge that decision under s288 Town and Country Planning Act 1990. The challenge will be heard at a rolled-up hearing. FoE seeks, for the purposes of that challenge, specific disclosure of the submission made by the Planning Casework Unit of the Department for Levelling Up to the Secretary of State. This Ministerial Submission is not referred to in the Decision Letter. FoE "came to understand", in its language, that policy advice had been given to the Secretary of State, and sought to obtain it

from him. FoE asserts that the Secretary of State had relied on it in reaching his decision on the application. It is a commonplace, where the Secretary of State has to reach a planning decision following a Public Inquiry and an Inspector's Report, that there will be a written submission to him from civil servants in the Department. The Secretary of State, by a letter of 4 April 2023, p741, refused to disclose this submission, saying that the reasons for his decision on the planning application were fully set out in the Decision Letter, and in the passages of the Inspector's Report which were adopted in the Decision Letter. There was no specific or detailed advice from policy advisers or specific written policy advice. The Secretary of State did not accept FoE's claim that the duty of candour gave the Claimants a right to see the Ministerial Submission. FoE's application for specific disclosure was adjourned for an oral hearing.

3. Mr Honey KC for the Secretary of State offered to provide to me, in confidence, a copy of the Ministerial Submission to assist in resolving issues; he also offered me a confidential analysis of it so that I could focus on the parts which he said it would be most important for me to see. I refused the latter but as Mr Fisher, for FOE, accepted that it would be better if I saw the Ministerial Submission in confidence than that I not see it at all, I agreed to receive it. I did not accept his first preference which

was that the Ministerial Submission be disclosed to the Claimant as well, for the purposes of the disclosure hearing, and subject to restrictions as to its further disclosure. I read it and informed the parties that I had done so.

4. The other application which I turn to at the end is for a witness statement from Mr Toru of FoE to be admitted, at the rolled-up hearing. This application had been refused on paper by Holgate J, but it was said, correctly as I see the timing of events, that he had not had sight of FoE's reply to the Secretary of State's objection.

5. **General Observations:** the disclosure provisions of CPR 31, which play a limited role in conventional judicial review claims anyway, have been explicitly disapplied in relation to statutory planning review by CPR Part 54 in the Practice Direction, Annex D 4.42. This provides that disclosure is not required unless ordered by the court. There is no statutory provision for the disclosure of any Ministerial Submission, despite their commonplace use. There is no general procedural rule, or any guidance in the Practice Direction, to support its disclosure. Rather there is a specific exclusion of disclosure in statutory review, subject to the court taking the express view that disclosure of the document should be ordered. The CPR and Practice Direction set out no principles as to when such disclosure should be ordered, but there is little point in this specific

provision in the Practice Direction, if the generally applicable disclosure tests are to be applied to an application for its specific disclosure.

6. There is one obvious reason for that specific approach in relation to planning statutory review. This is that the Decision Letter, or the combination of Inspector's Report and Decision Letter in the statutory review of a decision taken by the Secretary of State, should provide the complete reasoning of the decision-maker on the significant controversial issues, or those upon which the Secretary of State sought the Inspector's Report in a call-in letter. That is the upshot of the statutory duty in relation to the giving of reasons, combined with the bases for challenge as to the lawfulness of the decision, including the adequacy of the reasons.

7. The related but separate duty of candour owed to the Court and parties is not about the disclosure of documents as such, nor does it necessarily require any particular level of disclosure of documents, save perhaps where a purportedly accurate summary of a document is furnished instead of the document itself. The duty of candour is not even primarily directed to the disclosure of documents, but rather is directed at the duty to provide a full account of the decision-making process including the material considerations taken into account, a duty which arises in response to the grant of permission to proceed with a claim. The planning statutory duty to provide reasons for the decision, as developed

by well-known judicial authority, encompasses and embodies the duty of candour. (It does not matter here that permission to proceed has not yet been granted; this case is headed for a rolled-up hearing.)

8. The Secretary of State's defence, in this form of statutory challenge, stands or falls by what the Decision Letter says, and by the reasons it gives for the conclusions reached. Where the Secretary of State adopts the reasoning and conclusions of the Inspector's Report, as he did here almost entirely, the reasoning of the Secretary of State is also to be found in the reasoning of the Inspector's Report. It is not open to the Secretary of State to defend the decision, when challenged, by supplementary Decision Letters or witness statements saying that a factor was in fact considered, in response to contention that it was overlooked, or elaborating and explaining reasoning which is challenged as inadequate. And it would be very undesirable were that to become a permissible form of defence, with hindsight enabling wisdom and judgment after the event.

