The Queen on the Application of CPRE Kent v Dover District Council v China Gateway International Limited

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
14 September 2016

Case No: C1/2016/0076

Court of Appeal (Civil Division)

[2016] EWCA Civ 936, 2016 WL 04721342

Before: Lord Justice Laws and Lord Justice Simon

Date: 14/09/2016

On Appeal from Queens Bench Division Administrative Court – CO/2290/2015

Mr Justice Mitting

Hearing date: 1 September 2016

Representation

Mr Ned Westaway (instructed by Richard Buxton Environmental & Public Law) for the Appellant.
Mr Neil Cameron QC and Mr Zack Simons (instructed by Dover District Council Legal Services) for the Respondent.
Mr Matthew Reed (instructed by Pinsent Masons LLP) for the Interested Party.

Approved Judgment

Lord Justice Laws:

Introduction

1. This is an appeal against the judgment of Mitting J delivered in the Administrative Court on 16 December 2015, by which he gave permission for the appellant to seek judicial review of a planning permission granted by the Dover District Council (the first respondent) on 1 April 2015, but dismissed the substantive claim. The appellant, CPRE Kent, sought permission to appeal to this court on two grounds. On 6 May 2016 Lewison LJ granted permission on Ground 2 but refused it on Ground 1. On 21 June 2016 Sales LJ dismissed the appellant's renewed application for permission on Ground 1.

2. The details of the proposed development are described by Mitting J at paragraphs 1 to 3 of his judgment as follows:

> "1. On 13 May 2012, China Gateway International (CGI) Limited ("CGI") applied for planning permission for an extensive development on two sites on the western fringe of Dover. As originally submitted, the application was for: (a) outline planning permission for: one, the construction of 521

> residential units and a 90 apartment retirement 'village' on land at Farthingloe; two, the construction of 31 residential units and a hotel and conference centre at Western Heights; three, the provision of pedestrian access and landscaping work between the two sites; (b) full planning permission for: one, the conversion of the existing buildings on both sites for a variety of purposes; two, the conversion of the Drop Redoubt at Western Heights into a visitor centre and museum.
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> 2. The Farthingloe site lies in a long, dry valley between the A20 and the B2001 to the west of Western Heights. It compromises of 155 hectares of agricultural and scrubland. All of it lies within Kent Downs area of outstanding natural beauty, which runs westward from the western limits of Dover.
>
> 3. Western Heights is a prominent hilltop to the west of Dover on which a series of fortifications were built before and during the Napoleonic wars to protect the western flank of Dover. They include the Citadel, now used as an immigration detention centre, and the Drop Redoubt and adjacent bowl. They are acknowledged to be the largest, or one of the largest, and best surviving examples of early nineteenth century fortifications in England. The site is a scheduled monument. The surviving fortifications are in a poor state of repair and are on the English Heritage at risk register."

At the end of paragraph 4 of the judgment Mitting J added this:

> "The easternmost edge of the Farthingloe site is 340 metres from the western most fortification and about 1 and half kilometres from the Drop Redoubt."

It is said, and I believe it to be uncontentious, that the scale of the proposed development is unprecedented in an AONB.

3. There were substantial objections to the proposal from the appellant and others. Mr Westaway for the appellant, in the course of introducing the case, showed us documentation from the AONB Executive and from Natural England. However on 13 June 2013 the first respondent local authority resolved to approve the grant of planning permission subject to the completion of a section 106 agreement whose full details I need not rehearse: it included provision for a payment of £5 million to be expended on the refurbishment of the Drop Redoubt and its conversion to a visitor centre and museum.

4. After the resolution of June 2013 Natural England, the Kent Downs AONB Unit and the appellant applied to the Secretary of State to call in the planning application. We have been shown a submission from officials to the Minister which included this statement:

> "If you decide not to call in this application, this could place the protected landscape of the Area of Outstanding Natural Beauty at risk… "

But the Secretary of State decided not to call it in. Notification of the grant of permission was given on 1 April 2015.

Ground of Appeal Summarised; The NPPF

5. The sole remaining ground of appeal has been reformulated by Mr Westaway and may, I think, be refined further into two propositions: (1) the Planning Committee, in resolving to grant permission on 13 June 2013, failed properly to apply the requirements of paragraph 116 of the National Planning Policy Framework (the NPPF); (2) the Committee failed to give legally adequate reasons for the grant of permission. On Mr Westaway's presentation the reasons challenge included a distinct assertion that it was impossible to understand from the Minutes of the Committee meeting on 13 June 2013 why one "viability" case was preferred over another: I will return to that in due course.

6. Paragraphs 115 and 116 of the NPPF are at the centre of the case:

> "115. Great weight should be given to conserving landscape and scenic beauty in… Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty…
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> 116. Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated that they are in the public interest. Consideration of such applications should include an assessment of:
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> • The need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
>
> • The cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way;
>
> • Any detrimental effect on the environment, the landscape and recreational opportunities and the extent to which that could be moderated."

The focus of Mr Westaway's submissions is upon the last bullet point.

The Officers' Report

7. A very detailed report by officers of the council was before the Planning Committee on 13 June 2013. The report drew an important distinction between two distinct areas comprised in the Farthingloe development: "FL-B, which is predominantly green fields/agricultural land; and FL-C, at the eastern end of the site located on the former Channel Tunnel workers site…" (paragraph 2.153). FL-B is the more sensitive area (see, for example, paragraph 2.155). As the judge noted at paragraph 23 of the judgment the officer's report "made trenchant criticisms of the density and layout of the development proposed on the Farthingloe site". They start at paragraph 2.157, where it is said that the development design paid no regard to the differences in landscape character between FL-B and FL-C. Thus at 2.158 the officers point out that the proposed density of dwellings within the "more visually sensitive" FL-B is greater than in FL-C, and this is criticised at 2.159 (see also 2.178).

There is a point about storey height at 2.160, and another at 2.162 concerning woodland planting and screening – a passage to which I shall have to return in connection with a particular point made by Mr Westaway.

8. The criticisms are pulled together at 2.211. Then at 2.212:

> "Relative to the requirements of Policy DM16 [a provision in the Development Plan]… and the NPPF (paragraph 116), the proposals as presented would have a significant detrimental impact on the landscape and would result in long-term, irreversible harm to both the AONB and the urban edge of the town…"

See also 2.442.

9. Accordingly the officers were in favour of refusing permission for the development in the form proposed. However they recommended substantial modifications. Paragraph 2.215:

> "Achieving a design solution for this location that would help moderate harm to the AONB and deliver a viable quality development is challenging. In view of the concerns relating to the deliverability and marketability of the indicative proposals, Smiths Gore [who had given the council expert advice on the scheme] (as part of the viability assessment) examined an alternative outcome. This suggested a more traditional, lower density development at Farthingloe of around 375 dwelling houses. Smiths Gore concluded that this would be more marketable, financially viable and could also afford the relevant monetary contributions (and £5m heritage payment) currently on offer. This would require a reduction in the Code for Sustainable Homes (CSH) rating from Code 4 to Code 3 (saving build costs of some £4,900 per average unit). This option was included in the information previously sent to and considered by the applicant's viability assessor (BNP Paribas) which has not been challenged and was also subsequently brought to the attention of the applicant, although no comments have been received to date."

See also 2.443, and 2.445:

> "The proposals as presented are considered to fall short of demonstrating any suitable moderating effect. The recommendations in this report, as described, seek to address this and in a manner that safeguards development viability and delivers benefits in terms of housing quality."

A possible refinement of the approach set out at 2.215 was described at 2.216, which would reduce the housing density at Farthingloe to "around 365 units". Suggestions as to the phasing of the development are made at 2.221 and 2.224.

10. Later in the report the officers return to the merits of the proposed modifications:

> "2.447 … [I]t is your officers' opinion that offsetting the landscape harm by the modifications outlined in this report would shift the planning balance in favour of the economic and other national benefits of the application. The local economic issues and specific circumstances of this case… are considered to provide a finely balanced exceptional justification for this major AONB development, the benefits of which would be in the public interest. Essential to this conclusion would be seeking all the recommended conditions (changes) and ensuring (by condition/S.106 agreement) the deliverability of all the relevant application 'benefits'. The rationale for the application is as a composite package, and any permission should therefore be framed to ensure the emergence of the proposals in a structured and comprehensive fashion."

