Neutral Citation Number: [2024] EWHC 358 (Admin)

Case No: AC-2023-LON-000285

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2024

Before :

KAREN RIDGE SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

DR CAROLINE RYE	**Claimant**
- and –	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**First Defendant**
-and-	
DEREK WARWICK DEVELOPMENTS	**Second Defendant**
-and-	
SOUTH DOWNS NATIONAL PARK AUTHORITY	**Third Defendant**

- -
- -

Piers Riley-Smith (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Scott Stemp (instructed by **Moore Barlow Solicitors**) for the **Second Defendant**

Hearing date: 15 November 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 22 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Deputy High Court Judge Karen Ridge :

1. This claim for statutory review is brought by the Claimant under section 288 of the Town and Country Planning Act 1990. The Claimant seeks the quashing of a planning permission which was granted on 6 December 2022 by decision letter of the First Defendant's Planning Inspector following a successful, planning appeal. The site which was the subject of the planning appeal was The Queens Hotel, High Street, Selborne, Alton GU34 3JH (the site).

2. The planning permission allowed the conversion and extension of the existing Queens building and barn to form 5 aparthotel suites (C1), a field study centre and tap room (mixed class F.1 and sui generis) and one detached dwelling (C3) within the grounds, with associated parking and landscaping ('the Appeal Proposal') for the site which is located in the village of Selborne in the South Downs National Park. The Third Defendants are the Local Planning Authority for the area in which the site is located. They have played no part in these proceedings.

3. The claim was issued on 11 January 2023. It was brought on two grounds. On the 21 June 2023 Upper Tribunal Judge Cooke, sitting as a Judge of the High Court, granted permission to proceed on ground 1 and refused permission on ground 2. Ground 1 concerns an allegation that the Inspector made a material error of fact in relation to the trees on the site.

4. On the 2 October 2023 the First Defendant, the Secretary of State for Levelling Up, Housing and Communities, entered into a consent order. The recitals in that consent order state the following:

> "*AND UPON the 1st Defendant agreeing that the Decision was rendered unlawful by a material error of fact that was relied on by the Planning Inspector as making the development acceptable in landscape, character, and Conservation Area terms ("Ground 1 of the Claim") and that the Decision would not have been the same had it not been rendered unlawful.*
>
> *AND UPON the 1st Defendant agreeing to consent to a quashing order under Ground 1 of the Claim*."

5. The consent order ended the First Defendant's participation in this action. The Second Defendant continued to contest the claim and was represented at the substantive hearing.

LEGAL PRINCIPLES

6. The relevant principles are agreed between the parties. In *Bloor Homes East Midlands Ltd. v. Secretary of State for Communities and Local Government and another [2014] EWHC 754 (Admin) at 19,* Lindblom J. (as he was) said:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26, at p.28). "

7. There is no duty for an Inspector to refer to each and every item of evidence nor refer to every material consideration *Bolton MDC v. Secretary of State for the Environment (1996) 71 P&CR 309.* A s288 challenge may fail if the decision-maker would have reached the same conclusion without regard to any identified error *Simplex (GE) Holdings v. Secretary of State for the Environment [1998] 3 PLR 25.*

8. A material error of fact can render a decision unlawful if four criteria are met *(E v Secretary of State for the Home Department [2004] EWCA Civ 49)*:

> "i) There is a mistake to an existing fact.
>
> ii) The fact is uncontentious and objectively verifiable.
>
> iii) The Claimant is not responsible for the mistake.
>
> iv) The mistake played a material (but not necessarily decisive) part in the Decision. "

9. The ratio and tests of E have been applied in the context of a s.288 statutory planning challenge in *Kensington and Chelsea RLBC v Secretary of State for Communities and Local Government [2017] EWHC 1703 (Admin)* and in *Wainhomes (North-West) Ltd v Secretary of State for Housing, Communities and Local Government [2020] EWHC 2294 (Admin)*.

THE FACTS IN RELATION TO THE PLANNING APPEAL

10. In January 2016 the Queens Hotel ceased trading and closed for business. Up until then, the hotel had traded as a public house with hotel accommodation and a separate function room. Following closure in 2016, there were applications for re-development by the owners of the site who are the second Defendants (D2) within these proceedings. Each of those applications was unsuccessful and permission was refused by the National Parks Authority (the Third defendant). An application for conversion and alterations to form 4 residential dwellings and the erection of one additional dwelling was refused planning permission in February 2019 and dismissed at appeal in October 2019.