9. Where the conclusions of an Inspector's Report are rejected on a material issue, the Secretary of State has to have his own reasons for his differing conclusions, which he then expresses, for better or worse, in his Decision Letter. If he does so adequately, there will be no error of law, but if his reasons are inadequate, they cannot be made good by some later explanation as to what he had meant.

10. Those general points are very relevant to the disclosure of any Ministerial Submission, where the challenge is to the decision and reasoning in the Decision Letter; this is the reasoning and conclusion of the Secretary of State, by which the legal challenge will be judged. If the Secretary of State agrees with the Inspector's Report, and adopts its reasons, it is hard to see how disclosure of the Ministerial Submission could even be useful, let alone necessary, for the fair resolution of issues, a good test of relevance. If the Ministerial Submission disagrees with the reasoning or conclusions of the Inspector's Report, whether as to weight or some other point, but the Secretary of State agrees with what the Inspector said or has some view which differs from both, it is again difficult to see how the Ministerial Submission could be of relevance. If the Planning Casework Unit thought the Inspector's Report was wrong in reasoning or conclusions, but the Secretary of State disagreed with the Planning Casework Unit and preferred the reasoning or conclusions of the Inspector, as he would be entitled to do, any argument that his conclusion, as expressed in the Decision Letter, was irrational or that a factor had been wrongly ignored or allowed for, or that the reasoning was legally inadequate would be available on the combined Report and Decision Letter. It would not be advanced by it being shown that the Ministerial Submission was rejected, if the Secretary of State's reasoning and conclusions in the Decision Letter were lawful. It is not the task of

the Secretary of State, in the Decision Letter, to explain why he agreed with or disagreed with the Planning Casework Unit.

11. There is a real risk that the unnecessary deployment of Ministerial Submissions on a general or routine basis would simply lead to an irrelevant and costly time-consuming collateral debate about what Ministerial Submissions meant, in trying to see what an arguably unclear Decision Letter meant or, worse, in trying to contend that the clear Decision Letter was unclear or failed to deal with points raised by the Ministerial Submission. If the Ministerial Submission and the Decision Letter were not expressed in the same terms, the question would then be raised as to whether that was deliberate expression of difference, or merely a preference for a different form of words to express the same point. The Ministerial Submission could readily become the focus of a debate as to what *it* meant, and then whether the Secretary of State actually agreed with it - or had rejected it, where he used different language from that of the Ministerial Submission. How would the Secretary of State deal with a Ministerial Submission with which he disagreed: should he write an internal note for use in the event of disclosure of the Ministerial Submission, saying, for example, that he preferred the detailed consideration given to the point by an experienced Planning Inspector? Would the Secretary of State be able or be required

to put in a witness statement, as Mr Fisher seemed to suggest he ought to have done here, to explain how, in the light of the Ministerial Submission, he had considered the issues raised by FoE? Would that then generate a subsequent challenge, and within what time limits?

12. This indirect approach to the interpretation of the critical documents, with the added risk of collateral distractions, is not to be commended or assisted.

13. Mr Honey told me on instructions that, so far as he and those instructing him were aware, Secretaries of State had not disclosed a Ministerial Submission in order to advance or defend their own case. I accept that care is taken in Ministerial Submissions not to raise points, which were not raised before the Inspector.

14. I also accept the general point Mr Honey made that the Secretary of State should be able to receive advice in confidence from civil servants.

15. However, there is no blanket bar on the disclosure of Ministerial Submissions, just as there is no general rule that they should be disclosed. Applications for the disclosure of a Ministerial Submission must be based on the facts and issues in the case in question. The appropriate test for disclosure of the Ministerial Submission, where the decision and reasons relied on are set out, for better or worse, in the Decision Letter or

Decision Letter and Inspector's Report, is that in *Tweed v Parades Commission* for Northern Ireland [2006] UKHL 53, [2007] 1 AC 650 at [3]; Lord Bingham: disclosure should be "necessary to resolve the matter fairly and justly." In my judgment that test will rarely be satisfied. I emphasise "necessary". A cautious rather than a broad approach to ordering disclosure in these circumstances is called for.