I should also cite paragraph 2.457:

> "The application has been presented by CGI as a 'once-in-a lifetime opportunity to deliver regeneration for Dover'. It would be open to the Committee (having regard to the relevant requirements of the NPPF) to review the economic, housing delivery, heritage and other benefits associated with the proposals and come to a view as to whether these, and/or any other material planning considerations, would be sufficient to justify permission without one or more of the conditions/restrictions recommended. Based on anticipated concerns from the applicant, the Committee might consider what scope, if any, might exist to increase the residential density on say, FL-C, from that recommended… However, the officer position is that the conditions/changes as set out in this report (informed by independent legal and financial viability advice) are well founded and that all are necessary to deliver the right composite package, including the economic benefits, so that an on balance recommendation of approval can reasonably be made."

BNP Paribas

11. The developers, the second respondents, took professional advice from BNP Paribas, who were supplied with the officers' report. On 11 June 2013 (two days before the Planning Committee met) they wrote to the second respondents as follows:

> "… I note with concern the Planning Officer's comments at paragraph 2.215 that our not having commented on a sensitivity analysis by the Council's advisors should be taken as agreement to the findings…
>
> I am writing to confirm that I fundamentally disagree with the outcome of the Smiths Gore sensitivity analysis. As you are aware, we had a dialogue with Smiths Gore on the inputs to and the outputs from our appraisals. The result of this dialogue was that Smiths Gore concluded that the Application Scheme maximised the benefits from a residential development on the site.
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> We have not endorsed the Smiths Gore assessment that a smaller scheme could deliver the benefits provided by the Application Scheme. We did not respond specifically on the sensitivity analysis, as Smiths Gore had agreed that the Application Scheme maximised the benefits and could provide no more…

> We have re-run our appraisals to test the impact of the removal of 156 units, as suggested by Smiths Gore. The result is to turn a positive land value of £5.85 million to a negative land value of -£3.03 million. On the basis of this result, the scheme would not secure funding and could not proceed.
>
> For the avoidance of doubt, we do not agree with the planning officer's assessment that the benefits provided by the Application scheme could also be provided by the sensitivity analysis mooted by Smiths Gore. Indeed, our view is that such a scheme would not be capable of providing the benefits offered and could not proceed as it would be incapable of providing a competitive return to the landowner and developers, as required by the National Planning Policy Framework."

12. It seems that this letter was not before the Committee, although Mr Cameron QC for the first respondent told us that his instructions were that the Chairman of the Committee had sight of it. However the minutes of the Committee's deliberations contain a summary of what BNP Paribas had said:

> "On viability, the applicant's consultant, BNP Paribas, had stated since the report was written that they disagreed with the conclusions of the sensitivity analysis carried out by Smiths Gore, the Council's advisers. In their view, a lower density scheme would turn a positive land value into a negative value and, on this basis, it would not be able to secure the necessary funding. The viability of the scheme would be further undermined by the report's recommendation for graduated payments, when a substantial up-front payment of £1 million had been offered. It was suggested that the density details outlined in the report did not fairly or accurately represent the applicant's proposals. The Principal Planner advised the Committee that, having considered the further views of BNP Paribas, Smiths Gore stood by their analysis that a lower density scheme would be viable and would deliver the same monetary benefits as currently on offer. Officers therefore recommended that a lower density scheme should be approved as it was viable, not excessive for the site and would be compliant with the Core Strategy."

13. Mr Westaway accepted that this was a fair summary of the letter (though I note that the letter contains no reference to the effect of graduated payments). At all events it is clear that the views of BNP Paribas played a very significant part in the outcome of the Planning Committee meeting.

The Council's Decision

14. Such reasons as the Planning Committee gave for their resolution of 13 June 2013 granting planning permission have to be gleaned from the minutes of the meeting. I should note, however, that the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 applied to the case, so that the Council was obliged to make and keep a statement containing "the main reasons and considerations on which the decision is based…" and "a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development" (Regulation 24(1) . No such document was produced. At paragraph 22 Mitting J observed:

> "Mr Westaway accepts that if the only respect in which the decision making of the local planning authority is flawed is its failure to fulfil its statutory duty to make a statement of reasons, the acknowledgement of that failure… will suffice, and no further remedy… is required."

In his skeleton argument in this court, however, Mr Westaway places a somewhat oblique reliance on the obligation imposed by the EIA Regulations : "[t]he need to provide adequate reasons was especially important given that this was an EIA application…" (paragraph 35). I shall return to this.

15. In the minutes of the June 2013 meeting such reasons as are given for the resolution appear from the record of individual councillors' contributions. I will cite a slightly longer passage than that set out by the judge (at paragraph 21 of the judgment):

> "Councillors G Cowan, R S Walkden and P Walker spoke in favour of the proposals, stating that the application offered a rare opportunity for regeneration and investment and should be grasped. Its approval would encourage developers to invest in Dover and act as the catalyst for further regeneration of the town. Moreover, it would assist in safeguarding the town's heritage assets and revive the Western Heights area of the town as a tourism destination. Dover lacked a first-class hotel and building one with conference facilities would help to realise the potential of Dover's High Speed rail link and cruise terminal. Approval would be a courageous step but was necessary to give Dover's young people a future. However, it was felt that the application should not be restricted in the way proposed in the recommendation as this could jeopardise the viability of the scheme, deter other developers and be less effective in delivering the economic benefits. The Committee had to assess whether the advantages outweighed the harm that would be caused to the AONB. When seen from the ground and with effective screening, it was believed that this could be minimised. In these exceptional circumstances it was considered that the advantages did outweigh the harmful impact on the AONB.
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> Councillor B Gardner raised concerns regarding the security of the £5 million heritage payment, the phasing of the development to ensure that all the houses were built and English Heritage match funding. Given the significance of the heritage benefits, it was imperative that the development went ahead as planned to ensure that heritage assets were restored. The Principal Heritage and Urban Designer advised that English Heritage could not provide funding, but the developer's £1 million up-front payment would be used to kick-start funding from other sources…
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> [Councillor Cronk spoke against the proposal.]
>
> Councillor K E Morris welcomed the public speakers' contributions which had given the Committee food for thought. It was felt that the proposed development would have a balancing effect on recent job losses in the district. The fact that there were developers who were still interested in Dover despite wider economic uncertainties was to be welcomed. There were questions around the scheme's commercial sustainability and for this reason it was suggested that the density of housing at Farthingloe-C should not be reduced as recommended by Officers, nor should linkages be made between construction at Farthingloe-B and the Western Heights. Councillor P M Beresford added that there was a responsibility to make Dover an attractive place to live and work, and to care for the town's heritage. Dover was in great need of regeneration, and by construction and conservation working hand in hand this could be achieved in a sustainable way."

And so the proposal was approved by a majority.

Was there a Failure to Apply the Requirements of NPPF Paragraph 116?

16. As I have indicated, Mr Westaway submits that the Committee failed to apply NPPF paragraph 116 according to its terms, and that this was an error of law quite apart from what he says was the legal inadequacy of their reasons. He supports this overall contention with a number of individual points. Thus BNP Paribas' assertions about viability (upon which the Committee clearly relied) had nothing to say about the extent of harm to the AONB threatened by the proposed scheme, or the scope for moderating it, in particular as regards Farthingloe; there is no reference to paragraph 116 (or the emphasis on "great weight" in paragraph 115); on the contrary, the Committee's approach was to apply a simple balancing exercise ("whether the advantages outweighed the harm that would be caused to the AONB"); a number of specific matters, all relevant, were not considered (paragraph 26 of Mr Westaway's skeleton sets them out: I need not repeat them); the reference in the minutes to "effective screening" flies in the face of the evidence about screening.

17. The proposition that a statutory decision-maker has failed to apply the test or criterion to his decision which the statute enjoins is different in character from the proposition that the reasons he has given do not demonstrate that he has indeed applied the right test. The first of these propositions is not necessarily to be inferred from the fact that the second is made out. In this case the officers' report is replete with references to paragraph 116 and the policy which it enshrines. The first paragraph of the minutes themselves refers to the AONB as being "protected at the highest level by the National Planning Policy Framework (NPPF)." In my judgment it is not reasonable to attribute to the councillors who supported the resolution in June 2013 an ignorance or misunderstanding of the requirements of NPPF paragraph 116. Mr Westaway's real case is that the Committee has failed to give legally adequate reasons for their decision.

