Neutral Citation Number: [2017] EWHC 1837 (Admin)

Case No: CO/6473/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 20/07/2017

Before :

THE HONOURABLE MR JUSTICE SINGH

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Between :

The Queen (on the Application of Wet Finishing Works Limited)	**Claimant**
- and -	
Taunton Deane Borough Council	**Defendant**
Strongvox Homes	**Interested Party**

- -
- -

Mr Jack Parker (instructed under the Direct Access scheme) for the **Claimant**
Ms Jacqueline Lean (instructed by Law and Governance – Shape Partnership Services) for the **Defendant**
Mr Zack Simons (instructed by Ashfords LLP) for the **Interested Party**

Hearing date: 20th June 2017

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Approved Judgment

Mr Justice Singh :

Introduction

1. The Claimant challenges the decision of the Defendant, dated 11 November 2016, to grant an application by the Interested Party to amend a previous planning permission, and creating a new agreement under section 106 of the Town and Country Planning Act 1990 ("the 1990 Act"), removing a requirement that the Claimant should be paid a Heritage Asset Contribution ("HAC") for restoration of a cloth finishing works called Tone Works or Tone Mill ("the Mill").

2. Permission to bring this claim for judicial review was granted after a hearing before Dingemans J on 3 March 2017.

Factual Background

3. On 26 July 2005 the Claimant company was incorporated and took ownership of the Mill, which is a derelict Grade II* listed building, with a view to its restoration.

4. In 2006 a company which is part-owned by the sole shareholder of the Claimant, Mendip Estates Limited ("MEST"), began buying property around the Mill with a view to generating sufficient funds to assist in the restoration and with a view to flood risk mitigation.

5. In 2007, MEST submitted an application for planning permission to build 130 residential homes on the adjacent site. That application was withdrawn when the Environment Agency declared a large part of the adjacent site to be a flood risk.

6. On 22 August 2011 the Interested Party, MEST and the Claimant submitted a planning application for the erection of 84 dwellings on a smaller part of the adjacent site. It is clear from the planning officers' report on that application that the primary issue for consideration was whether the proposed residential development would secure public benefits that would outweigh any identified conflict with planning policy. In addressing that issue the report concluded that the proposal represented "the most feasible option of bringing forward heritage led regeneration" to safeguard the Mill, which it described as an "important heritage asset." The report also concluded that "significant weight should be given in the balance of decision making to the combination of the cultural, economic and heritage benefits which will outweigh any identified conflict with policy."

7. The application for planning permission was granted by the Defendant on 3 April 2012.

8. The planning permission was accompanied by a section 106 agreement dated 30 March 2012. The parties to that agreement included the Defendant, the Interested Party and the Claimant. The agreement contained provision for payment of the HAC (as defined in clause 2.21) of £780,000 for the restoration of the Mill. It also provided for the payment of that money to be made by the Interested Party (as the current owner of the residential land), to the Defendant which would then forward it to the

Claimant (as the current "Heritage Landowner" within the meaning of the agreement) for the purposes of restoration: see the owner's covenants in Sch. 1, in particular para. 1.1, and the Council's covenants in Sch. 3, in particular para. 3. As para. 1 of Sch.1 made clear, the Interested Party was not permitted to commence development until it had paid the HAC to the Defendant. However, it followed that the payment of the HAC did not have to be made within a specified time, so long as the development was not commenced for the purposes of the agreement (the meaning of commencement of development for those purposes was distinct from the meaning of that concept for the purposes of the planning legislation). There is a dispute between the parties about whether development ever commenced for the purposes of the 2012 agreement but it is not a dispute which I can or need to resolve for the purpose of the present claim for judicial review.

9. In June 2013 the Interested Party purchased the adjacent site with a view to developing it under the 2012 permission.

10. In fact during the period 2013-2015 the Interested Party did not commence any substantive development, save for some minor works on clearing of land, which meant that the Claimant could not begin restoration of the Mill by virtue of a clause in the section 106 agreement which prevented restoration until after the HAC had been paid.

11. On 6 October 2015 the Interested Party submitted an application under section 73 of the 1990 Act to vary the planning permission in respect of the adjacent residential site by increasing the dwelling numbers from 84 to 90.

12. On 27 November 2015 the Defendant issued a notice to the Claimant, requiring repairs to the Mill.

13. On 11 November 2016 the Defendant granted the Interested Party's application under section 73 of the 1990 Act. That is the decision under challenge in the present proceedings.

14. On the same date, 11 November 2016, a new section 106 agreement was made by the Defendant and the Interested Party. They were the only parties to the 2016 agreement. The Claimant was not a party to it. The new agreement dispensed with the HAC and instead included provision for a Heritage Protection Contribution ("HPC"), which required the money for restoration of the Mill (still in the sum of £780,000, as can be seen from clause 2.19) to be paid to the Defendant council, for its own use in restoration of the Mill, thus cutting the Claimant out of the process (unless it was directly instructed by the Defendant). The payment of the HPC had to be made within 1 year of the grant of the amended planning permission: see the owner's covenant in Sch. 1, para. 18. For the council's covenants see Sch. 2: they no longer included any obligation to pay the Claimant.

