

Case No: CO/3488/2012

Neutral Citation Number: [2012] EWHC 3131 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SITTING IN THE ADMINISTRATIVE COURT
CARDIFF CIVIL JUSTICE CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2012

Before:

THE HON. MRS JUSTICE NICOLA DAVIES DBE

Between :

The Queen on the application of Long

Claimant

- and -

The Welsh Ministers

Defendant

Monmouthshire County Council

First Interested

Party

Optimisation Developments Ltd

Second Interested

Party

Mr John Steel QC and Ms Jennifer Thelen (instructed by **Richard Buxton**) for the **Claimant**

Mr Clive Lewis QC (instructed by **Welsh Government**) for the **Defendant**

Mr Richard Ground (instructed by **Eversheds LLP**) for the **First Interested Party**

Mr James Maurici (instructed by **Gordons LLP**) for the **Second Interested Party**

Hearing dates: 3 October 2012

Judgment

Mrs Justice Nicola Davies:

1. This is an application for judicial review of:
 - i) The decision announced by the Minister for Local Government and Communities, Wales to lay an Order to repeal section 28 of the Abergavenny Improvement Act of 1854 (“the 1854 Act”) including, section 26 of the 1854 Act to the extent that it affects section 28 of the Act; and
 - ii) The subsequent order, namely the Abergavenny Improvement Act 1854 (Repeal) Order 2012.
2. The Order was made by the Minister on 28 February 2012, it was laid before the National Assembly for Wales on 2 March 2012 and came into force on 26 March 2012. The Order was made under section 58(2)(d) of the Local Government (Wales) Act 1994 (“the 1994 Act”).
3. The claimant is the founding member of the Abergavenny town and surrounding rural community opposition group “Keep Abergavenny Livestock Market (“KALM”). KALM was formed in 2009 to oppose the loss of the livestock market in Abergavenny. The claimant brings these proceedings on behalf of KALM.
4. The claimant challenges the decision on the ground that it was made in error of law in that:
 - i) It was made unlawfully, unreasonably and/or irrationally as the Welsh Ministers misdirected themselves in determining that section 28 of the 1854 Act was “spent, obsolete, unnecessary or substantially superseded”; and
 - ii) The Minister gave the existence of a power under section 50 of the Food Act 1984 (“the Food Act”) to hold a market as a reason for reaching his decision that the duty or requirement under section 28 was obsolete, unnecessary or substantially superseded; this was not open to him to do, as the existence of a power to hold a market under one Act cannot be a proper reason for concluding that a duty or requirement to hold a market under another Act is obsolete, no longer necessary, or substantially superseded;
 - iii) The Welsh Ministers in making their decision expressly ignored and/or failed to take into account:
 - a) The economic, social, environmental and other issues relating to the effect of section 28 remaining in force, which requires the Council to continue to hold a market in Abergavenny, as against those of section 28 being repealed;
 - b) The consultation replies sent to the Ministers including those relating to the merits of there ceasing to be a market in Abergavenny.
5. On 7 June 2012, permission for judicial review was refused by Singh J. Following a renewal application, on 25 July 2012 permission for judicial review was granted by Beatson J.

Legislative background

6. The Abergavenny Improvement Acts dated 1854, 1860 and 1871 conferred functions and duties on the then Abergavenny Commissioners which were transferred to successive institutions of elected local government and now largely lie with Monmouthshire County Council (“the Council”).
7. Section 28 of the 1854 Act, read in conjunction with section 26 of the 1854 Act and the provisions of the Markets and Fairs Clauses Act 1847 (the “1847 Act”), and subsequent amending legislation, require the Council to hold a livestock market within the town of Abergavenny on designated land in the current town centre. Since the 1854 Act there has been a livestock market on the site in the town centre of Abergavenny held on certain days.
8. The 1854 Act provides for the livestock market as follows:
 - i) for a market to be held in Abergavenny on a specified area (described as the “yellow land”) (ss.3 and 28);
 - ii) incorporates the 1847 Act (s.26); and
 - iii) authorises the Commissioners from time to time to construct a market for the sale of horses, cattle, pigs and other live animals (s.28).
9. Section 14 of the 1847 Act provides:

“After the market place or place for fairs is opened for public use the undertakers shall hold markets and fairs therein on the prescribed days (if any), and on such other days as the undertakers shall appoint from time to time by any byelaw to be made in pursuance of this or the special Act.”
10. Section 50 of the Food Act 1984 (“the Food Act”) provides:

“(1) A local authority may -

 - (a) establish a market within their area;
 - (b) acquire by agreement (but not otherwise), either by purchase or on lease, the whole or any part of an existing market undertaking within their area, and any rights enjoyed by any person within their area in respect of a market and tolls

and, in either case, may provide

 - (i) a market place with convenient approaches to it;
 - (ii) a market house and other buildings convenient for the holding of a market.