Reasons – The Applicable Law

18. There was some controversy at the Bar as to the standard of reasons required of a local planning authority determining an application in such circumstances as these. Mr Cameron for the first respondent placed particular reliance on observations made by Lang J in *Hawksworth Securities PLC [2016] EWHC 1870 (Admin)* , to which I shall come directly. To set the scene I should cite this familiar passage from Lord Brown's speech in *South Bucks v Porter (No 2) [2004] 1 WLR 1953* , which was concerned with the quality of reasons given by the Secretary of State's inspector on a planning appeal:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

19. This approach may with respect be described as mainstream; it reflects the thrust of many earlier decisions on the law of reasons. Lord Brown's observation that "the degree of particularity required depend[s] entirely on the nature of the issues falling for decision" has, as I shall show, a particular resonance in the circumstances of the present case. Mr Cameron,

however, seeks to distance the approach in South Bucks from what he says is needed here. In Hawksworth Lang J was dealing, not with a decision of the Secretary of State's inspector, but with the grant of a planning permission by the local authority: though in that case, in contrast to this, the Planning Committee agreed with its officers. This is what Lang J said:

> "87. I agree with the submission made by the Defendant and the IP that Lord Brown's formulation in South Bucks , which applies where a minister or inspector is giving a decision on appeal, is not the standard to be applied to a local planning authority's decision to grant planning permission. Planning appeals are an adversarial procedure, akin to court or tribunal proceedings, in which opposing parties make competing submissions, and the decision-maker adjudicates upon them, giving reasons for his conclusions on the *'principal important controversial issues'* , limited to ' *the main issues in dispute* ' not ' *every material consideration* ' (per Lord Brown in South Bucks at [36]). In contrast, a local planning authority is an administrative body, determining an individual application for planning permission. Its reasons ought to state why planning permission was granted, usually by reference to the relevant planning policies. But it is not conducting a formal adjudication in a dispute between the applicant for planning permission and objectors, and so it is not required to give reasons for rejecting the representations made by those who object to the grant of planning permission.
>
> 88. Moreover, as Lady Hale said in *Morge v. Hampshire County Council [2011] UKSC 2, [2011] 1 WLR 268* , at [36], ' *[d]emocratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them…* '. They are politicians from all walks of life, not trained judges or civil servants. As Sullivan LJ said in *Siraj* , at [14], whereas a minister's decision on appeal is intended to be a 'stand-alone' document which contains a full explanation of the Secretary of State's reasons for allowing or dismissing an appeal, a local planning authority's reasons for granting planning permission by their very nature do not present a full account of the local planning authority's decision making process, in which the planning officer's report is a crucial part. It is expected that the report will form the background to the reasons. I also consider it would be unduly onerous to impose a duty to give detailed reasons, as proposed by the Claimant, given the volume of applications which have to be processed.
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> 89. For these reasons, I consider that where a local authority planning committee gives reasons for a grant of planning permission it need only summarise the main reasons for the decision and can do so briefly. The committee is not required to set out each step in its reasoning, nor indicate which factual matters were accepted or rejected…"

20. I would by no means suggest that this reasoning is wrong in principle: the differences between an inspector's decision after a planning inquiry and a planning authority's resolution to grant permission are real enough. Mr Cameron, supported by Mr Reed for the second respondent (the developers), was at pains to submit that the law should not impose on planning authorities an unduly onerous duty to give reasons, which would delay or complicate the processing of planning applications. The sceptic (cynic?) might say that this is just a plea to administrative inconvenience, but it was endorsed by Lang J ("the volume of applications which have to be processed") and there is a clear public interest in the expeditious resolution of planning issues. That said, I think that Lang J's approach needs to be treated with some care. Interested parties (and the public) are just as entitled to know why the decision is as it is when it is made by the authority as when it is made by the Secretary of State.

21. In any event, there are in my judgment a number of features in the present case which point away from Lang J's approach. There is, first, the pressing nature of the policy expressed in NPPF paragraphs 115 and 116: "Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty…" A local planning authority which is going to authorise a development which will inflict substantial harm on an AONB must surely give substantial

reasons for doing so. This is no more than an application of Lord Brown's observation that "the degree of particularity required depend[s] entirely on the nature of the issues falling for decision".

22. Secondly there is the fact that in this case the Planning Committee did not accept the officers' recommendation but departed from it. *Mevagissey Parish Council [2013] EWHC 3684 (Admin)* concerned an application for a housing development in a coastal AONB. The Planning Committee differed from the officers. Hickinbottom J said this:

> "54. It was the Planning Committee's duty to exercise their own judgment on the application. In doing so, they were of course entitled to come to a different conclusion from that of the officer. However, they could not do so without, in their summary reasons, (i) indicating that they had correctly identified, understood and applied the relevant policies, notably paragraphs 115-116 of the NPPF; and (ii) explaining, if but briefly, why they had come to the conclusion they had, and thus why they considered the officer's conclusion wrong."

Where the Planning Committee is disposed to disagree with the Council's officers – especially in an AONB case – it must ("if but briefly") engage with the officers' reasoning.

23. Thirdly, this was as I have explained a case in which the council owed a statutory duty to give reasons, imposed by the EIA Regulations : a duty that was not fulfilled by any document produced for the purpose. In those circumstances it seems to me that the decision should be quashed unless the reasons disclosed in the minutes were, so to speak, just as good.

Reasons – Was there a Breach of Duty?

Viability: Smiths Gore and BNP Paribas

24. As I have indicated, the appellant's reasons challenge included a distinct assertion that it was impossible to understand from the minutes of the Committee meeting on 13 June 2013 why one "viability" case was preferred over another: that is, why BNP Paribas' view that the "lower density scheme would turn a positive land value into a negative value and, on this basis, it would not be able to secure the necessary funding" prevailed over Smiths Gore's view that the "lower density scheme would be viable and would deliver the same monetary benefits as currently on offer" (the quotations are from the minutes, already cited).

25. I do not accept this submission. BNP Paribas referred in terms to the reduction of a positive land value to a negative value. If it is permissible to look at BNP Paribas' letter of 11 June 2013 (which seems to me doubtful to say the least, given that all we know about its distribution is Mr Cameron's statement on instructions that it was before the chairman of the Committee; but I will assume for present purposes that we may have regard to it), more detail is given: "[t]he result [of a re-run appraisal] is to turn a positive land value of £5.85 million to a negative land value of -£3.03 million". It is to be noted that the preference expressed in the minutes for BNP Paribas' view is put in terms of risk rather than certainty – " *could* jeopardise the viability of the scheme" (my emphasis), and that is a point to which I will return. But whether it was seen as a risk or a certainty, there was a basis before the Committee for BNP Paribas' view of viability, however thinly expressed.

26. But that is not to say that the Committee's conclusions on viability were adequately reasoned. As I have said the material from BNP Paribas which was before the Committee was (to say the least) thin. They do not appear to have considered whether the grant of permission with "one or more of the conditions/restrictions recommended" (officers' report paragraph 2.457) might be viable. These points, however, have to be viewed as part and parcel of what I regard as the fundamental basis of the appellant's reasons challenge: the Committee's treatment (or lack of it) of the extent of harm to the AONB.

Harm to the AONB

27. I may introduce this by reference to a central submission advanced by the respondents. This was that given the terms of the officers' report (and the experts' views) the Committee in giving reasons for their decision had in effect only to deal with one issue: the question whether the harm to the AONB might be reduced by the suggested modifications to the scheme: in effect the Smiths Gore proposals described by the officers at paragraph 2.215 of the report. In the circumstances, on the respondent's case, that would appear to mean that the Committee's reasons had to focus only on the issue of viability; and the minutes show that that is what the Committee did.

28. But the premise of this submission is that the Committee was under no obligation to say anything – or anything more than they did – about the degree of harm to the AONB which would be occasioned by the proposed scheme. The contention must be that if they were satisfied that the Smiths Gore modifications were not viable because they "would not be able to secure the necessary funding" – or even if that *might* be so – they were entitled to conclude that the scheme as proposed should be accepted without advancing any further reasons as to the harm it would cause: in effect, without saying anything more about the strictures of NPPF paragraph 116.

29. In my judgment that is not a tenable position. First, it is by no means entirely clear whether the Committee accepted their officers' assessment of the harm which would be inflicted by the development as proposed. They do not say so; there is no acknowledgement of "a significant detrimental impact on the landscape and… long-term, irreversible harm to… the AONB" (paragraph 2.212 of the officers' report, already cited). If they did not accept that view, their decision is certainly flawed: they would have failed to articulate any judgment upon an issue which is clearly at the very centre of the policy expressed in NPPF paragraphs 115 and 116. But if (and this is perhaps the fairer view) the Committee is to be taken as having accepted the officers' assessment of harm to the AONB, the position is hardly any better. They would have opted to inflict irreversible harm on the AONB on the exiguous material before them from BNP Paribas – whose letter of 11 June 2013 made no reference at all to harm to the AONB – without apparently considering whether some of Smiths Gore's modifications might be put in place. It is not clear, moreover, whether their view was that the proposed modifications *would* render the scheme unviable or *might* do so. If they concluded that that was no more than a risk, and not a certainty, then their obligation to address the issue of harm was surely all the more acute.

