Neutral Citation Number: [2023] EWHC 317 (Admin)

Case No: CO/3568/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2023

Before :

THE HON. MR JUSTICE BOURNE

- -

Between :

THE KING on the application of JONATHAN ARMSTRONG	**Claimant**
- and -	
ASHFORD BOROUGH COUNCIL	**Defendant**
- and -	
THE WINEBURNER LLP	**Interested Party**

- -

Philip Petchey (Direct Access) for the **Claimant**
Emmaline Lambert (instructed by **Ashford Borough Council**) for the **Defendant**

Hearing date: 2 February 2023

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Approved Judgment

This judgment was handed down remotely at 10am on 15 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The Hon. Mr Justice Bourne :

Introduction and background

1. This is an application for permission to apply for judicial review of a decision by a local planning authority, ABC, on 17.8.22 to resolve to grant planning permission to the Interested Party for change of use of the ground floor of an agricultural building to distillery use (sui generis) at the building known as The Magnum Building, The Street, Brabourne, Ashford, Kent ("the building").

2. By way of background, on 6 October 2019 a Mr Jessel applied to the Defendant under Part 6 of sch 2 to the GPDO for a determination whether prior approval was necessary for a new building which was said to be reasonably necessary for the purpose of agriculture. The plans identified a large building with a ground floor of around 550 m2 and ancillary office and workshop accommodation in a mezzanine, which was said to be needed for storage space for equipment and facilities for staff in connection with a vineyard. On 24 October 2019 the Defendant decided that the building was reasonably necessary for the purpose of agriculture and that prior approval was not required.

3. It seems that the building was completed in January 2021. On 20.7.21 the Interested Party applied for planning permission for a change of use enabling the building to be used as a distillery. That application was withdrawn but on 20.10.21 another was submitted for the same permission. The accompanying planning statement included among the benefits of the proposal: "beneficial use of a disused rural building". Those last words, however, were not reflected by other information contained in the application, in that the site was described as not being currently vacant, and plans showed that the change of use was to affect the ground floor only. That was consistent with another part of the application which specified that the change of use affected a floorspace of 540 m2, which was the area of the ground floor. However, the planning statement said nothing about the agricultural use which had been authorised back in 2019.

4. The Defendant sought expert advice from Rural Planning Ltd, as it had when deciding the 2019 application. The adviser, Richard Lloyd Hughes MRICS, responded on 3 September 2021 (his advice having been sought in relation to the first application of 20.7.21). He noted first that there was a potential requirement for the building to be removed if its agricultural use had ceased, though that requirement would not bite until 3 years after the cessation in the absence of PP for a change of use. He secondly queried whether it had been reasonably required for agricultural purposes in the first place and, if not, whether it would be potentially subject to enforcement action. Thirdly he noted that a change of use now could give rise to a proposal for a replacement structure, in which case the proposal "could be regarded as equivalent to an application to construct a new brewery building".

5. The Defendant's Planning Committee considered the application at a meeting on 17 August 2022. For that meeting, it received a report from the Assistant Director Planning and Development ("the Officer's report"). The report was published on 9 August 2o22, one week before the meeting.