(2) A market shall not be established in pursuance of this section so as to interfere with any rights, powers or privileges

enjoyed within [the authority's area] in respect of a market by any person, without that person's consent."

Repeal of the Abergavenny Acts

11. Section 58(2)(d) of the 1994 Act provides a power to repeal statutes which meet specified criteria. Pursuant to section 57(1) of the 1994 Act, local statutory provisions which apply as of 1 April 1996 continue to apply after that date.

Section 58 provides:

"(1) This section applies where any local statutory provision ("the relevant provision") is

(a) continued in force in any area by section 57, or

...

(2) The Secretary of State may by order or (as the case may be) the modifying order may –

...

(d) repeal or revoke any local statutory provision to which this section applies and which appears to the Minister to have become spent, obsolete or unnecessary or to have been substantially superseded by any enactment or instrument which applies or may be applied to the area, persons or things to which or to whom the relevant provision applies.

..."

12. The functions under section 58 of the 1994 Act were transferred to the Welsh Assembly and thereafter to the Welsh Ministers by article 2 of the National Assembly for Wales (Transfer of Functions etc) Order 1999 and paragraph 30 of Schedule 11 to the Government of Wales Act 2006.

The livestock market

13. The livestock market site is 1.9 hectares in size, situated on land that is part of the original yellow boundary land. It is predominantly hard standing and incorporates a number of buildings on the site. The livestock market is currently leased to the Abergavenny and Newport Market Auctioneers Limited ("ANMAL"). In July 2005, the Council entered into an agreement with the former market operator, Abergavenny Market Auctioneers Limited ("AMAL"), whereby AMAL would relinquish the use of the existing livestock market and the Council would provide a new livestock market, which is currently proposed to be near Raglan, some ten miles away.
14. On 7 November 2011 the Council granted planning permission for "the demolition of the existing livestock market and associated buildings and the construction of a new library, supermarket and associated car park and landscaping" on the current livestock

market site to Optimisation Developments Ltd. The claimant is also seeking review of that grant of planning permission in related but separate proceedings.

15. A Memorandum of Understanding between the Council, the National Farmers Union (“the NFU”) and the Farmers Union of Wales (“the FUW”), whereby the Council will undertake to provide a livestock market for farmers for 50 years, has been agreed. The claimant takes issue with this agreement, her case being that the NFU and FUW do not represent the views of the majority of upland farmers in Abergavenny and the surrounding district.

Factual background

16. The Council applied to the Welsh Ministers for an order repealing the material provisions of the 1854 Act. The Council noted that they now had powers to hold markets under the Food Act and that the 1854 Act would prevent the establishment of a new market outside the town in a more suitable location which, in turn, would prevent the regeneration of town centre.
17. The Welsh Ministers’ preliminary view was that there was a strong case in principle for repealing the 1854 Act. A decision was made to consult on the proposed repeal. The consultation letter of 13 September 2011 included the following:

“Subject to this consultation, the Minister is minded in principle to repeal the relevant provisions of the Improvement Acts, on the grounds that they impose a highly unusual restriction on Monmouthshire County Council which prevents it from implementing reasonable decisions about the redevelopment of Abergavenny. All local authorities, including Monmouthshire County Council, have other permissive powers (in the Food Act 1984) governing livestock markets, and there is no need for provisions in the Improvement Acts relating specifically to Abergavenny. Accordingly, we consider in principle that the provision concerning the holding of the livestock market in Abergavenny town centre is obsolete, unnecessary and substantially superseded. We also believe that the Council’s planning processes have offered ample opportunity for interested parties to comment on the detailed processes for the current market site, and that the decision it has made following those processes should now be implemented. However, we wish to consult representatives of market users before coming to a final decision about any repeal.

The Minister has no view on the proposals for the development of the site, or on the proposed construction of a new market at Raglan. These are of course matters for Monmouthshire County Council, and we cannot take these matters, or any views about them, into account in deciding whether to repeal the relevant provisions in the Improvement Acts.”

18. On 19 October 2011, the Minister for Local Government and Communities issued a statement regarding the scope of the consultation:

“I have a power in the Local Government (Wales) Act 1994 to repeal Acts such as these where it appears to me that they are “spent, obsolete or unnecessary”. The Council has asked me to do just that; and my officials are currently consulting users of the market on whether I should do so.

...