30. It is of course right that the Committee made some reference to the harm issue. I repeat this passage from the minutes: "[t]he Committee had to assess whether the advantages outweighed the harm that would be caused to the AONB. When seen from the ground and with effective screening, it was believed that this could be minimised." But this compounds the difficulties. First, the reference to "outweighed the harm" appears to suggest that policy requires no more than the striking of a balance; and although I have held that it is not reasonable to attribute to the councillors an ignorance or misunderstanding of the requirements of NPPF paragraph 116, it is not possible to glean from this passage in the minutes what the councillors made of the strictures of the NPPF policy in light of the strong view of harm taken by the officers. Secondly, the reference to effective screening has to be set against what was said by the officers at paragraph 2.162 of their report:

> "The applicant refers to woodland planting being introduced to the west of FL-B to part screen this area. Even with a substantial increase in the area of planting however, the change in levels east of any planting would mean that, over time, screening would still be largely ineffective."

Mr Westaway also referred to a passage concerning screening in a document from his clients, which I need not cite. The upshot is that if the Committee believed that screening would make a substantial difference to the harm to the AONB threatened by the proposed development (as described by the officers), that view is fragile at best and would have to be supported by reasoning a good deal more substantial than the sentence in the minutes.

Conclusion

31. In all these circumstances I would allow the appeal. I consider that the Committee failed to give legally adequate reasons for their decision to grant planning permission. A statutory statement of reasons made under the EIA Regulations would

have been required to grapple with the issue of harm much more closely than what the minutes disclose; and the strictures of NPPF paragraph 116 demand no less.

32. I should add this. This is an unusual case. As I stated at the outset, the scale of the proposed development is unprecedented in an AONB. This judgment, if my Lord agrees with it, should not be read as imposing in general an onerous duty on local planning authorities to give reasons for the grant of permissions, far removed from the approach outlined by Lang J in Hawksworth . As Lord Brown said in South Bucks , "the degree of particularity required depend[s] entirely on the nature of the issues falling for decision".

Lord Justice Simon:

33. I agree.

34. The judge set out his conclusion on the point in issue on this appeal at paragraph 25 of his judgment:

> "It is plain from the minutes already cited that the majority of councillors concluded that the reduction proposed by the planning officers would jeopardise the scheme and so put at risk the benefits which they were anxious to secure for Dover. It is necessarily implicit in that reasoning that although they assessed the extent to which the detrimental effects on the environment and landscape could be moderated, they concluded that the proposal for moderation advanced by the planning officers would jeopardise the scheme and so could not be accepted. Accordingly, they voted to reject that advice and approve the scheme at the original density. In doing so, they fulfilled the obligation of the authority to make the assessment required by paragraph 116 of the National Planning Policy Framework (emphasis added)."

35. In disagreement with the judge, I have concluded that the implication that should properly be drawn from the material we have seen is that the Committee's reasons for its decision were not legally adequate.

36. I would also wish add my specific agreement to Laws LJ's observation in [32] of his judgment.

Rika Shasha, Toni Shasha and Rownamoor Trustees Limited as Trustees of the Placement Pension Fund v Westminster City Council v Portman Mansions Residents Company Limited

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Administrative Court)

Judgment Date
19 December 2016

Case No: CO/2910/2016

High Court of Justice Queen's Bench Division Planning Court

[2016] EWHC 3283 (Admin), 2016 WL 07223747

Before : John Howell QC (Sitting as a Deputy High Court Judge)

Date: 19 December 2016

Hearing date: 29 November 2016

Representation

Ms Victoria Hutton (instructed by Glinert Davis LLP) for the Claimants.
Mr Meyric Lewis (instructed by Dir. of Law, Westminster CC) for the Defendant.

Approved Judgment

John Howell QC :

1. This is a claim for judicial review of a decision by Westminster City Council on April 29th 2016 to grant planning permission for development at Portman Mansions, Chiltern Street, London W1. Permission to make this claim was granted by Ouseley J.

2. The Claimants, the Trustees of the Placement Pension Fund, contend that that decision was flawed on four grounds. In summary these are (i) a failure to consider the Trustees' objections to the effect of the proposed development on the amenity of their premises in Portman Mansions on their merits; (ii) a failure to interpret correctly and to apply a development plan policy, Policy ENV13; (iii) a failure to ensure that there was sufficient information on the impact of the development on the amenity of the Trustees' premises and a failure to take into account its proximity to their bay windows; and (iv) a failure to comply with the requirements arising from section 70(2) of the Town and Country Planning Act 1990 (" *the 1990 Act* ") and section 38(6) of the Planning and Compulsory Purchase Act 2004 (" *the 2004 Act* ").

Background

3. Portman Mansions comprise a number of red brick, residential blocks built between 1890 and 1900 containing some 120 residential units. They are unlisted buildings of merit within the Portman Estate Conservation Area. They face Porter Street to the south, Chiltern Street to the east and Marylebone Road to the north.

4. The Claimants are the long leaseholders of 2A Portman Mansions (" *the premises* ") in Block 2 which itself contains 48 residential flats. Although their long lease also permits residential use, the premises are currently used as offices.

5. The premises are at lower ground floor level mainly facing Marylebone Road. They are set back from the pavement on that road behind an open area planted with some small bushes and trees. This open area is at street level behind a small wall with railings next to the pavement but then, nearer the premises, it slopes down towards them. At the bottom of that slope, between it and the premises, there is a narrow, flat hard-surfaced area.

6. The premises have 10 windows facing Marylebone Road and two smaller windows facing Chiltern Street. Six of the windows facing Marylebone Road are in two bays (each containing three windows). Photographs taken from within the premises show that those inside them can see not only the sloping bank outside facing them but also the wall and railings along Marylebone Road and the buildings on the opposite side of it.

7. On April 29th 2016 the City Council decided to grant planning permission for a development at Portman Mansions comprising a number of elements. One element (which is the subject of this claim for judicial review) was the "excavation of a new subterranean building to provide an estate office, meeting rooms and a residents' gym….below a ground level roof covered by soft landscaping".

8. The development proposed involved excavating the area behind the wall and railings along Marylebone Road to create a new, single storey building (with an area of 86m2). That building would be provided with a planted roof incorporating a number of semi-mature trees. The wall of new building, constructed approximately at the bottom of the existing slope, would be directly opposite the premises and on the edge of the existing narrow hard-surfaced area adjoining Block 2. It would be about as high as the existing wall along the edge of the pavement on Marylebone Road but it would, of course, be far closer to the premises. It would be about 1.3m from the main elevation of the Block 2 (and those windows in the premises in that elevation) and only 0.8m from their bay windows.

9. It would appear that the western part of the wall (behind which the gym is located) is glazed, whereas the eastern part of the wall (behind which the estate office and meeting rooms are located) would not be.

10. Access to the new building was proposed to be by an entrance on a new paved area at the corner of Marylebone Road and Chiltern Street (opposite one of the premises' bay windows) at the level of existing narrow, flat hard-surfaced area immediately adjacent to Block 2. Access to that paved area was to be provided by new stairs from street level (as well as by use of a new disabled access platform lift).

11. The plans also show that access to the gym could be obtained at its western end through a door onto existing narrow, flat hard-surfaced area immediately adjacent to Block 2. Although the plans show that access to the gym would be obtainable through the new building itself at its eastern end from the entrance on the new paved area, evidence given by Mr Alistair John Redler, a qualified Chartered Surveyor (which was not contradicted by the Council) is that the existing narrow hard

surfaced area in front of the premises "will become an access corridor for those entering and exiting the development via the door near the gym at the furthest end of the corridor."

12. The application for planning permission was submitted on behalf of the Interested Party, the Portman Mansions Residents Company Limited, on February 3rd 2016. Effectively it replicated an application for which the City Council had previously granted conditional planning permission on April 4th 2013. That permission had not been implemented and was about to expire on April 4th 2016. The application was accompanied by a Design and Access Statement. In relation to the new building proposed it was asserted in the Statement that "given the location of the site there are no issues of overlooking or loss of amenity to adjacent sites." The plans describing the development for which permission was sought did not show the premises' bay windows.

13. On March 18th 2016 the Claimants' planning consultants submitted objections to the planning application. Some of the objections were based on the fact that the main facing elevation to this new building was less than 1.5m at its closest point from the 10 windows in the premises that face Marylebone Road. At that stage it appears that neither the Claimants nor their planning consultants had recognised that the bay windows were not shown on the plans for which permission was sought. Among the concerns raised by the Claimants' planning consultants were the potential impact of the development on the levels of daylight enjoyed in, and its overshadowing of, the premises. They pointed out that no supporting daylight analysis, and no evidence that there would not be an unacceptable degree of overshadowing, had been submitted with the planning application. They also objected to the proposed development on the basis that it would result in a significantly increased sense of enclosure within the premises due to its siting and close proximity as well as on the basis that it would lead to a loss of privacy and increased levels of overlooking. In addition they objected to the increased levels of noise and disturbance from the use of the proposed new facilities directly opposite the premises. It was contended that the impact of amenity would be contrary to Policy ENV13 in the City of Westminster Unitary Development Plan.