11. On 18 Sep 2021 a planning application, reference SDNP/20/04118/FUL, was submitted for the conversion and extension of the existing Queens building and barn to form 5 aparthotel suites, a field study centre, and a tap room and one detached dwelling within the grounds, together with associated parking and landscaping. The Appeal Proposal included the retention of the mature trees to the rear of The Queens, with the exception of the Holly Tree. That application was refused planning permission on 1 October 2019 for two reasons. The second reason related to the effects of the new building, increased parking provision, landscaping and access alterations which it was determined would have an unacceptable impact on the landscape character of the area and the Conservation Area, contrary to stated development plan policy and national policy in the National Planning Policy Framework.

12. An appeal was submitted against the refusal of planning permission by D2 to the Planning Inspectorate on 20 December 2021.

13. Until May 2022, the eastern boundary of the Queens (also referred to as the rear of the Queens) had a belt of mature trees made up of Ash, Holly, Cyprus, Spruce and Apple trees. In the period between the submission of the planning appeal and the Inspector's site visit, D2, as landowners, submitted a proposed Notification of Proposed Tree Works to the Parks Authority pursuant to section 211 of the Act. That notification required the Parks Authority to give its consent (or otherwise) to the proposed Tree Works because they were in a conservation area. The wording of the proposed works was as follows:

> "T1 3 x Mature Ash -Remove,
>
> T2, 1 x cherry - Remove,
>
> T3 2 x Thuja - lift canopy from current height of 2.5m to a height of 3.5 to 4m,
>
> T4 3x Holly - remove and replace with fruit trees or hedging,
>
> T5 mature apple - lift canopy from 2.5m to a height of 3.5 to 4m,
>
> T6 - mid-life spruce - remove and replace with fruit tree or hedging"

14. The tree works proposal sets out the justification for removal and cutting back of the various trees. Consent was given on 10 May 2022. The Tree Works Consent is entirely separate to the consideration of an application for planning permission. It is to ensure that local planning authorities control works done to trees in conservation areas.

15. On the 13 May 2022 the Claimant emailed the case officer at the Planning Inspectorate alerting them to the intended felling of the trees and asking if a site visit could be conducted as a matter of urgency. The case officer replied to say that an Inspector had not yet been appointed and that "the removal of the trees

will be a material change to site so I will make sure this is drawn to the Inspector's attention in due course".

16. Subsequently the authorised tree works, comprising felling and canopy lifting, were completed on 16 May 2022.

17. The planning application and appeal were supported by a suite of documents which included The Tree Protection Plan [HB/431] and an Arboricultural Method Statement [HB/406]. The numbers (1 – 8) on the Tree Plan correspond to the T1 – T8 Trees within the Statement. Under the section entitled 'Discussion' the Statement sets out [HB/426]:

> "One tree (T5) requires removal as a result of the proposed development, as it lies within the proposed new access to the new car parking area. It is also proposed to remove two limbs from tree T1 for Health & Safety reasons, as these are leaning over the existing car parking area and could present a future hazard. The removal of these limbs will not affect the overall health or visual amenity of this tree. Both of these trees are a part of an existing line of trees to the rear of the site and their removal will not have a significant impact on the overall appearance and visual amenity provided by these trees. "

18. The appeal proposal therefore included the removal of one Holly Tree (T5 on the Tree Plan), with the remainder of the trees along the access road depicted as being retained.

19. On appeal, one of the two key issues was the effect of the proposal on the character and appearance of the surrounding area. The Parks Authority had contended that the proposal represented overdevelopment of the site which, it said, would have an unacceptable impact on the landscape character of the area and the Selborne Conservation Area. The Parks Authority's Statement of Case which submitted on the planning appeal notes that

> "The subsequent loss of space within the application site, when viewed from the access road which leads to the properties to the north (and the access for the proposed barn), would result in a 'busier' and more intense form of development which would appear somewhat cramped, given the access and parking area wedged between the new apartment suite and the dwelling to the north of the car park, which would introduce more built form abutting the car park area. In these respects, the proposals would constitute and overdevelopment of the site which would be apparent within the streetscene "

20. During the appeal process D2, as appellants, made Final Comments in May 2022 which included the following:

> "2.25: …. The Appeal Scheme would preserve and enhance the character and appearance of the Selborne Conservation Area and the setting of nearby listed buildings. The development would