It is vital to understand that the question before me has nothing to do with the proposals to close the current market, to construct a new market at Raglan, or to allow Morrisons to open a supermarket on the site. Those are matters for the Council, and it is for the Council to account for the decisions its planning committee makes. The Acts do not require the market to be held on the current site, nor do they prohibit redevelopment of that site. Repealing the Acts would not require the current market to close, and strictly speaking, retaining the Acts would not require the current market to remain open. Either way, the Council’s decision to grant planning permission will stand, and it is up to the Council and its developers to implement it.

Rather, I need to consider whether the Council should remain subject to the requirement that the Acts appear to impose. So far as we know, no other local authority in Wales, and possibly beyond, is subject to such restrictions. All other local authorities can operate livestock markets under powers in the Food Act 1984. I am therefore conducting a consultation on a possible repeal of the acts.

...

Nonetheless, it is clear from correspondence I have already received that this remains a very controversial issue within the town and beyond. It would be wrong to ignore such feelings. I am therefore inviting all views and responses from anyone with an interest in this issue, not just market users, by the end of November ...”

19. The “correspondence” received by the Minister included letters and representations from local farmers, traders, livestock dealers, shopkeepers, residents, many of whom were members of KALM. They said that they, and other users of the livestock market, would be significantly and detrimentally affected by the repeal of section 28, as would the town and townspeople of Abergavenny, as this would inevitably lead to the closure of the market. Representations also referred to the economic, social and environmental effects of closure. Many said that their livelihoods would be severely affected. Reference was made to the beneficial effect the market had on the town of Abergavenny, one of the oldest market towns in Wales. The market was said to be

thriving and, but for the threat of closure, would be able to continue indefinitely. Representations also referred to the market giving Abergavenny a special Welsh character and identity. The Ministers were asked not to repeal the provision.

20. Following the consultation, on 11 January 2012, the Minister announced his intention to make an order repealing the relevant parts of the Abergavenny Acts. His statement included the following:

“ ... I can have no view on this matter or on wider development issues in the town. Whether the market should close; whether there should be a Morrisons and a new library; and whether there should be a new market near Raglan are all local issues. They are certainly important and complex, but they should be decided by the Council in the normal course of business, as they are everywhere else in Wales and beyond. Those who oppose such plans should likewise seek to influence the Council. And it must be for the Council to justify the decisions that it makes, on this issue or any other. It should not be able to hide behind mid-Victorian statute or my role in possibly repealing or it, and to its credit it has not sought to do so.

That is why I believe the relevant provisions of the Abergavenny Improvement Acts should be repealed, and that Monmouthshire County Council should be fully and properly accountable for local development matters. I repeat that this is not about what happens to the market. It is a question of how decisions about the market and the town are made. I cannot see any good reason why Monmouthshire County Council should be treated any differently from other local authorities in this regard. They should be able to take local decisions about livestock markets or anything else, and should be held accountable for them. The Acts prevent this. They are an unjustifiable constraint on local democracy.

In particular, I believe the provisions dealing with livestock markets are unnecessary, because there are other more modern powers available to all local authorities governing livestock markets. They are also obsolete, because they impede the Council's accountability and decision-making ability. I heard nothing from our consultation which would lead me to an alternative view.

...

I will therefore make an order repealing the Acts shortly; and that order will come into force one month after it is made.”

The decision

21. The Abergavenny Improvement Act 1854 (Repeal) Order 2012 (the “Order”) provides:

“It appears to the Welsh Ministers that section 28 of the Abergavenny Improvement Act 1854, being a local statutory provision for the purposes of section 57 and 58 of the Local Government (Wales) Act 1994, has become obsolete and unnecessary and has been substantially superseded by [sections 50 and 53] of the Food Act 1984.

...

2. Section 28 (commissioners may form and construct cattle market and slaughterhouses) of the Abergavenny Improvement Act 1854 (the “1854 Act”) is repealed (including to the extent that section 26 (incorporation of the Markets and Fairs Clauses Act 1847 of the 1854 Act has effect in relation to section 28).”

The Explanatory Note to the Order provides:

“The ground on which the Order is made is that the repealed provision is obsolete, unnecessary and has been superseded. The Food Act 1984 contains provisions concerning the establishment and operation of livestock markets and applies to county councils, county borough councils and community councils in Wales.”

22. The Minister also issued an Explanatory Memorandum (the “Explanatory Memorandum”) which provided:

“The Council approached the Welsh Government to seek the repeal of these provisions on the grounds that they are an unjustified and obsolete constraint on its ability to make decisions about the development of Abergavenny and about the provision of livestock market in the County. All local authorities (including Monmouthshire) have modern discretionary powers governing livestock markets in the Food Act 1984.