14. Policy ENV13 forms part of the development plan for the City of Westminster. It provides inter alia that:

> "(E) The City Council will normally resist proposals which result in a material loss of daylight/ sunlight, particularly to existing dwellings and educational buildings. In cases where the resulting level is unacceptable, permission will be refused.
>
> (F) Developments should not result in a significant increase in the sense of enclosure or overlooking, or cause unacceptable overshadowing, particularly on gardens, public open space or on adjoining buildings, whether in residential or public use."

15. The Marylebone Association also objected to the loss of natural light to the premises and pointed out that no daylight study appeared to have accompanied the application.

16. On April 29th 2016 Ms Helen Mackenzie, an Area Planning Officer employed by the City Council, completed a report recommending the grant of planning permission (" *the Report* "). The Report stated that:

> "An objection has been received from 2A Portman Mansions which is currently used for office purposes. They are concerned that the proposals would have an impact on existing working/office environment as a result of loss of daylight and potential overshadowing and increase sense of enclosure. The objectors office is located at lower ground floor with windows overlooking the currently sloped landscaped bank, with Marylebone Road behind. UDP Policy ENV13 (E) states that the City Council will normally resist proposals which result in a material loss of daylight/sunlight particularly to existing dwellings and educational buildings. ENV13 (F) states that developments should not result in a significant increase in the sense of enclosure or overlooking, or case unacceptable overshadowing particularly on gardens, public open space or on adjoining building, whether in residential or public use.
>
> The proposal will include a sheer wall in front of the windows at lower ground floor level and this will have some impact on the office windows at lower ground floor level. The windows at lower ground floor level are partially restricted by the landscaped sloped bank. The windows face north and therefore will receive very limited levels of sunlight. It is noted that there is likely to be a loss of daylight to these windows. Policy ENV13 (E) seeks to resist material losses of daylight to residential and educational buildings, and losses to office accommodation is not given the same high protection. As permission has previously been granted for the proposal the objections on the loss of daylight and increase sense of enclosure are not considered sustainable to justify a reason for refusal of the scheme.
>
> The objection also refers to the impact the relocated office and resident's gym will have on the working environment of the office accommodation. It is unlikely that the estate office will have an impact on noise and disturbance, especially considering that the estate office will not want to have an impact on the existing residential properties.
>
> The Marylebone Association has objected to the scheme on the basis that the new building will have an adverse impact on the residential windows at lower ground floor level and that a daylight study has not been submitted. These are the same windows occupied by the offices at 2A Portman Mansions. Therefore the objection on these grounds is not considered sustainable to justify a reason for refusal."

Accompanying the report was a draft letter granting conditional planning permission for the development.

17. On April 29th 2016 the City Council granted conditional planning permission for the development proposed.

18. In her first witness statement dated August 9th 2016 Ms Mackenzie stated that she "referred [the application] to the officer's Team Leader who agreed with my recommendation, having considered the application and the objections to it." It was asserted both in the City Council's Detailed Grounds of Resistance and in Ms Mackenzie's first witness statement, however, that she had herself granted the planning permissions under delegated authority on the applications submitted in 2013 and 2016. In response to my question during the hearing about the compatibility of these claims with the form of the reports in respect of those applications (which in each case were said to contain her recommendation) and that she had herself referred in her statement to her "recommendation" in April 2016, the City Council subsequently stated that the individual who in fact took the decision to grant planning permission in each case was Ms Mackenzie's Team Leader at the time. This was subsequently confirmed in Ms Mackenzie's second witness statement. Although I accept that there was no intention to mislead the court, I am unimpressed by her explanation that her statement "reflects the colloquial use of language used by case officers when discussing planning permissions" and that she "did not appreciate how" her statement read.

The Legal Framework

(i) The statutory requirements governing the determination of planning applications

19. In dealing with any application for planning permission a local planning authority is required to have regard to the provisions of the development plan so far as material: see section 70(2)(a) of the Town and Country Planning Act 1990 . Where section 38(6) of the 2004 Act applies, as it does when a local planning authority determines whether or not to grant planning permission, it requires that "the determination must be made in accordance with the [development] plan unless material considerations indicate otherwise".

20. In discharging these requirements reference to relevant policies is not of itself sufficient. An authority must interpret the policies correctly and, given the duty imposed by section 38(6) of the 2004 Act, as a general rule, it must also determine (a) whether the individual material policies support or count against the proposed development or are consistent or inconsistent with them and (b) whether or not the proposed development is in accordance with the development plan as a whole.: see *Tesco Stores Ltd v Dundee City Council [2012] UKSC 13, [2012] PTSR 983* , per Lord Reed at [17]-[19], [22]; *R (Hampton Bishop Parish Council) v Herefordshire County Council [2014] EWCA Civ 878, [2015] 1 WLR 2367* , per Richards LJ at [28], [32]-[33].

(ii) The requirement to give reasons for granting planning permission in exercise of delegated powers

21. A local planning authority as such is not under any statutory obligation to give any reasons, or to give any summary of their reasons (as they once were), for the grant of planning permission, whereas they are required to give full reasons for any refusal of permission and for any conditions imposed on any permission [1] . In such circumstances the Court of Appeal has found that there is no general obligation at common law requiring reasons to be provided for the grant of planning permission: see *R v Aylesbury District Council ex p Chaplin (1998) 76 P&CR 207* . There may nonetheless be something in the circumstances such that reasons need to be provided as a matter of fairness: see eg *R v Mendip District Council ex p Fabre (2000) 80 P&CR 500* per Sullivan J (as he then was) at pp509–513, *Oakley v South Cambridgeshire District Council [2016] EWHC 570 (Admin)* per Jay J at [35]-[41]. This may mean, as Lang J stated in *R (Hawksworth Securities PLC) v Peterborough City Council [2016] EWHC 1870 (Admin)* at [80], that a requirement to give reasons may only arise "exceptionally" to meet the requirements of fairness. Article 6 of the ECHR may also require reasons to be provided to a person whose civil rights are determined by the grant of permission.

22. In this case Ms Victoria Hutton did not contend on behalf of the Claimants that there was any obligation to give reasons for the decision impugned as a matter of fairness or in order to comply with the requirements of article 6 of the ECHR . Instead she submitted that there was an obligation to provide reasons by virtue of regulation 7 of the Openness of Local Government Bodies Regulations 2014 (" *the 2014 Regulations* ").

23. Ms Hutton was concerned to establish that there was such an obligation to give reasons to lay the foundation for her submissions about inferences to be drawn from the report written by Ms Mackenzie and to support her claims that Ms Mackenzie's witness statement was inadmissible.

24. Part 3 of the 2014 Regulations (which contains regulation 7) was made under section 40(3) of the Local Audit and Accountability Act 2014 . For the purposes of that Part a "relevant local government body" includes bodies which are local planning authorities (such as district councils, county councils and London Borough Councils such as the City Council) [2] . Regulation 7 provides that:

> "(1) The decision-making officer must produce a written record of any decision which falls within paragraph (2).
>
> (2) A decision falls within this paragraph if it would otherwise have been taken by the relevant local government body, or a committee, sub-committee of that body or a joint committee in which that body participates, but it has been delegated to an officer of that body either—

(a) under a specific express authorisation; or

(b) under a general authorisation to officers to take such decisions and, the effect of the decision is to—

(i) grant a permission or licence;

(ii) affect the rights of an individual; or

(iii) award a contract or incur expenditure which, in either case, materially affects that relevant local government body's financial position.

(3) The written record must be produced as soon as reasonably practicable after the decision-making officer has made the decision and must contain the following information—

(a) the date the decision was taken;

(b) a record of the decision taken along with reasons for the decision;

(c) details of alternative options, if any, considered and rejected; and

(d) where the decision falls under paragraph (2)(a), the names of any member of the relevant local government body who has declared a conflict of interest in relation to the decision.

(4) The duty imposed by paragraph (1) is satisfied where, in respect of a decision, a written record containing the information referred to in sub-paragraphs (a) and (b) of paragraph (3) is already required to be produced in accordance with any other statutory requirement."