> have no adverse impact on the amenities of neighbouring residents and the landscaped nature of the site would be retained through the retention and provision of trees and hedgerows. ….
>
> 2.34 In their comments of 16/11/20 the Landscape Officer advised that, 'Parked cars do not create the most appropriate or characteristic edge to Selborne, this space should be revisited'. In recognition of this and the 'countryside edge' that forms the eastern edge of the development site and the designated greenspace immediately beyond this, the car parking for the tourist accommodation was moved internally to the site to protect this sensitive rural 'interface'. The new integrated car parking court will sit behind the belt of mature Cyprus, Holly, Ash and Spruce trees which will serve to shield the cars from longer distance views. The amendments to the proposal were made at the explicit request of the LPA's Landscape consultee and are considered to constitute betterment of the pre-existing relationship of the site with the countryside edge."

21. The authorised Tree Works had therefore resulted in the felling of mature trees which had been depicted as to be retained on the Tree Protection Plan and which formed part of the appeal proposal. The removed trees included three mature ashes (T1, T1a and T8), a cherry (T2), and a spruce (T6). The ashes would not be replaced, and the spruce would be replaced with either a fruit tree or hedging. The Cyprus (T3 and T4) and Apple (T7) would be retained but pruned.

22. The appeal was duly allocated to an Inspector appointed by the First Defendant. The Inspector then carried out a site visit on 8 November 2022. By decision letter (DL) dated 6 December 2022 the appeal was allowed and planning permission was granted.

THE DECISION LETTER

23. The DL deals with the issue of character and appearance at paragraph 20 onwards. Paragraphs 20-22 set the scene in terms of the location of the buildings within the settlement and their layout within the site. The Inspector then goes on to describe the proposals. At paragraphs 28-29 she considers the impact of the new building on the character and appearance of the area given the proposed landscaping.

> "28. The positioning of this new building would entail the removal of the existing hedgerow which lines the edge of Huckers Lane, and which contributes in part to the introduction of the verdant character to the north. Despite this, due to its height and low eaves level, the new building would not obstruct longer views to the countryside to the north and views of mature trees would remain apparent from the High Street. For these reasons despite the dilution in rural character at this point, I do not find the removal of the hedgerow would be harmful to the significance of the SCA.

> 29. The proposals would retain trees at the back of the site with the exception of one tree positioned at the car park access, which would be removed. Those trees at the back of the appeal site would continue to form the backdrop to the development and contribute to the appreciation of open space to the rear. The protection of the retained trees could be adequately secured by condition and the supporting plans indicate a no-dig method would be used in construction of the parking areas close to those trees. I consider that the alterations to the access onto Huckers Lane would not cause visual harm or conflict with the character of the area, given the varied nature of other vehicular accesses in the wider area. "

24. The Inspector goes on to conclude that the proposal would preserve the character and appearance of the Conservation Area. Then, after finding in favour of the proposal on both issues, the Inspector concludes that planning permission should be granted and goes on to consider the imposition of appropriate conditions (DL40-DL46). At paragraph 42 she said:

> "To protect the character of the area, conditions are required which secure protection of the retained trees on the site, secure the scheme of soft landscaping and ensure replacement of any trees which die within a five year period, in order to ensure that the soft landscaping becomes established. "

25. The condition imposed read as follows:

> "5) Throughout the construction process, including demolition phases, the trees to be retained on the site shall be protected in full accordance with the details contained in the document 'Arboricultural Method Statement and Tree Survey' by Partridge Associated, dated 8 March 2021 and drawing 2247/1B. "

DISCUSSION

26. Mr Riley-Smith contends that the Claimant's case is straightforward. It is that the Inspector was under the mistaken belief that some of the trees which were to be retained on the site, as part of the appeal proposal, had not been felled.

27. There can be no dispute that the landowners had felled trees that were depicted as proposed to be retained on the Tree Protection Plan. In the appeal the Tree Protection Plan clearly refers to one Holly tree being removed and the pruning of branches from another tree. The works undertaken as part of the Tree Works Consent resulted in the removal of a number of mature trees which had been depicted as being retained. The trees which were depicted as retained in the appeal proposal but which were felled included three mature ash trees (T1, T1a and T8), one cherry tree (T2) and one spruce tree (T6). I am satisfied that this fact is objectively verifiable and uncontentious.

28. It cannot be said that the Claimant was responsible for the mistake. Indeed, it was the Claimant who was seeking to draw the implications of the Tree Works consent to the Inspector's attention.