The Welsh Ministers have powers in section 58 of the Local Government (Wales) Act to repeal local Acts such as these by order where it appears to them that such acts are “spent, obsolete or unnecessary or to have been substantially superseded.

Following consultation, the Minister for Local Government and Communities determined that section 26 (in so far as it related to section 28) and section 28 of the 1854 Act were indeed obsolete and unnecessary, and have been superseded by the provisions of the Food Act 1984. This Order repeals those sections. Other provisions in the Abergavenny Improvement Acts are not affected.

...

As a result, the Council will be free of the obligations which the repealed sections of the Act impose. It will be in the same position as any other local authority in that it will be able to operate livestock markets anywhere in the County under the Food Act 1984.”

23. The Welsh Ministers have stated that the reasons for the Order appear from the provisions of the Order itself, the Explanatory Note to the Order, the Explanatory Memorandum to the Order and the Written Statement by the Welsh Government dated 11 January 2012.
24. The analysis of the Welsh Ministers’ reasons as contained in the defendant’s submissions is as follows:
 - i) Section 28 is unnecessary because there are more modern powers available to all local authorities governing livestock markets;
 - ii) Section 28 is obsolete because it impedes the Council’s accountability and decision-making ability; it is an “unjustifiable constraint on local democracy”; and
 - iii) Section 28 has been substantially superseded by section 50 of the Food Act.

The claimant’s case

Ground 1

25. The claimant contends that the decision was made in error of law in that it was made unlawfully, unreasonably and/or irrationally in that section 28 of the 1854 Act is not spent, obsolete, unnecessary or substantially superseded. All parties accept that the “spent” provision within s.58(2)(d) is not applicable.
26. The approach to a decision pursuant to s.58(2)(d) is said by the claimant to encompass two stages:
 - i) Stage one: the Minister must consider whether or not a provision which comes within the ambit of s.58 is “spent, obsolete, unnecessary or substantially superseded”, if so, the Minister is seized with the power to repeal;
 - ii) Stage two: the Minister should then consider whether or not to exercise that power.
27. The first stage, described as the “gateway” to stage two is said to be one of mixed fact and law, requiring an objective assessment by the Minister of the relevant issues. During the course of the hearing, Mr Steel QC, on behalf of the claimant, accepted that this stage encompasses the exercise of judgment. The discretion to be exercised by the Minister at this stage must be done in an “objective way”. The second stage is the exercise by the Minister of a discretionary power which is wide in its ambit.
28. The claimant accepts that the Court has the power to intervene if the Minister misdirects himself on the law in relation to the first stage. The Court may intervene in relation to the second stage applying what is described by the claimant as “well known administrative law principles” – generally, whether the Minister has failed to

take into account a material consideration, taken into account an irrelevant consideration, or has otherwise acted irrationally. The claimant contends that the Minister must first consider the provision sought by an applicant authority to be repealed, and matters relating to it including its intent, purpose and subject matter. The Minister must then ask whether having regard to those matters the provision is “obsolete”, “unnecessary”, or “substantially superseded”.

29. It is agreed that s.28 has a relatively simple intent, purpose and subject matter. It is to provide for a livestock market for local farmers, townspeople and others in the town of Abergavenny at a designated site. The claimant also submits that its purpose is to give the town of Abergavenny and its environs a distinct Welsh character. As the defendant and the interested parties have noted, this is no part of the statutory provisions.
30. Section 26 of the 1854 Act provides for the market to be held indefinitely. Given its thriving nature, the claimant submits that neither the subject matter, nor the intent or purpose of the provision, has become “obsolete” or “unnecessary”, or “substantially superseded”. Further, the provision is necessary, given the statements made by the Council that it is their intention that the market would cease to be held and that the site would be redeveloped in the event that section 28 were to be repealed by the Welsh Ministers.
31. The existence of a power to hold a market under the Food Act does not mean that section 28 has been substantially superseded. The purpose and effect of the provision is a statutory requirement for the Council to hold a market on land set aside and designated for the purpose. That may be awkward or frustrating to the current members of the Council who wish to sell the land to a developer, however, it is essential that the users and beneficiaries of the livestock market continue to receive that statutory protection.
32. In passing the Food Act, Parliament did not repeal any of the existing provisions relating to markets. Thus, the claimant contends, in 1984 Parliament did not itself conclude that provisions imposing a requirement under a local Act to hold a market once established and open to the public were unnecessary, obsolete or substantially superseded by the provisions it was passing. This is to be contrasted with section 262(12) of the Local Government Act 1972, disapplying statutory undertakings (including markets) from the effects of a provision causing local statutory provisions to cease to have effect.
33. Specifically, as to the power provided by s.58 of the 1994 Act, the claimant contends that it can only be used to repeal statutory provisions conferring a power to hold a market and cannot be used to repeal a statutory provision imposing a duty.