A "decision-making officer" is "an officer of a relevant local government body who makes a decision which falls within regulation 7(2) " [3] . As soon as reasonably practicable after the required record is made it must be made available to the public, together with any background papers, in accordance with the provisions of regulation 8 .

25. In this case, so Ms Hutton submitted, the decision to grant planning permission had been delegated under a general authorisation to officers to take such decisions and its effect was to grant a permission. Accordingly the decision fell within regulation 7(2)(b)(i) and it followed that the decision-making officer was required to produce a written record of the decision taken along with the reasons for it by virtue of regulation 7(3)(b) .

26. On behalf of the Defendants, Mr Meyric Lewis submitted that there was no duty to give reasons for the grant of planning permission under regulation 7 . He submitted that, as Lord Scarman put it in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132* at p141, "Parliament has provided a comprehensive code of planning control" and that it would be "beyond anomolous" if there was requirement to give reasons for the grant of permission only under delegated powers when the requirement in all cases to provide merely summary reasons for the grant of planning permission had been revoked. Mr Lewis further submitted that, even if there was any duty to give reasons under regulation 7 , it would be satisfied (given regulation 7(4)) by a notice provided in accordance with article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 containing the reasons for any conditions imposed.

27. In my judgment regulation 7 is applicable to a decision taken under delegated powers to grant planning permission. There is no basis for holding that a decision to grant planning permission is not a decision "the effect of" which "is to…grant permission" (to which regulation 7(2)(b)(i) applies).

28. True it is that planning legislation provides a comprehensive code of planning control. But that legislation does not by itself provide a comprehensive code that governs by whom and how planning decisions are to be taken by local authorities. Those matters are also governed by the primary legislation applicable to the discharge of their functions by local authorities, including in particular, in England, Parts V, VA and VI of, and Schedule 12 to, the Local Government Act 1972 and Part

1A of the Local Government Act 2000 , and subordinate legislation made under such Acts, and in this case the Local Audit and Accountability Act 2014 .

29. The suggestion that imposing a requirement to give reasons for the decision to grant planning permission under delegated powers with effect from August 6th 2014 under the 2014 Regulations sits ill with the earlier removal of the requirement in all cases to give summary reasons for the grant of planning permission on June 25th 2013 provides no reason to construe regulation 7 of the 2014 Regulations other than in accordance with its terms. The Explanatory Memorandum to Order which removed the requirement, the Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013 , explained the change on the basis that officer reports typically provided more detail on the logic and reasoning behind a particular decision to grant planning permission than the decision notice and that the requirement to provide summary reasons for that decision added little to the transparency and quality of the decision making process but that it did add to the burdens on local planning authorities. It is at least consistent with such reasons for that change that reasons should nonetheless be required to be provided for delegated decisions. Whereas officer reports are almost invariably produced when decisions are taken by members of planning authorities, an equivalent document or one with the content that regulation 7(3) requires need not be produced when an officer takes a decision to grant planning permission [4] . But, whether or not that provides an explanation for regulation 7 of the 2014 Regulations and whether or not the requirement it imposes may be thought anomolous given the removal of the requirement to give summary reasons in all cases, in my judgment there is no basis for reading the words "other than a planning permission" into regulation 7(2)(b)(i) , where they do not appear, or to exclude decisions to grant planning permission from those falling within section 7(2)(a) or 7(2)(b)(ii) if they would also otherwise fall within those provisions.

30. Mr Lewis' submission that, given regulation 7(4) , the duty to give reasons for the decision to grant permission under regulation 7(3)(b) would be satisfied by a notice provided in accordance with article 35 of the Town and Country Planning (Development Management Procedure Order) (England) Order 2015 containing the reasons for any conditions imposed is misconceived. Such a notice is not required to contain the reasons for the grant of the permission. It is only required to give reasons for each condition imposed and for any refusal of permission.

31. For these reasons in my judgment there was an obligation on the decision-making officer in this case to produce a record of the decision to grant planning permission and the reasons for it as soon as practicable after the decision-making officer made the decision [5] .

32. In this case that did not happen. Understandably Ms Hutton took no point on that. Where members of an authority take a decision, it is a reasonable inference, in the absence of contrary evidence, that they accepted the reasoning in any officer's report to them, at all events where they follow the officer's recommendation: see *Palmer v Hertfordshire County Council [2016] EWCA Civ 1061* per Lewison LJ at [7]. In my judgment the same inference in the like circumstances is reasonable when one officer takes a decision having received a report from another officer containing a recommendation.

iii The standard of reasons required from an officer acting under delegated powers for a decision to grant planning permission

33. As Lord Scarman stated in Westminster City Council v Great Portland Estates Plc [1985] AC 661 at p673,

> "When a statute requires a public body to give reasons for a decision, the reasons given must be proper, adequate, and intelligible. In *In re Poyser and Mills' Arbitration [1964] 2 Q.B. 467* ,… Megaw J. commented, at p. 478:
>
> > 'Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be

> intelligible, but which deal with the substantial points that have been raised.'
>
> He added that there must be something 'substantially wrong or inadequate' in the reasons given. In Edwin H. Bradley and Sons Ltd. v. Secretary of State for the Environment (1982) 264 E.G. 926, 931 Glidewell J. added a rider to what Megaw J. had said: namely, that reasons can be briefly stated. I accept gladly the guidance given in these two cases."

34. As noted above, regulation 7(3) of the 2014 Regulations replicates the requirements imposed on an officer of a local authority operating executive arrangements taking an "executive decision". Plainly, however, what such provisions require by way of reasons for any decision will vary depending on the nature of the decision to which they apply.

35. In this case regulation 7(3) applies to the decision to grant planning permission by an officer under delegated powers and it requires reasons (not merely summary reasons) to be produced for that decision.

36. In my judgment the reasons to be produced for such a decision should make clear whether or not the decision to do so was in accordance with the development plan and, if it was not, what material considerations indicated that planning permission should be granted otherwise than in accordance with it. It may be clear whether or not the development was considered to be in accordance with the development plan, however, even when that is not stated explicitly: see *Secretary of State for Communities and Local Government v BDW Trading Ltd [2016] EWCA Civ 493* per Lindblom LJ at [25], [27].

37. In *R (Hawksworth Securities Plc) v Peterborough City Council [2016] EWHC 1870 (Admin)* Lang J suggested (obiter) at [87], that, where fairness required a planning authority to give reasons for a decision to grant planning permission, "it is not required to give reasons for rejecting the representations made by those who object to the grant of planning permission." But, as Laws LJ stated in *R (CPRE Kent) v Dover District Council [2016] EWCA Civ 936* at [21], "Lang J's approach needs to be treated with some care. Interested parties (and the public) are just as entitled to know why the decision is as it is when it is made by the authority as when it is made by the Secretary of State." In my judgment, as the guidance provided in Lord Scarman's speech indicates, the reasons given by an officer for a decision granting planning permission also need to "deal with the substantial points that have been raised" and that may well involve giving reasons for rejecting any objections which raise substantial points to the grant of planning permission. Such reasons, however, may be briefly stated.

iv The admissibility of evidence about the reasons for a decision when there is an obligation to have provided them

38. Ms Hutton submitted that Ms Mackenzie's first witness statement should not be admitted in evidence to shore up the reasoning in the Report with additional *ex post facto* reasoning. She contended that, just as an Inspector or Secretary of State should not be permitted to add to the reasoning in their decision letters (as Ouseley J thought in Ioannou v Secretary of State for Communities and Local Government [2013] REHC 3954 (Admin) at [51]), so equally a decision-making officer should not be permitted to add to the reasoning required to be provided by regulation 7 of the 2014 Regulations. Alternatively she submitted that the statement should be treated as inadmissible on the basis of the principles enunciated by Hutchison LJ in *R v Westminster City Council ex p Ermakov (1995) 28 HLR 819* at pp833-834. Ms Mackenzie was not merely elucidating the reasons in her report.

39. Mr Lewis submitted that Ms Mackenzie's evidence was not equivalent to a "backdoor second decision letter" which, as Ouseley J had stated in *Ioannu* , a witness statement should not be nor did it involve any "fundamental alteration" or "contradiction" of the reasons in the Report of the kind that was impermissible in accordance with the decision in *ex p Ermakov* .

40. In my judgment, when a local authority is required to give a notice of its decision with reasons (as it was when it was obliged to give notice of the grant of planning permission with a statement of its summary reasons for the grant), it may not adduce evidence to contradict its stated reasons or its own "official records of what it decided and how its decisions were reached" including any relevant officer's report: see *ex p Ermakov supra* and *R (Lanner Parish Council) v Cornwall Council [2013] EWCA Civ 1290* per Jackson LJ at [61]-[64].