29. The remaining matters in dispute therefore revolve around the first and fourth criteria in the E case, namely whether the Inspector was mistaken as to an existing fact and secondly whether that mistake played a material (but not necessarily decisive) part in the Decision.

30. As to mistake of fact, I must start by noting that at no point in the DL is the Tree Works Consent referenced. That is important given that the effect of the tree works consent was to render the Tree Protection Plan out of date in terms of the trees which would be retained. At DL29 the Inspector states her understanding that the proposal would retain trees at the back of the site *'with the exception of one tree positioned at the car park access which would be removed'*. That statement is an accurate reflection of the position as represented by the Tree Protection Plan.

31. Mr Stemp contends that the Inspector would have been aware of the removal of the trees on the site visit. At the date of the site visit the Holly tree T5 had been removed but the DL refers to one tree which 'would be removed'. That clearly anticipates a future removal of a tree on the site. It is indicative of a lack of awareness as to the trees which had been removed and the trees proposed to be retained under the appeal proposal which no longer existed. If the Inspector had appreciated that some trees which were proposed to be retained, had in fact already been removed, it is logical to expect this to have been recorded as the baseline position against which the subsequent assessment as to the effects on character and appearance was to be made.

32. Mr Stemp sought to persuade me that a fair reading of DL29 would indicate that the Inspector was saying that some trees would remain at the back of the site when the proposal was built out. However, that does not take account of the context in which the word 'retain' is used throughout the DL. The Tree Protection Plan refers to retained trees meaning those trees which are existing and which are to be protected and kept as part of the appeal scheme. DL29 when describing the effects of the proposal uses the word 'retain' and the condition imposed seeks to retain the trees by reference to the Tree Protection Plan. The word retain is consistently used throughout and I do not accept that inserting the word 'existing' before the word retain in DL29 would be necessary to render good the Claimant's submission that retain means to continue to have. The DL stands to be read as a whole and when read as a whole, the assessment is clearly based on the understanding that the retained trees would be those existing trees as depicted to be retained on the Tree Protection Plan.

33. The Inspector goes on to confirm that retention of the trees could be secured and protected by the imposition of a condition [DL29]. This is reinforced at DL42 when the Inspector again sets out the requirement for a condition to 'secure protection of the retained trees on the site' by reference to the Tree Protection Plan. In order to impose such a condition the Inspector had to be satisfied that it passed the necessary policy tests set out at paragraph 56 of the National Planning Policy Framework. Those tests require, inter alia, for conditions to be

enforceable and precise. The requirement to protect retained trees which had already been felled was clearly not enforceable and nor was it precise. The imposition of such a condition supports a finding that the Inspector was under a mistaken belief.

34. It is relevant to note that three of the trees proposed to be retained on the Tree Protection Plan, T1, T1a and T8 were outside the red line area and condition 5 would only bite against those trees within the red line. It is unclear as to whether the Inspector was aware of this matter. There were clearly a significant number of plans associated with the appeal, they are recorded in condition 2. Notably there is no red line depicted on either the landscape plan or the Tree Protection Plan, so it would have required a read across from another plan to understand which of the trees on the Tree Protection Plan were within the red line.

35. If the Inspector was aware of the three trees outside the red line, and had intended to impose the condition requiring protection of the retained trees on site, the trees to be retained on site included the removed trees T2 and T6 and the Inspector's analysis at DL29 contains no reference to these trees having been removed. This is distinctly at odds with her care in describing the proposals as retaining '*trees at the back of the site <u>with the exception of one tree</u> positioned at the car park access'*. [my emphasis]

36. Mr Stemp also pointed out that the Aboricultural Method Statement was effectively imposing areas of no dig and root protection areas in relation to trees which were no longer there. He said that it rendered part of the condition otiose and that fairness demanded that there was an appreciation as to the evolution of the proposal and the history of the site. The point however remains that the imposition of this condition and the requirement to carry out development in accordance with the Tree Protection Plan is indicative of a conclusion on the part of the Inspector that, at the very least, it was necessary to protect and secure the trees depicted as to be retained within the red line.

37. Mr Stemp argued that the tree works provided that the felled trees T2 and T6 would be replaced and in that way they would effectively be "retained". That is not a good point. The tree works consent required replacement of the cherry with an ornamental cherry and replacement of the spruce with a fruit tree or hedging. I do not accept that the word retain effectively encompasses the felling of a tree and its replacement with something different.