Ground 2

34. At the hearing, the claimant sought leave to amend Ground 2 which stated:

“... the Decision ... was made in error of law in that it was made unlawfully, unreasonably and/or irrationally:

...

In that the Minister took into account a number of irrelevant considerations in reaching the Decision”

The amendment seeks to include the following:

“Based on the correspondence set out above, a number of relevant considerations have failed to have been taken into account and a number of irrelevant considerations have been taken into account in making the Decision. The Minister has also acted irrationally.”

It was agreed that the claimant’s application was to be determined by the Court having heard all parties’ submissions upon the substance of Ground 2.

35. In essence, the claimant’s case is that the Welsh Ministers failed to take into account the consequences of the contemplated repeal. The claimant relies upon the following extracts from statements made by the Minister:

“ ... It is vital to understand that the question before me has nothing to do with the proposals to close the current market, to construct a new market at Raglan, or to allow Morrisons to open a supermarket on the site. Those are matters for the Council, and it is for the Council to account for the decisions its planning committee makes”

(19th October 2011 Statement)

“I can have no view on this matter or on wider development issues in the town. Whether the market should close; whether there should be a Morrisons and a new library; and whether there should be a new market near Raglan are all local issues. They are certainly important and complex, but they should be decided by the Council in the normal course of business, as they are everywhere else in Wales and beyond. Those who oppose such plans should likewise seek to influence the Council. And it must be for the Council to justify the decisions that it makes, on this issue or any other. It should not be able to hide behind mid-Victorian statute or my role in possibly repealing or it, and to its credit it has not sought to do so.”

(11th January 2012 Statement)

36. It is said these statements demonstrate that the Minister deliberately determined not to take into account the consequences of the repeal. The Minister cannot properly and lawfully exercise his discretion at stage two without taking into account these matters, they being relevant issues.
37. As to such consequences, it is submitted that the closure of the market could have significant economic, social, cultural and environmental effects on an area of Wales within the jurisdiction of the Minister, or in relation to issues for which the Welsh Ministers are responsible in Wales, including what is described as localism and

sustainability. The Welsh Ministers have to consider these matters from the perspective as overseeing Ministers for Wales, not as a proposing local authority, where the approach and weight given to such issues or any of them is likely to be different. If there is overlap between issues to be considered by a local authority and Welsh Ministers, this does not absolve the Ministers from considering the same issue.

38. Reliance is placed upon the authority of *R v North and East Devon HA, Ex p Coughlan* (CA) [2001] QB 213, para 108 per Lord Woolf MR:

“It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.”

39. Pursuant to *Coughlan* the point is made that the Welsh Ministers are “duty bound in law” to take account of the representations made in response to the consultation, failure to do so renders the consultation a hollow process. Those consequences are extreme for some market users who would be deprived of their livelihoods if the market were to close, with economic, social and environmental consequences for the town and its townspeople. Further, the representations spoke to the “feelings” of individuals which were evidence based.

40. Thus it is said:

- i) The Minister was duty-bound in law to take into account the views of consultees in relation to the consequences of the repeal of the provision, as this was the likely consequence of the exercise of his discretion to repeal the provision and a highly relevant consideration. As such considerations were expressly excluded from his decision-making, the Minister failed to exercise his discretion properly in accordance with law.
- ii) As the Minister closed his mind to such matters, he acted irrationally. He also acted irrationally in determining that these were local (planning) matters for the Council alone and not relevant matters for him.

The defendant’s case

41. In summary the defendant’s case is that:

- i) The 1854 Act imposed a duty upon the Council to hold a market in a particular location, that location being in the yellow part of the town plan as identified in 1854;