41. It does not follow, however, that it may not adduce any evidence of any description as to the reasons for its decision. While Sullivan LJ (in *Secretary of State for Communities and Local Government v Ioannu [2014] EWCA Civ 1432, [2015] 1 P&CR 185*) endorsed at [41] Ouseley J's view that evidence about the reasons for a decision on a planning appeal by the Secretary of State or an Inspector should be discouraged, he neither endorsed, nor dissented from, the view that such evidence should in all cases be inadmissible. But, whatever the position may be in respect of decision on planning appeals, in my judgment such an exclusionary rule ought not to be applied in any event to local authority decisions on planning applications, whether by the authority itself or one of its committees. The nature of the decision-making processes involved is different from that on an appeal. The same is true when the decision to grant planning permission is taken under delegated powers by an officer of the authority. In such a case, where the officer has to produce a written record of the decision along with the reasons for it, in my judgment the principles enunciated in *ex p Ermakov* should govern the admissibility of evidence as to the reasons for the decision.

42. Those principles allow for the admission of evidence to elucidate but only exceptionally to correct, or to add to, the reasons required to be produced. The examples of the corrections which may be exceptionally be considered (which do not amount to an impermissible contradiction or alteration) include errors in transcription or expression and words inadvertently omitted. An example of an addition that may be permitted exceptionally is where the language used may be lacking in clarity in some way: see *ex p Ermakov* at p833. Such corrections or additions ought now to emerge in any event before any claim for judicial review is brought if the pre-action protocol is complied with.

43. Ms Mackenzie was not the decision-maker in this case. Her evidence on what she may have thought when writing the Report or intended it to mean, therefore, is not evidence as such (even if admissible) as to the reasons for the grant of planning permission by the decision-maker. The Report must be taken to mean what it appears to say, since there is no evidence (even were it to be admissible) of what the decision-maker understood it to mean. That is not to say that her statement is all necessarily inadmissible. Some parts of it state facts evidence of which is plainly admissible, for example about the relationship between the developments eventually permitted in 2013 and 2016, the content of the objections in each case and the fact that she visited Portman Mansions in February 2013. I will consider the admissibility of her evidence on what she did and thought in 2013, and on the Report, below (where appropriate) in the light of the principles enunciated in *ex p Ermakov* .

44. As *R (Lanner Parish Council) v Cornwall Council supra* shows, those principles applied to the official documents including any officer's report when the City Council was under an obligation (as it was when it granted the planning permission in 2013) to give notice of its decision including a summary of its reasons for doing so. There is no reason why the test for the admissibility of material for the purpose of determining why a planning permission was granted by a local planning authority should differ in such circumstances depending on whether the decision to grant the permission is the subject of the claim for judicial review or one of relevance to it, such as in this case the planning permission granted in April 2013 (albeit recognising in that case that only summary reasons were required to be given and that they may be amplified by the officer's report recommending its grant).

Ground 1: Whether the Claimants' Objections Were Considered on Their Merits

45. On behalf of the Claimants Ms Hutton submitted that the City Council had failed to consider the Claimants' various amenity objections on their merits. These concerned the loss of daylight and the increased overshadowing, sense of enclosure and overlooking of the premises that the development would cause. She submitted that the statement in the report, that the objections based on the loss of daylight and increased sense of enclosure were not considered sustainable "as permission has previously been granted", shows that to have been the case. The officer had merely treated objections on those matters as foreclosed by the grant of permission in 2013 for the same development when there had then been no objection that raised those issues nor the issues of overshadowing and overlooking. Moreover the Report did not address overshadowing or overlooking which were also material considerations to be taken into account having regard to policy ENV13.

46. On behalf of the Council, Mr Lewis submitted that it could not be said that the Claimants' objections had not been taken into account. They demonstrably were. The Report referred, when dealing with consultation on the application, to the objection by the long leaseholders of the premises raising the "impact of the new building on the existing office accommodation.., including loss of daylight and sunlight, increase sense of enclosure" and "impact of the estate office and resident's gym on the office floorspace". Moreover the Report recognised that there would be a "likely" loss of daylight and an increased "sense of enclosure". While the Report states this in the context of the previous grant of planning permission in April 2013, there was no reason to reach a different decision in April 2016. Ms Mackenzie states that she visited the site in

February 2013 and looked at the Marylebone Road frontage of Portman Mansions. She states that, although objections were then made to the application on different grounds not relating to the premises, she had the potential impact on sunlight and daylight from the development clearly in mind given an objection on those grounds relating to a different part of Portman Mansions. She says that she had assessed the situation on the ground and was well aware of what the amenity impacts on the premises would be and that she had responded to them in detail in her report.

47. In my judgment the issue is not whether the decision-maker in 2016 had regard to the Claimants' objections. For present purposes I assume that they were sufficiently described in the Report. It also recognised that the development would cause a loss of daylight and an increased sense of enclosure.

48. The issue is whether the decision-maker considered whether such effects could provide a reason for refusal on their merits.

49. The Report states that the objections based on such matters "are not considered to be sustainable as a reason for refusal of the scheme" "as permission has previously been granted for the proposal". The grant of a planning permission, even one that has expired, may be a material consideration in the determination of a planning application but a local planning authority is in no way bound by a previous planning permission that has expired: see *South Oxfordshire District Council v Secretary of State [1981] 1 WLR 1092* per Woolf J at p1096e.

50. In my judgment the Report indicates that it was considered that the City Council was so bound.

51. The Report did not say (as it could have done) that the amenity objections were unsustainable as they had been previously considered and rejected on their merits when permission was granted in April 2013 and that there had been no material change of circumstances, and no new information of relevance about them which had emerged, since then.

52. Any misdirection might well be immaterial, however, if it could be shown that that was in fact the case. But, in my judgment that has not been shown to be the case. There were no objections to the development in 2013 on the basis of its impact on the premises on any of the same grounds as were raised by the Claimants in 2016 (as they say they were unaware of the planning application). Unsurprisingly, therefore, the officer's report on the application in March 2013 does not consider any of those objections. There is no material that indicates that the decision-maker in April 2013 considered the amenity objections that were subsequently raised by the Claimants. Indeed the summary reasons for granting permission (provided in the first informative contained in the notice granting it) did not identify Policy ENV13 as one of the 11 policies of particular relevance in the determination.

53. The question then arises whether there is any admissible material in Ms Mackenzie's witness statement that alters this analysis. In my judgment there is not.

54. The Report in March 2016 must be taken to mean what it says.

55. There is no dispute that Ms Mackenzie visited Portman Mansions in February 2013 or that she went to the lower ground floor level at the corner of Marylebone Road and Chiltern Street where the estate office was to be relocated. The Marylebone Association had made representations concerning, among other matters, details of the proposed disabled lift and the effect

of the estate office being open 24 hours a day. Ms Mackenzie confirms, however, that the objections to grant of planning permission were made on different grounds on each occasion. Her report in March 2013 makes no mention of the relevant amenity objections now raised by the Claimants.

56. In my judgment what Ms Mackenzie says about her thought processes in 2013 is inadmissible. It does not elucidate or clarify any statement in her report in April 2013 or April 2016. What she says seeks to add to them. There is insufficient justification in my judgment for permitting such evidence to be adduced exceptionally. There is no evidence (admissible or otherwise) that her thoughts in 2013 were shared with, or by, the decision-makers in 2013 or 2016. No record has been produced of what she thought at the time (other than her report in March 2013). Further her witness statement raises questions about precisely what Ms Mackenzie thought in 2013 that the amenity impacts of the proposed development on the premises would be and about how they should be regarded in terms of policy ENV13. If her evidence were to be admitted, it would not resolve any question but would raise further issues that the obligation to give reasons for a decision is imposed to be obviate.

57. Thus Ms Mackenzie does not say what the particular amenity impacts on the premises were of which she was well aware in 2013. She claims that, because an issue had been raised about the impact of works in a courtyard elsewhere in the Mansions on sunlight and daylight of other premises, "it follows that I had the potential impact of loss of sunlight and daylight from the development clearly in mind when I made my site visit". Even if this should be understood to mean that she that potential impact on sunlight and daylight available to the premises in mind when she visited the site (which she does not in terms state), she does not say that she had in mind any potential overlooking, or increased overshadowing or sense of enclosure, of the premises in mind or that she assessed them. In fact the Report in 2016 in which she says that she dealt with the impacts in detail also makes no mention of overlooking or overshadowing of the premises. It is thus unclear which amenity impacts Ms Mackenzie may have considered in February 2013. Nor does she say whether or not, when considering any of the impacts in 2013, she had recognised that the new building would be only 0.8m from the premises' bay windows or whether she then considered any of them in terms of Policy ENV13. As I have mentioned that was not a policy listed as being among those particularly relevant to the consideration of the application in 2013.