6. The Officer's report stated inter alia:

> "11. Planning permission is sought for the conversion and change of use of the ground floor of the agricultural storage building, (approx. 550sqm), known as the Magnum building, to use as a craft distillery as a fledgling business venture, utilising produce from the farm for its production. The grain and the pomace (pulpy residue) produced from squashed grapes, following juice extraction for the winemaking would be produced by the wider farm thereby avoiding transportation off site.
>
> 12. The micro-distillery would be set up through leasing the ground floor of the building to the Wineburner LLP with the mezzanine floor being in continued used for Vineyard staff facilities and storage together with the Covered Apron, alongside routine vineyard operations.
> …
>
> 18. The building is of sufficient design and construction to accommodate the distillery without having to build anything further with the mezzanine floor and covered apron continuing to be adequate for vineyard operations which are centred on Penstock Hall Farm.
> …
>
> 26. The following consultation responses have been received:
> …
>
> Rural Planning – questioned the legal status of the application building for agricultural use and raises questions about the future of the possible development on the wider farm and vineyard.
> …
>
> 33. Officers have discussed the status of the building and which policy is the most relevant and the Legal status of the building has been raised as a concern in the representations.
>
> 34. There has been a question as to its usage since it was granted permission under Permitted Development for agricultural machinery storage since 2019. However, the evidence suggests that it has been used in accordance with the consent granted in 2019 and a practical stance has been adopted and the use is considered lawful. It has not been built entirely in accordance with the originally approved plans but the alterations are included in this application and are considered acceptable in retrospect and no action is considered necessary to correct the differences."

7. The report put forward draft conditions for planning permission, one of which was that "The Magnum building shall only be used for … distillation purposes …".

8. On 15 August 2022, an agent acting for the Interested Party emailed the Defendant pointing out that the proposed change of use related only to the ground floor and therefore requested that the condition be reworded. On the day of the meeting, the

planning officer responded to propose the alternative wording "Conversion and change of use of the ground floor to distillery use …".

9. For the meeting, the planning officer prepared an "Update Report" in which the draft condition was reworded to refer only to the ground floor. There was no explanation for the change. That report was circulated to Committee members the day before the meeting and was made available at the meeting.

10. The video recording of the meeting record that the planning officer opened the proceedings with the following:

> "… I'll be presenting this application to you tonight but before I do so there has been a fair amount of late activity on that so there are a few further alterations. The first thing is the applicant and agent have agreed to change the description of the application to refer specifically to a distillery in the ground floor of the building so that's the first amendment; there is also an amendment to condition 4 where we're deleting everything after the word 'distillation purposes' so we're deleting 'and no other alternative industrial purpose'."

11. At the meeting the Defendant resolved to grant planning permission. It has not yet made the grant though the effect of the resolution is to authorise officers to do so without further ado.

12. The Claimant, by his counsel Philip Petchey, summarises his two proposed grounds of judicial review as follows:

> "Ground 1: unfairness (No detail was supplied to planning committee members as to the usage since 2019) and neither Mr Armstrong nor any of the consultees had any opportunity to consider the change to description of the application or any significance which the officer may have considered it may have had."
>
> "Ground 2: inadequacy of report such that the committee was misled and such that a decision made on such a flawed basis cannot stand."

Is the application premature?

13. Emmaline Lambert of counsel, representing the Defendant, contended that a challenge to the Defendant's resolution was premature on the basis that the time limit for a judicial review challenge to a grant of planning permission runs from the grant and not from the planning authority's prior resolution authorising the grant. That was decided in *R (Burkett) v Hammersmith & Fulham LBC and another* [2002] UKHL 23, [2002] 1 WLR 1593.

14. However, the same case makes clear that a mere resolution can be challenged, at [4] per Lord Slynn and at [38] per Lord Steyn. Lord Millett and Lord Phillips MR agreed with both of them and Lord Hope agreed with Lord Steyn.

15. Although Lord Steyn at [42] said that an application to declare a resolution unlawful "might arguably be premature and be objected to on this ground" and "in strict law

could be dismissed", that was only by way of caveat to his ruling that such a challenge is possible.

16. It seems to me that whilst a prematurity argument may therefore be available in principle, it does not provide a reason to refuse permission in this case. The resolution was a legally significant step because it authorised officers to grant planning permission. The facts of this case disclose no reason why it would be preferable to await the grant before entertaining such a challenge.

Ground 1

17. Mr Petchey contends that his client (and others with a similar interest) were wrong-footed by the announcement at the start of the meeting that the application only affected the ground floor of the building.