16. *Horeau v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC Admin 1508 at [11-24] applies *Tweed*, and explains the role of the duty of candour in way wholly compatibly with the general approach I have adopted towards it, in this context of a s288 appeal, where there is both a Decision Letter and an Inspector's Report, and even more so where the Decision Letter agrees with the Inspector's Report.

17. I have been shown only one decided statutory planning case in which disclosure of the Ministerial Submission was ordered: *Ball v Secretary of State for Communities and Local Government* [2012] EWHC 3090 (Admin), Stuart-Smith J at [66] onwards. The issue which led to disclosure being ordered, including advice to the Ministerial decision-maker, was an allegation that the Secretary of State, Mr Pickles, who was also the constituency MP for one of the gipsy caravan sites proposed, might have influenced the decision improperly, although excluded from the decision-making process. I can understand how that disclosure was

thought to be necessary for the fair and just disposal of the bias claim. The Ministerial Submission was however also used to support an unsuccessful rationality argument that it was irrational for the Minister to disagree with Ministerial Submission, and with the Inspector. This furnishes a good example of the care needed before ordering disclosure. I cannot see how that would have passed the *Tweed* test, and illustrates the problem of the use of a Ministerial Submission as a collateral and time-consuming distraction.

18. I also enter a note of caution about the possible breadth of language of Stuart-Smith J at [66] treating relevance under the duty of candour as the touchstone for disclosure. Of course, relevance is required but it seems to me wrong to say that because the Ministerial Submission has something to say about the issues, which is likely to be the case, it is therefore disclosable in a s288 case. Where there is a Decision Letter dealing with the issues as far as or in the way the Secretary of State has chosen to deal with them, or a Decision Letter and Inspector's Report, that is far too broad an approach.

19. I also accept that there have been disclosures of Ministerial Submissions in other cases; but I cannot discern from them on what basis disclosure was given or ordered. I have not been referred to any judgment explaining the basis. It may be that the Secretary of State thought

disclosure necessary, as part of the duty of candour in response to specific grounds of claim. The Ministerial Submission was disclosed in *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2021] EWHC 2161 (Admin), especially at [170,171,177]. Two paragraphs in the Decision Letter revealed what would have been an error of law, if the Secretary of State had in fact not considered two particular documents; those two paragraphs implied that he had considered them. The Court, however, was told that the Secretary of State had not in fact considered them. It is not clear on what basis the Ministerial Submission was disclosed. But it appears likely to have related to the issue of what was considered by the Secretary of State, and whether the Ministerial Submission showed that he had or had not considered the documents. This shows no more than that a Ministerial Submission is disclosable in response to specific points raised in a case, where disclosure is necessary for the fair determination of the issues. I hasten to add that the test for disclosure is not whether it would be determinative of the issues.

20. I could not see what led to the disclosure of the Ministerial Submission in *Starbones Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 526 (Admin); it led to an argument about the rationality of the Secretary of State's decision, which was contrary to the

conclusions of the Inspector's Report and the advice of officials. I derive no assistance from that case.

21. I do not accept the broader basis upon which Mr Fisher appeared to put his case. This was that, in the s288 context, as much as in other public law contexts, the duty of candour meant that a document fell for disclosure, not just when it would advance the Claimant's claim or undermine the Defendant's defence, nor simply when it was necessary for just and fair determination of the issues. The duty of candour required the public law Defendant, and especially the Government Department or Minister to co-operate with the Court, and to provide for the Court a full and accurate picture of the decision-making substance and process, as a partnership in maintaining the rule of law. The Ministerial Submission was part of that. It would be disclosable if, whatever it said, agreeing with the Inspector's Report, clarifying it, or qualifying it, disagreeing with it, or drawing inferences as to what the Inspector meant- which might or might not be what the Secretary of State inferred- it was related to the issues, and was in that sense relevant.

22. As I have said, I regard relevance in that sense, related to, or as put earlier in correspondence and in Skeleton Argument "touching upon", as too broad. It is not consistent with the position in the Practice Direction and *Tweed*, and emphatically the more so when the Court already has a fully

reasoned Decision Letter and Inspector's Report. Mr Fisher suggests a very broad basis upon which any number of further, post-challenge witness statements, and clarifying decisions could be placed before the Court. This would not be consistent with the statutory language of the challenge provision in s288, as long understood.