58. I have also taken into account, when considering whether to admit Ms Mackenzie's evidence about what she thought in 2013, her assertion in her first witness statement (now accepted to be untrue) that "acting under delegated authority, I granted planning permission under both applications". She also stated that "I did not grant planning permission in 2016 simply because I had granted it in 2013." Given that she did not grant planning permission on either occasion, the making of such statements must inevitably raise doubts about the reliability of her other statements that she has made about what she thought in 2013 and which are not confirmed by any record or note made in 2013.

59. In my judgment, therefore, the first ground on which this claim is brought is well founded. The Report on the basis of which it is to be inferred that the decision to grant planning permission was taken indicates that it was considered (erroneously as a matter of law) that the amenity objections raised by the Claimants did not constitute a reason for refusing permission as permission had previously been granted for the development. That misdirection was not immaterial: the relevant amenity objections had not been considered and dismissed on their merits by the decision-maker when permission for the same development was granted in April 2013.

Ground 3: Whether the Decision-Maker Had Sufficient Information on the Amenity Impacts of the Proposed Development

60. A local planning authority may not determine an application for planning permission without information that any reasonable planning authority would require in the circumstances for that purpose.

61. Ms Hutton submits that the documents submitted with the application did not provide any supporting daylight analysis or any evidence that there would not be unacceptable overlooking of the premises and that the failure to require the applicant to provide such information was unlawful. Such omissions she submits were aggravated by the failure of the application drawings to show the bay windows of the premises and their proximity (800mm) from the proposed new building. The failure to do so was also itself unlawful.

62. Mr Lewis submits that what the Defendants had was self-evidently sufficient and there was no obligation in law on them to seek further information.

63. In my judgment the nature of the Claimants' objections was such that they could have been assessed and conclusions reached on them not unreasonably as a matter of planning judgment on the basis of the application material, assisted if thought to be required by a site view, provided that the position of the windows in the premises was understood. There was no legal requirement in the circumstances for the Council to seek further information from the applicant for permission (which is what the first part of this ground is concerned with).

64. The Claimants also alleged that the Council unlawfully failed to take into account the correct distance from the bay windows to the new building. The application plans did not show them. The Defendants contend in response that Ms Mackenzie visited the site in February 2013. But she does not say in her witness statement, however, that she noticed the bay windows, that she realised that the application drawings failed to show them and that she appreciated that the bay windows were only 800mm from the new building. Nor, if she did, does she say that she communicated those facts to the decision-maker in 2013 or 2016. In my judgment, therefore, this ground succeeds at least to that extent.

Grounds 2 and 4: Whether the City Council Failed To Interpret Correctly and To Apply Development Plan Policy Env13 and To Comply with Section 38(6) of the 2004 Act

65. The second ground on which the decision is impugned is that Policy ENV13 was not interpreted correctly and was not applied.

66. Ms Hutton contends that the statement in the Report, that "Policy ENV13 (E) seeks to resist material losses of daylight to residential and educational buildings, and losses to office accommodation is not given the same high protection", shows that the Policy was not thought to apply to offices. In my judgment, had it been thought that that policy could not apply to offices, that would have involved a misdirection. But that is not what the Report states. Nor would it be a fair reading of the Report as a whole. Had its author or any reader thought that it could not apply to offices there would have been no reason for considering (as the Report does to some extent) that there would be a loss of daylight to windows of the premises.

67. Ms Hutton alternatively submits that no conclusion was reached on whether the proposed development would result in a material loss of daylight to the premises and whether it was unacceptable. Had it been, no conclusion other than it was material could have been reached in the circumstances. In response Mr Lewis submits that, on a fair reading of the Report, the loss of daylight was not regarded as being so material as to require refusal of permission.

68. The Report stated, correctly that "Policy ENV13 (E) states that the City Council will normally resist proposals which result in a material loss of daylight/sunlight particularly to existing dwellings and educational buildings." That Policy also states that, "in cases where the resulting level is unacceptable, permission will be refused". In my judgment it is clear from the Policy that there may be a material loss of daylight but one that is not unacceptable. No doubt a material loss is particularly

likely to be unacceptable in the case of dwellings and educational buildings as their use is more likely to be sensitive to such losses than some other uses of land.

69. The Report pointed out that the proposed development would involve "a sheer wall in front of the windows at lower ground level" and this will have "some impact" on them. It stated that there was likely to be "a loss" of daylight to those windows which are already "partially restricted by the landscaped sloped bank" and which "receive very limited levels of sunlight" as they face north. No conclusion is expressed whether or not the loss of daylight would be "material" given the existing limitations on daylight and sunlight reaching the premises.

70. In my judgment a conclusion on that issue was one that necessarily had to be reached if the Policy was to be applied lawfully. The policy is that normally any material loss will lead to refusal of permission. There may, of course, be other factors that mean that such a material loss is not unacceptable. But those would then need to be identified. Mr Lewis' submission, that on a fair reading of the Report, the loss of daylight was not regarded as being so material as to require refusal of permission, involves an incorrect interpretation of the policy conflating the question whether the loss is "material" with the question whether it is "unacceptable". But in any event it is not what the Report says. For the reasons given above, in my judgment the objection based on loss of daylight was not regarded as "sustainable" because permission had previously been granted for the development, not because it was said not to be material or not to be unacceptable.

71. Policy ENV13(F) provides that "developments should not result in a significant increase in the sense of enclosure or overlooking, or cause unacceptable overshadowing." The Report recited the Policy and stated that there will be a sheer wall in front of the windows of the premises at lower ground floor level. It did not say whether or not the increased sense of enclosure or overlooking was significant or any overshadowing was unacceptable. In my judgment conclusions on those matters had also necessarily to be reached if the policy was to be applied to this development. Policy EN13(F) does not say that permission should be refused for any development which results in a significant increase in the sense of enclosure. Like significantly increased overlooking, it may itself justify the refusal of permission but, even if it does not do so, it may be a consideration that is to be weighed in the balance when considering the merits of any proposed development in accordance with the development plan.

72. Mr Lewis submitted that, on a fair reading of the Report, the increased sense of enclosure was not considered to be so significant as to require permission to be refused. But that again is not what the Report says. All that it says is that the objection based on the increased sense of enclosure is "not considered sustainable to justify a reason for refusal of the scheme" "as permission has previously been granted for the proposal".

73. These matters also affect Ground 4, the contention that there was a failure to determine whether or not the proposed development was in accordance with the development plan. Ms Hutton is correct when she submits that no conclusion was reached in the Report on that question (which is not addressed). Without determining whether or not the loss of daylight was material, whether or not the increased sense of enclosure and overlooking would be significant and whether any overshadowing was unacceptable, no conclusion could be reached whether or not the proposal was in accordance with Policy ENV13. Although no other policies are mentioned in the Report, however, that does not mean that no other policies were material as Ms Hutton suggested. As mentioned above, the informative on the permission for the development in 2013 listed 11 other policies in the City Council's Core Strategy and Unitary Development Plan which were particularly relevant. Whether or not such policies are relevant, there is nonetheless no conclusion reached on whether or not the proposed development was in accordance with the development plan and, absent any conclusions on the matters that ENV13 raises, nor could there properly be.

74. For these reasons the claim also succeeds on Grounds 2 and 4.

Conclusion

75. It does not appear to me to be highly likely that the outcome for the Claimants would not have been substantially different if the conduct which I have found to be unlawful had not occurred.

76. For the reasons given above, therefore, this claim for judicial review succeeds.

Footnotes

1 see article 35(1) of the Town and Country Planning (Development Management Procedure)(England) Order 2015 as amended by article 7 of the Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013 .

2 see regulation 6 of the Openness of Local Government Bodies Regulations 2014 .

3 see regulation 6 the Openness of Local Government Bodies Regulations 2014 .

4 Regulation 7(3) provision replicates requirements that already exist when an officer takes an "executive decision" which the grant of planning permission and certain other decisions are not: see regulation 13(4) of Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 . For the purpose of that provision an "executive decision" means a decision made or to be made by a decision maker in connection with the discharge of a function which is the responsibility of the executive of a local authority: see regulation 2 of those Regulations. The power to determine applications for planning permission is not a responsibility of a local authority executive: see regulation 2(1) of, and Schedule 1 to, the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 .

5 It should be noted that, in *R (Cooper) v Ashford BC [2016] EWHC 1525 (Admin)* , it was not suggested that there was any such duty. The judgment in that case needs to be read, therefore, in the light of the finding in this case that there is an obligation to produce reasons for a delegated decision by an officer under regulation 7 of the 2014 Regulations.