- ii) The 1994 Act empowers the Welsh Ministers to repeal the specific provision where it appears to be obsolete or unnecessary or to have been substantially superseded;
 - iii) The Welsh Ministers considered the provision compelling a local authority to hold a market in a specific location and found it to be obsolete and outdated in that it impeded the ability of the local authority to hold a market where and when it was deemed appropriate within the local government area. The provision is unnecessary as there is now a statutory power enabling the local authority to hold a market where and when it considers appropriate. The statutory provisions in the 1854 Act have been substantially superseded by a modern statutory regime contained in the Food Act which enables a local authority to determine where and when to hold a market.
42. The decision to repeal the 1854 provisions was taken by the Welsh Ministers who were well aware of the consequences of the repeal and took them into account. The legal consequence of the repeal is that the Council is freed from its obligation to hold a market at a specific location. The Welsh Ministers were entitled to take the view that in repealing the provision and relieving the Council of the obligation to hold a market within the yellow land, it was appropriate for the Council to decide thereafter how to exercise its statutory powers as to the holding of the market. The decision making process was not irrational, no mistake of law was made, there was no failure to have regard to considerations which, as a matter of law, have to be taken into account pursuant to section 58 of the 1994 Act.
43. It is common ground that the requirements of section 58, as evidenced by the specific words, are alternatives. The Welsh Ministers are required to be satisfied of only one matter ie “obsolete” or “unnecessary” or “substantially superseded” in order for a repeal to follow.

The Order

44. The wording of the Order includes in its reasoning the exact words contained in section 58 of the 1994 Act, namely “obsolete, unnecessary and substantially superseded.” The Explanatory Note uses the same words. The Explanatory Memorandum makes clear that the repeal does not require the Council to do anything about the livestock market or otherwise, it merely frees it from the obligations imposed by sections 26 and 28 of the 1854 Act.

Ground 1

45. The defendant contends that the first stage of the claimant’s two stage test involves the exercise of judgment or evaluation. This is demonstrated by the words “which appears to the Minister to have become spent ...” a point relied upon by Singh J in refusing permission where he stated:

“The enabling power in section 58(2)(d) of the Local Government (Wales) Act 1994 confers a wide discretion on the Defendants to form a view and exercise judgment about which local statutory provisions have become spent, obsolete or unnecessary, or have been substantially superseded.”

46. As to the evaluation, there is no suggestion by the claimant that the wrong test was used by the Welsh Ministers, who used the words provided by the statute. In the circumstances, the Court could only interfere if the exercise of that judgment by the Welsh Ministers was *Wednesbury* unreasonable. It is the defendant's case that the decision made by the Welsh Ministers was well within the permissible range of judgment, there is no suggestion that they misunderstood the words.
47. The defendant's case is that the issue for the Welsh Ministers and the question, which had to be addressed, is whether an obligation to hold a market at a particular location is an obligation that the Welsh Ministers can conclude is obsolete, unnecessary or has been substantially superseded. Whether or not the market is thriving was not a consideration which had to be addressed in answering the question. In short, its absence as a consideration does not render the decision unlawful.
48. Further, as to the claimant's contention that the power conferred by section 58 of the 1994 Act can only be used to repeal statutory provisions conferring a power to hold a market and can never be used in respect of an earlier statutory provision imposing a duty, there is no basis for such a construction. Section 58(2)(d) permits the repeal of "any" statutory provision. In principle, that must include a statutory provision which imposes an obligation and is not confined to a provision which confers a power.
49. Against that background, there is no reason in law why the Welsh Ministers cannot conclude that an obligation to hold a market at a particular location on particular days is obsolete or outdated. A local authority ought to be able to determine where and when a market should be held within its area rather than being forced to hold it at a particular location on particular days. It is open to them to conclude that it has become unnecessary to compel the Council to hold a market at a particular location given that it now has powers to hold a market where and when it considers it appropriate. Further, it is open to the Welsh Ministers to conclude that the modern statutory regime, provided by the Food Act, has substantially superseded (i.e. replaced or rendered unnecessary) a specific obligation to hold a market in a particular location. It is of note that no other local authority in Wales is subject to the same constraints.
50. The defendant relies upon two private acts of Parliament enacted to remove obligations similar to section 26 of the 1854 Act on the grounds that such provisions were out-dated and/or restrictive and required replacement with modern provisions. The enactments are the St Austell Market Act 1842 and the Hereford Improvements Act 1854. It is right to note that the claimant places a different interpretation upon provisions in these statutes. Embarking upon an analysis of the competing submissions will be of limited effect for the purpose of my decision, suffice it to say that had I found it necessary to rely upon this limb of the defendant's submissions in order to reach a decision I would have accepted the defendant's interpretation.

Ground 2

51. The response on behalf of the Welsh Ministers is succinct: the legal consequence of the repeal is that the Council will no longer be obliged to hold a market at a particular location but will have a power to hold a market anywhere within their administrative area. What the claimant seeks to do is elide the legal consequence of the repeal – the removal of the obligation to hold a market – with the merits as to what the Council may or may not do in relation to the site. This is a flawed approach. A distinction is

to be drawn between the consequences of the repeal and the consequences of the exercise of the power by the Council pursuant to the Food Act following the repeal of s.28 of the 1854 Act.