15. It is common ground in the present case that, although the Defendant consulted the Claimant in relation to the Interested Party's application to vary the 2012 permission, it did not consult the Claimant in relation to the section 106 agreement entered into in 2016. Mr Timothy Roper, the Director of the Claimant company, explains this at paras. 32-33 of his second witness statement. At paras. 37 and 39 he also sets out the

prejudice, including financial prejudice, caused to the Claimant by the Defendant's failure to consult it on the new section 106 agreement.

Material Legislation

16. Under section 70(1) of the Town and Country Planning Act 1990 a local planning authority has power either to grant planning permission or to refuse it. If it grants planning permission it may do so "either unconditionally or subject to such conditions as they think fit".

17. Further provision is made in relation to conditional grants of planning permission by section 72.

18. Section 73, so far as material, provides that:

> "(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and –
>
> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
>
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application. …
>
> (4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun. … "

19. Section 106, so far as material, provides that:

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section … as 'a planning obligation'), enforceable to the extent mentioned in subsection (3) –

> (a) restricting the development or use of the land in any specified way:
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> (c) requiring the land to be used in any specified way; or
>
> (d) requiring a sum or sums to be paid to the authority … on a specified date or dates or periodically. …
>
> (3) Subject to subsection (4) a planning obligation is enforceable by the authority … -
>
> (a) against the person entering into the obligation and
>
> (b) against any person deriving title from that person. …
>
> (11) A planning obligation shall be a local land charge and for the purposes of the Local Land Charges Act 1975 the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge. …"

20. The Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No. 595) ("the DPMO") contains the following relevant provisions.

21. Article 2 is the interpretation provision. Unless the context otherwise requires, "planning obligation" means an obligation entered into by agreement or otherwise by any person interested in land pursuant to section 106 of the 1990 Act.

22. Article 7 of the Order sets out general requirements for applications for planning permission.

23. Article 13(1) of the Order provides that, except where paragraph (2) applies:

> "An applicant for planning permission must give requisite notice of the application to any person (other than the applicant) who on the prescribed date is an owner of the land to which the application relates …"

24. Article 15 of the Order provides that:

> "(1) An application for planning permission must be publicised by the local planning authority to which the application is made in the manner prescribed by this Article. …
>
> (2) In the case of an application for planning permission for development which - …
>
> (b) does not accord with the provisions of the development plan in force in the area in which the land to which the application relates is situated … the application must be publicised in the manner specified in paragraph (3).

(3) An application falling within paragraph (2) … must be publicised in accordance with the requirements in paragraph (7) and by giving requisite notice –

(a) by site display in at least one place on or near the land to which the application relates for not less than 21 days; and

(b) by publication of the notice in a newspaper circulating in the locality in which the land to which the application relates is situated. …

(5) In a case to which paragraphs (2), (4) or (4A) do not apply, the application must be publicised in accordance with the requirements in paragraph (7) and by giving requisite notice –

(a) by site display in at least one place on or near the land to which the application relates for not less than 21 days; or

(b) by serving the notice on any adjoining owner or occupier. …

(7) The following information must be published on a website maintained by the local planning authority –

(a) the address or location of the proposed development;

(b) a description of the proposed development; …

(c) the date by which any representations about the application must be made, which must not be before the last day of the period of 14 days … beginning with the date on which the information was published;

(d) where and when the application may be inspected;

(e) how representations may be made about the application; …"

25. Article 20 of the Order provides that:

"(1) Paragraph (2) applies in relation to an application –

(a) Made pursuant to section 73 of the 1990 Act (determination of application to develop land without conditions previously attached); …

(2) Before granting planning permission on an application in relation to which this paragraph applies, the local planning authority must consult such authorities or persons falling within a category set out in the Table in Schedule 4 as the local planning authority consider appropriate."

It is common ground that Schedule 4 is not relevant to the present case. The Table in that Schedule sets out various public bodies which may have to be consulted under the above provision.

26. Article 40 of the Order requires a "local planning register authority" (which for present purposes includes a district planning authority such as the Defendant) to maintain a local planning register. It provides that:

> "(2) Each local planning register authority must keep, in two parts, a register ("the Register") of every application for planning permission relating to their area.
>
> (3) Part 1 of the Register must contain in respect of each such application … made or sent to the local planning register authority and not finally disposed of –
>
> (a) a copy … of the application together with any accompanying plans and drawings;
>
> (b) a copy (which may be photographic or in electronic form) of any planning obligation … proposed or entered into in connection with the application;
>
> (c) a copy (which may be photographic or in electronic form) of any other planning obligation … entered into in respect of the land the subject of the application which the applicant considers relevant; and
>
> (d) particulars of any modification to any planning obligation … included in Part 1 of the Register in accordance with sub-paragraphs (b) and (c) …
>
> (4) [This relates to what Part 2 of the Register must contain] …
>
> (10) Subject to paragraph (11), every entry in the Register must be made within 14 days of the receipt of an application, or of the giving or making of the relevant direction, decision or approval as the case may be. …
>
> (12) The Register *must* either be kept at the principal office of the local planning register authority or that part of the Register which relates to land in part of that authority's area must be kept at a place situated in or convenient to that part. …
>
> (14) Where the Register kept by a local planning register authority under this Article is kept using electronic storage, the authority *may* make the Register available for inspection by the public on a website maintained by the authority for that purpose." (Emphasis added)