38. I remain satisfied that, even if the Inspector had appreciated the point about condition 5 only protecting trees within the red line, she was still under a misapprehension as to the trees proposed to be retained. I am satisfied that there was a mistake as to an existing fact and now turn to consider whether that mistake played a material part in the decision.

39. The second main issue before the Inspector was a consideration of the impact of the proposal on the character and appearance of the area, with particular reference to the Selborne Conservation Area. This matter is considered at DL20 onwards when the Inspector commences an assessment of the character of the conservation area. DL21 and DL22 go on to consider the location of the site and the existing development on site and the contribution which it makes to the

conservation area. Consideration of the effects of the appeal proposal commences at DL24 and continues.

40. At DL28 the effect of the new building is considered and for reasons set out the Inspector concludes that the removal of an existing hedgerow would not be harmful. At DL29 the Inspector is assessing the backdrop to the development comprising the trees at the back of the site. Her assessment confirms that the trees at the back of the appeal site would continue to form the backdrop to development and the alterations to the access road (which would include the removal of one tree) would cause visual harm or conflict with the character of the area.

41. The Park Authority's concern was that the new development on the site would create a busier and more intense development when viewed from the access road. This concern was the one which was being addressed in DL29.

42. It is of note that the felled trees (under the tree works) had been relied upon by D2 in promoting its appeal. This is evidenced by the appeal statement referring to the removal of the holly tree and contending that the removal of the two limbs from T1 will not affect the overall health or visual amenity of this tree. That statement goes on to say that both trees (namely the Holly Tree and T1) are part of an existing line of trees and their removal will not have a significant impact on the overall appearance and visual amenity provided by these trees. The words 'these trees' refer to the existing line of trees and the proposition is that the trees which would remain would still provide visual amenity and their overall appearance would not be significantly impacted.

43. The mature tree belt comprised the three ashes which were described as being between 16.5 metres and 17.5 metres high. If I take the point that these were outside the ambit of condition 5, that still leaves the Cherry Tree at 7.5metres and the spruce at 14 metres.

44. At DL29 the Inspector is relying on the retention of trees in continuing to form the backdrop when she concludes that the alterations would not cause harm. That conclusion fed into her overall conclusion in DL30 that the proposal would preserve the character and appearance of the Conservation Area.

45. I am satisfied that the Inspector's mistake as to the retained trees being in existence played a material part in her decision. The importance of retaining the trees was reinforced by the imposition of a condition which was deemed necessary to make the development acceptable. I am satisfied that all four criterion in E are met and these matters render the decision unlawful for the reasons given.

46. Mr Riley-Smith sought to persuade me that it was significant that the first Defendant, acting on behalf of the Secretary of State and charged with deciding whether to defend the claim against the decision of his Inspector, has now acquiesced to the quashing of the decision letter on ground 1. He argues that this concession should carry significant weight given that the nature of the challenge is fundamentally an argument about what the Inspector thought.

47. I accept that the concession may have been arrived at on the basis that it was accepted that the Inspector was under a material misapprehension. However, I equally accept Mr Stemp's submission that there may be some other reason for acquiescing to the quashing of the decision. I have arrived at my own conclusions regarding the legality of the decision letter based on the submissions in light of the evidence and the contents of the decision letter.

48. Mr Stemp contends that the Court can be satisfied that the Inspector found that the two remaining trees (which were present on the site visit) constituted an acceptable backdrop. He refers me to the photograph taken immediately after the felling on 20 May 2022. Consequently, he relies on the Simplex case and section 31(3D) of the Senior Courts Act 1981 to contend that it is highly likely that the outcome would not have been substantially different in the event that the Inspector had not made the mistake.

49. With regard to the photograph in the bundle at [HB42], I note that it was taken at 20 May 2022 and depicts the ash tree stumps immediately after felling. However, I also note that the site visit was undertaken by the Inspector on 8 November 2022, some 6 months later. It is not possible to know or to make assumptions about how the site visit was conducted and what the Inspector saw at the time of her visit.

50. Having concluded that there was a mistake as to a fact which was material to the exercise of the planning judgment of the Inspector, I am not in a position to make any determination as to whether or not the appeal proposal would have succeeded had the material mistake not been made. The mistake was material and went to the heart of the exercise of her planning judgment on key points in relation to the second issue. For these reasons I am not satisfied that it was highly likely that the decision would have been the same. The decision must be quashed on ground 1.

51. Counsel are invited to draw up an appropriate order for my approval.