18. This is in the context, he says, of a wider lack of information. Rural Planning had raised questions about (1) whether the building was necessary for agricultural purposes and should have been authorised at all, (2) whether agricultural use had ceased and (3) whether this application, by reducing the space available to store machinery, would lead to or should be interpreted as an application for further building for that purpose. Mr Petchey complains that the Defendant, before making its decision, did not properly deal with these questions.

19. It seems to me that, as Ms Lambert submitted, there was in fact no arguable unfairness in relation to the clarification of the scope of the application. A careful reader of the application would have worked out that it concerned the area of the ground floor, as the plan showed. Then, one week before the meeting, the Officer's report made that perfectly clear. This was understood by the Interested Party, whose agent picked up the point on 15 August 2022 as I have said. It therefore should not be assumed that anyone was wrong-footed when the scope of the application was clarified at the start of the meeting.

20. Moreover, to the extent that the clarification could be seen as a change, it narrowed the scope of the application and made it, if anything, less controversial. It created no need for any further consultation.

Ground 2

21. By ground 2, Mr Petchey argues that the Officer's report was misleading. Further argument refined this to an allegation that it was misleading by omission because of an absence of information relating to the three points raised by Rural Planning and summarised at paragraph 4 above. In particular the report did not address the question of what would happen to the machinery for whose storage the building had originally been authorised and whether an application for some further building (in an Area of Outstanding Natural Beauty) should be anticipated. Instead, Mr Petchey submits, the officer focused on the existence of a small quantity of evidence showing that the building had been put to lawful agricultural use.

22. In response, Ms Lambert cites the legal principles relating to the reports of planning officers. These do not appear to be in dispute, and were set out in *R (Trashorfield Ltd)*

v Bristol City Council v Sainsbury's Ltd, Bristol Rovers (1883) Ltd [2014] EWHC 757 Admin. In brief summary:

(i) weight to be given to material considerations is for decision-makers to decide;
(ii) reports to planning committees should be concise and focused;
(iii) the assessment of how much and what information to include is for the expert judgment of planning officers;
(iv) judicial review will not make headway on the basis of a defective report unless "the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee";
(v) Courts should make a fair reading of each report as a whole;
(vi) reports should be read bearing in mind that they are addressed to a "knowledgeable readership", and in challenges to the decisions of democratically elected and experienced members of planning committees Courts should proceed with prudence and caution.

23. Applying those principles, Ms Lambert resists the suggestion that there was any defect in the officer's report. She submits that it included sufficient summaries of consultation responses, including that of Rural Planning and that this referred to the query about future use of the land. There was in fact no question of agricultural use having ceased or of the original authorisation having been mistaken. Meanwhile the underlying documents including the letter from Rural Planning were made available to the committee. No information was kept from them. The report's "knowledgeable" readers were entirely able to consider the future use of the land.

24. I agree with those submissions. In my judgment it is not arguable that the absence of any further amplification of the comment made by Rural Planning meant that the report, read as a whole, misled the Defendant's Planning Committee about a material matter.

25. I also accept Ms Lambert's alternative submission, applying section 31(3D) of the Senior Courts Act 1981, that it is highly likely that the outcome for the Claimant would not have been substantially different if the Officer's report had fully set out the concerns of Rural Planning.

Conclusion

26. Neither ground has a realistic prospect of success, and permission to seek judicial review is refused.

Costs

27. Two matters arise.

28. First, there is an issue as to what if any costs protection the parties should have on the basis that this is an Aarhus Convention claim. The question is academic in view of my refusal of permission but as it was argued, I will set out my conclusion on it.

29. By CPR 45.42(1), rules 45.43-45 apply:
    "… where a claimant who is a member of the public has –
    (a) stated in the claim form that the claim is an Aarhus Convention claim; and
    (b) filed and served with the claim form a schedule of the claimant's financial resources, which is verified by a statement of truth and provides details of –
        (i) the claimant's significant assets, liabilities, income and expenditure; and
        (ii) in relation to any financial support which any person has provided or is likely to provide to the claimant, the aggregate amount which has been provided and which is likely to be provided."