52. The Welsh Ministers are not obliged to form a view upon the merits of any particular proposal for redevelopment of the site or the construction of a market on an alternative site. The Welsh Ministers have consistently taken the view, which they are entitled to do, that any particular scheme of development, and the planning considerations relevant to those matters, would be for the Council not the Welsh Ministers to determine.
53. The stance to be adopted by Welsh Ministers was specifically referred to in the consultation letter dated 13 September 2011. The consequences of repeal are addressed in the Explanatory Memorandum which notes that as a result of repeal “the Council will be free of the obligations which the repealed sections of the Act impose”. Reference was also made to the fact that the Council will then be in the same position as any other local authority in Wales, free to operate livestock markets anywhere in the county under the Food Act. The Welsh Ministers made clear that they would not form a view as to the Council’s proposal and siting, as is usual. The parameters of the Welsh Ministers’ position and the consultation were clear; they could not be misunderstood. The fact that some who responded to the consultation ignored the identified parameters and expressed views upon the Council’s proposals cannot elevate those representations into material considerations. Thus, there was no duty upon the Welsh Ministers to take account of such representations, nor did the statute require such matters to be so considered.

The interested parties

54. Both interested parties adopted and supported the Grounds of the Welsh Ministers and the other interested party. Mr Ground, on behalf of Monmouthshire County Council, and Mr Maurici, on behalf of Optimisation Developments Ltd., provided detailed written submissions and some oral submissions. It is no reflection upon the quality of the submissions made on behalf of the interested parties that limited reference is made to them. It is simply that much of the ground has been referred to in the submissions of Mr Lewis QC, on behalf of the defendant.

The first interested party: Monmouthshire County Council Ground 1

55. The Welsh Ministers did not misconstrue the statutory test, they correctly cited it. Any challenge founded upon the rationality of the exercise of judgment is a very high hurdle to surmount, *R v Monopolies Commission ex parte S Yorks Ltd* [1993] 1 WLR 23 Lord Mustill at [32]:

“In such a case the Court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classified as rational: *Edwards v Bairstow* [1956] A.C.14.”

56. The decision taken by the Welsh Ministers is neither unreasonable nor perverse.

Obsolete

57. The 1854 Act requires the livestock market to be held in the boundaries of nineteenth century Abergavenny. A decision made in the mid-nineteenth century has demonstrably become obsolete given that the authority now has a power to choose where to create a market. A decision made in the twenty first century that there is a more appropriate place for the market clearly renders out of date the earlier requirement for a particular location. Further, the earlier provision impedes the decision making ability of the Council.

Unnecessary

58. The Welsh Ministers are entitled to take the view that it is unnecessary to have prescriptive control of the livestock market in Abergavenny when the remainder of Wales can survive without this restriction. They are entitled to rely on the Council choosing and being accountable for the provision of the livestock market.

Substantially superseded

59. This provision does not require a “like for like” replacement of statutes. The language of the 1994 Act is wider and allows local Acts to be repealed if they are substantially superseded. As to the claimant’s contention that the Food Act did not repeal the 1854 Act, this is said to have little bearing upon whether the Welsh Ministers should view the 1854 Act as substantially superseded by the enactment of their discretion under the 1994 Act. The purpose of s.58(2)(d) is much wider than merely enabling the Welsh Ministers to repeal local statutory provisions. The fact that Parliament did not repeal the 1854 Act in the Food Act does not mean that the Welsh Ministers using a wide power, should not do so on the facts of this case. The exercise of judgment was rational.

Ground 2

60. The same points are relied upon by the Council as submitted by the Welsh Ministers.

The second interested party: Optimisation Developments Ltd

Ground 1

61. The approach of the Court to undefined, ordinary words is to allow a broad discretion as a matter of fact and judgment as to their application. *Edwards v Bairstow* [1956] AC 14, 33 and *R v Monopolies & Merger Commission ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23, per Lord Mustill, 29 and 32.
62. The approach to the principal issue on Ground 1 is whether the view taken by the Welsh Ministers, as a matter of fact and judgment, that the relevant parts of the 1854 Act were obsolete, unnecessary or substantially superseded, was irrational or *Wednesbury* unreasonable having regard to the legitimate broad range of meaning attached to such words. In this regard, the claimant faces a high hurdle. None of the matters relied upon by the claimant demonstrate that this is the case.