23. Indeed, Mr Fisher submitted that *Alconbury* [2001] UKHL 23, [2003] 2 AC 295 showed that the interplay between Secretary of State and the Inspector's Report was a feature of concern in the fulfilment of Article 6 ECHR rights, to which disclosure could be relevant. I do not see that as a concern in the House of Lords at all, given the role which Article 6 was found to have, or more aptly not to have, and in the light of what Lord Hoffmann said at [123-130.]

24. Nor does the Aarhus Convention assist the Claimant in Article 6(9), which requires the "reasons and considerations on which the [environmental] decision was based" to be accessible to the public. "Considerations" here does not mean everything which passed in front of the Secretary of State considered but the material factors he considered and upon which he gave his reasons. That obligation is amply met by the Decision Letter and the Inspector's Report.

25. Mr Fisher also submitted, although he put his case on the basis that the Ministerial Submission could be relevant to his Grounds 1 and 2 in the

challenge, that it was also disclosable if it revealed other, hitherto unsuspected, grounds. I accept, as a general proposition, that could be a basis upon which disclosure became necessary, but it would not be disclosable simply for the purposes of seeing whether that might be so. I also accept that I am not as well placed as Mr Fisher would be to see what reasonably arguable grounds arose from the Ministerial Submission, but doing the best that I can, nothing appeared to me in the Ministerial Submission to be of such a nature, or even potentially so.

26. I am not concerned with the relevance of the Ministerial Submission to the grounds put forward by the second Claimant in the challenge, South Lakeland Action on Climate Change. They have not made an application for specific discovery, nor is Mr Fisher instructed for them.

27. With that, I turn to his Grounds 1 and 2, in the substantive challenge to see how the application for specific disclosure relates to them.

28. **Ground 1**: West Cumbria Mining Ltd, WCM, the developer, contended before the Inspector that an agreement under s106 TCPA would ensure that the mine would be net zero for purpose of the UK's carbon budgets. Ground 1 contends that that was not the correct approach. The Secretary of State and the Inspector's Report did not demonstrate that they realised that was an erroneous approach. So the Ground contends that the Secretary of State erroneously took into account the irrelevant claim by

WCM to have achieved net zero for the purpose of the carbon budget, and also erred in concluding that the offset proposal was supported by the Climate Change Committee Report on the 6th Carbon Budget and the Industrial Decarbonisation Strategy.

29. The Ministerial Submission was said to be relevant to whether the Secretary of State misunderstood what WCM were claiming, and also because it would illuminate what was in the Secretary of State's mind in the Decision Letter, and whether it involved a misunderstanding of factual position.

30. Mr Honey KC for Secretary of State submitted that the Secretary of State had not concluded that the mine would be net zero for the purposes of the 6th Carbon Budget; the impact of the mine on the Carbon Budget was not a material planning consideration; the testing of planning proposals under the Climate Change Act was not required; in law carbon offsets provided for under a s106 agreement could count for the purposes of the 6th Carbon Budget. The Secretary of State had not adopted the wrong approach to net zero as alleged. The Court dealing with the substantive challenge would be able to see the relevant legislation, the evidence before the Inspector and his conclusions, and judge whether the errors contended for arose. Any misunderstanding of the factual position would be capable of being perceived on the basis of terms of the Decision

Letter. The Ministerial Submission would add nothing to determination of those issues, and was certainly not necessary or their fair determination.

31. As I understand these submissions, there is a dispute as to what the Decision Letter and Inspector's Report mean. There may also be a dispute as to what constitutes net zero for planning purposes is also net zero for Carbon Budget purposes and whether s106 offsets are admissible for net zero planning purposes, but not for other purposes. But I do not see how the Ministerial Submission can assist in the resolution of these issues. I repeat the general observations I made earlier. If these were important points on which a conclusion was required and the conclusion was not sufficiently clear from the Decision Letter and Inspector's Report, the challenge to the decision and reasoning has good prospects. If the position were clear in the Ministerial Submission but not in the Decision Letter, (or vice versa), the argument would still turn on what the Decision Letter meant, differing as it would from the Ministerial submission, either for a substantial purpose or a purely stylistic one.