30. Rule 45.43 limits the potential liability of a claimant to pay costs to £5,000 in the case of an individual, and the potential liability of a defendant to £35,000.

31. Under rule 45.44(1)-(2), the limit on a claimant's liability may be varied on a party's application if the court is satisfied that a variation "would not make the costs of the proceedings prohibitively expensive for the claimant" having regard to circumstances specified in rule 45.44(3).

32. The Claimant has filed a schedule headed "statement of means", verified by a statement of truth. It identifies his income and outgoings and various assets and liabilities and also informs the Court that other local residents have informally pledged to contribute up to £12,500 in support of the proposed judicial review.

33. Oddly the statement does not disclose the value of the Claimant's home, of which he is one of two tenants-in-common, although it does set out the mortgage liability. The Defendant has put information before the Court about that property, the price for which it was originally purchased and an estimate of its value from the Zoopla website. It is common ground that there is substantial equity in the property.

34. Ms Lambert submits that the Claimant has not yet complied with CPR 45.42(1)(b) and specifically sub-para (i) because of the lack of information in the required format about his home. In the alternative, she applies to lift any cap on the basis that the Claimant can afford to pay the costs of this claim. The Claimant indicated that he would not oppose a variation to £10,000.

35. I agree that a schedule complying with the requirements of rule 45.42 has not been served, and therefore the limit in rule 45.43 at present does not apply.

36. I therefore have not decided what if any variation might have been ordered but, if deciding that point, I would have attached weight to the sums pledged by others, albeit not with binding effect, and to the fact that the Claimant could reasonably be expected to bear some costs himself in addition, having regard to those assets about which I have been told. Plainly a significant upward variation would have been warranted.

37. The second costs issue arises from the order of Judge Walden-Smith who refused permission on the papers. The Defendant had sought costs of £5,938.98. The Judge made a provisional award of costs summarily assessed at £4,771.48 but provided for the parties to serve notice of objection and make written submissions.

38. I have read the Claimant's written submissions but have not heard oral submissions. Under Judge Walden-Smith's order, hearing oral submissions is a matter for my discretion. My view at present is that it would not be proportionate to convene a further oral hearing, having regard to the sums in issue. I will include liberty to apply in the relevant part of my order but any further hearing would be at the risk of the person applying in respect of costs.

39. Having regard to the written submissions, I do not accept that no costs order should have been made. I am not convinced that there was so significant a public interest in this claim that costs should not follow the event to the extent that is usual in an application for permission to seek judicial review. There was no application for a costs capping order on public interest grounds (aside from the Aarhus Convention debate). Nor does it seem to me that the Defendant has engaged in any unreasonable conduct which has caused costs to be incurred unnecessarily.

40. As to the amount, Judge Walden-Smith has already reduced the amount sought for counsel's fees by 20% and the amount sought for work on documents by the solicitor by about 25%. The Claimant contends that she nevertheless awarded costs going beyond those of filing an Acknowledgment of Service as contemplated in the *Mount Cook* case, and that a number of specific sums are excessive.

41. This exercise is necessarily of a broad brush nature, and the need for any further adjustments is subject to those adjustments already made, which go some way to answering the Claimant's specific objections.

42. Subject to any application for an oral hearing, which must be made within 14 days of the date of my order, I will reduce the amount awarded by way of summary assessment by a further £623, representing a further 3.5 hours at the solicitor's hourly rate. I make that reduction because the total still seems slightly excessive for the limited objective of filing an AOS, that in turn reflecting the probability of some duplication of effort between solicitors and counsel. However I am not persuaded that it is unreasonable for the Defendant's solicitor to use the Guideline Hourly Rates.

43. The recoverable costs are therefore £4,148.48, subject to any further application by either side to vary that award.