Ground 2

63. This is unsustainable. The decision of the Welsh Ministers was focused upon whether to repeal the relevant parts of the 1854 Act. The Welsh Ministers rightly concluded that any decision as to when and where to hold a market and/or on the planning merits of any redevelopment of the cattle market site were matters for the Council. The decision was made as a result of the Welsh Ministers properly directing themselves as to the consequences of the repeal, namely that the Council would be free of the obligations that the repealed provisions of the 1854 Act imposed. That was the only consequence which the Welsh Ministers were reasonably required to take into account.

Conclusion

Ground 1

64. The intention of s.28 of the 1854 Act was to provide a livestock market in the town of Abergavenny at a designated site. It is a unique provision within Wales and one which restricts the decision making ability of the Council. The provision was enacted nearly 160 years ago. Abergavenny has not stood still since the nineteenth century.
65. The wording of s.58(2)(d) permits the repeal of “any statutory provision”. I am satisfied that the ambit of these words include a statutory provision which imposes an obligation and is not limited to one which confers a power. The fact that the Food Act did not repeal the 1854 provision does not prevent a subsequent repeal by a different statute with relevant power.
66. The enabling power of section 58(2)(d) confers a wide discretion upon the Welsh Ministers to form a view and exercise judgment as to whether earlier statutory provisions have become obsolete or unnecessary or have been substantially superseded. The approach of the courts to undefined, ordinary words is to allow a broad discretion as a matter of fact and judgment as to their application. It is a process which involves the evaluation of facts and based upon such facts, the exercise of judgment. Within the context of this case, it requires the court:
- i) to be satisfied that there has been no misdirection as to the general meaning of the particular words; and
 - ii) to interfere with the application of such words only in cases of irrationality or *Wednesbury* unreasonableness.
67. The words contained in section 58(2)(d) are not difficult to understand, they can be given their ordinary meaning. The Welsh Ministers used the precise words of section 58(2)(d) in making their decision. There is nothing in the evidence to demonstrate any misdirection, still less any misunderstanding, as to the meaning of “obsolete” or “unnecessary” or “substantially superseded.”

Application of the relevant words

Obsolete

68. The provision requires the market to be held within the boundaries of nineteenth century Abergavenny. A location which was suitable and/or convenient in the nineteenth century is not or may not be so today. The power provided by the Food

Act allows the local authority to choose a site appropriate for the twenty first century. A finding by the Welsh Ministers that the relevant provision of the 1854 Act is “obsolete” is neither irrational nor unreasonable. It properly reflects the fact that with the passage of time the needs of individuals, organisations and communities have changed.

Unnecessary

69. Abergavenny is the only place in Wales where such a prescriptive regime exists. It is a regime which clearly restricts the local authority in the making of wider planning and development decisions. A finding by the Welsh Ministers that a provision which results in unique restrictive control upon one local authority in Wales is no longer necessary, given that the Food Act confers a power upon such an authority to hold a market where and when it considers it appropriate, is neither irrational nor unreasonable. It permits a consistency of approach throughout Wales and allows the local authority to make its own planning and development decisions.

Substantially superseded

70. I accept that in order for a statutory provision to be substantially superseded there does not have to be like for like replacement of the relevant provision. The wording of s.58(2)(d) permits the repeal of provisions which confer not only a duty but also a power. Its purpose is wider than merely enabling the Welsh Ministers to repeal local statutory provisions.
71. A modern statutory regime contained in the Food Act confers discretionary powers upon local authorities to determine where and when to hold a livestock market. Given these facts, the decision by the Welsh Ministers that the provision of the 1854 Act had been “substantially superseded” properly reflects the powers provided by the Food Act and is neither irrational nor unreasonable.

Ground 2

72. I do not grant leave to the claimant to amend Ground 2 because I regard the proposed amendment and the submissions upon which it is based as unsustainable. The legal consequence of the repeal of section 28 of the 1854 Act is that the Council will no longer be obliged to hold a market at a particular location but will have a power to hold a market anywhere within their administrative area. What the claimant has sought to do is elide the legal consequence of the repeal with the consequences of the exercise of the power conferred upon the Council by the Food Act. I regard such an approach as being fundamentally flawed.
73. The Welsh Ministers considered the correct legal consequence of the proposed repeal. Their approach to the identified consequence was made clear in the consultation letter dated 13 September 2011. If some of those who responded chose to comment upon the practical consequences of the exercise of the new power by the Council, such replies could not be elevated to the level of a material consideration of which account had to be taken. The 13 September 2011 letter correctly identified the parameters of the consultation required for the proposed repeal. The Welsh Ministers did not fail to take into account relevant considerations nor did they act irrationally.

74. Accordingly, the claimant's application on both grounds is dismissed.