32. If the Ministerial Submission was itself unclear, the issue would still have to be resolved on the basis of the terms of the Decision Letter, except that there would now be the added argument about what the Ministerial

Submission meant, and whether it resolved the issue one way or the other, and whether that had been what the Secretary of State intended.

33. Mr Fisher referred to the absence of an explanatory witness statement from the Secretary of State, as supporting the disclosure application. I disagree. It would be quite wrong for him to have provided a supplementary Decision Letter, whether in the form of a witness statement or otherwise, in response to the grounds of claim and the Claimant would have been the first to protest at its admissibility.

34. The Secretary of State, as I have said, must stand or fall by his reasoning in relation to the Inspector's Report. The prospect that something, here the Ministerial Submission, may have illuminated the mind of the Secretary of State, in Mr Fisher's words, provides no basis for its disclosure. If the illumination were important, it would be in the Decision Letter; if not, the omission of a relevant factor or reasons for a conclusion on a principal issue in controversy would be apparent. Whether reasons were based on a misunderstanding of the factual or policy position is matter for the examination of the Decision Letter and the Inspector's Report; it is difficult to see how that would be advanced by sight of the Ministerial Submission, if not apparent from the Decision Letter and Inspector's Report.

35. Neither Ground 1 or Ground 2 raise issues outside the content of the Decision Letter or Inspector's Report, such as an allegation of actual or apparent bias. They do not raise a new point of fact, as may sometimes give rise to an error of law; nor is it said that there is some obvious point on which the Decision Letter is misleading or incomplete, such as where a different decision has been reached in a very similar case, and in such a way that it is disclosure of the Ministerial Submission which is required for the fair disposal of the claim. That disclosure may not always be the answer to or proof of the allegation.

36. **Ground 2**: the first element of this is whether paragraph 217 of the National Planning Policy Framework, NPPF, excludes or applies to the international carbon emissions impacts of the proposal or whether its scope is confined to national impacts. That is matter of interpretation to which the Ministerial Submission can be of no use, whichever way it went. The interpretation of the NPPF is a matter for the Court. Whether, on some other basis than NPPF paragraph 217, the existence or significance of any international effects were relevant or considered, is a matter of law and then a matter of the for interpretation of the Decision Letter and Inspector's Report. If an important point were raised at the Public Inquiry and not dealt with, or dealt with but with insufficient reasons, that is to be demonstrated by the language of the Decision Letter

and Inspector's Report. I cannot see how the Ministerial Submission would assist resolving those issues, let alone be necessary for their fair disposal. The mind of the Secretary of State, which is what matters, is shown by what he says in his Decision Letter, and not by what the PCU says to him in its Ministerial Submission. If they do differ, what the PCU said cannot not illuminate what Secretary of State then said. It involves no error of law, of itself, to adopt an approach commended by the PCU, or to reject it.

37. I would have reached those views without sight of the Ministerial Submission; nothing in it indicated to me that I should adopt different views now after consideration of the arguments.

38. Accordingly, I dismiss this application for specific disclosure.

39. **The witness statement of Mr Toru of FoE**: This responds to a point, which may be being made by Mr Honey in the Detailed Grounds of Defence, about what Lord Deben, Chair of the Climate Change Committee meant when speaking at the time when the UK was Chair of COP. The point may be that Lord Deben was referring to that at a time when he considered that the UK should not be undermining its leadership in fighting climate change. The witness statement is intended to show that Lord Deben's concern about that leadership was not time limited, and

that Mr Honey makes a bad point about the significance of the timing of what Lord Deben said.

40. This evidence postdates the decision. But, taken at face value, it suggests that Lord Deben was not intending to limit his comments about leadership to the timeframe of the UK's COP presidency.

41. I am not sure how Mr Honey will put his case at the substantive hearing in terms of, or how far his comment in the Detailed Grounds of Defence is intended to go or how far he will rely on it. The admissibility of the witness statement to refute any he may make point is, in my judgment, better considered by the trial judge. The evidence is short, and does not obviously call for reply. I therefore adjourn the application for permission to adduce that evidence to the judge at the rolled-up hearing. It should not be put in the core trial bundle.

42. I am grateful to both Counsel and for the quality of their written and oral submission and to the juniors as well.

43. Permission is given to cite this judgment in Court.