Procedural matters

27. At the hearing on 3 March 2017 permission was refused by Dingemans J on all grounds save for the two identified in para. 1(a) and (b) of the order, which was sealed on 6 March 2017. Those grounds were:

> (a) The decision was procedurally unfair because the Council did not consult the Claimant in respect of the section 106 agreement it entered

into with the Interested Party on 11 November 2016 ("the First Ground");

(b) The decision was ultra vires the Defendant's powers under section 73 of the 1990 Act on the basis that there was a "fundamental alteration" from the permission it had granted on 3 April 2012 ("the Second Ground").

28. The Claimant was required by para. 3 of the order to file and serve amended grounds by 28 March 2017. It did so. However, in those Amended Grounds it included, at paras. 35-37, an argument that the duty of consultation arose under an express statutory provision: Article 40(3)(b) of the DMPO. This was said to be the first of two ways in which the duty of consultation arose under the heading of "procedural fairness" which was given to the First Ground. The other way was said to arise at common law.

29. In their detailed grounds of defence, and at the hearing before me, both the Defendant (represented by Ms Jacqueline Lean) and the Interested Party (represented by Mr Zack Simons) submitted that reliance on the DMPO raised a new ground in this claim for judicial review, which would require an application for permission to amend, and that such permission should be refused. The Claimant, represented by Mr Jack Parker, denied that permission was needed to amend the grounds, since this argument was subsumed within the First Ground (procedural fairness), for which permission had been granted by Dingemans J. In any event, he sought permission to amend the grounds if that is required.

30. In my judgement the reliance on the DMPO does indeed raise a new ground of challenge, which had not been raised previously, and so an application for permission to amend the grounds is required. Furthermore, in the exercise of the Court's discretion, I refuse that application to amend for the following reasons:

(1) The Claimant has had plenty of time and opportunity to consider what grounds it wished to raise. Although the initial grounds were drafted when the Claimant was acting in person, it has since had access to legal advice and it was represented by counsel at the hearing before Dingemans J.

(2) At that hearing no mention was made of any suggested statutory basis for the duty of consultation. Indeed, Ms Lean informed me that it was common ground that there was no statutory basis for such a duty. What was relied on was the common law and nothing else. See also in this regard para. 31 of the Defendant's detailed grounds of defence.

(3) Dingemans J was careful to limit the grounds on which permission was granted, after a contested permission hearing. He was clearly concerned that there should not be a more wide-ranging attack launched when a substantive hearing took place.

(4) On the face of Article 40(3)(b) it does not in truth impose a duty of consultation at all. As will be seen from the material provisions of the Order, it is Article 20 which imposes a duty of consultation – but it is common ground that that provision does not apply to this case, since it

requires consultation of the public bodies which are set out in the Table in Sch. 4. At the hearing before me this necessitated further enquiries by me and further research by counsel, which eventually led to arguments based on other provisions in the Order, none of which had been foreshadowed in the Claimant's Amended Grounds or skeleton argument. This is the kind of exercise which the order made by Dingemans J was intended to avoid.

(5) The issue of interpretation raised has potentially wider implications for other cases. There is some authority on the issue in R (Police and Crime Commissioner for Leicestershire) v Blaby DC [2014] EWHC 1719 (Admin), at para. 80, where Foskett J said:

> "Whilst I have had very little opportunity to give this issue mature consideration, I find it difficult to find within Article 36(3)(b) [of the DMPO 2010, whose counterpart now is Article 40(3)(b) of the DMPO 2015] an obligation that 'travelling drafts' of a section 106 agreement should be placed on the register."

I would be required to take a different view from Foskett J. I am unwilling to do so in circumstances where, again, there been little time for mature consideration and I have not had the benefit of full argument on all sides.

(6) In any event, the new argument seeks to prove too much. If correct, it would lead to a general requirement of consultation of (presumably) the public generally or at least a wider class of persons than the Claimant alone. That is not what the present case is actually about. What the Claimant in fact argues is that, in the light of the particular history and circumstances of this case, it was unfair for the Defendant to enter into a new section 106 agreement in 2016 without consulting it first. The Claimant does not need to rely on the DMPO to make that argument. That is the argument which it was granted permission to argue by Dingemans J under the heading of "procedural fairness."

31. I will therefore address the two grounds as they were formulated in the order of Dingemans J.

The Grounds of Challenge

32. As I have mentioned, the Claimant brings this claim on two grounds.

33. By its First Ground, the Claimant submits that there was a duty to consult the Claimant in relation to the proposed new agreement in 2016 as a matter of procedural fairness.

34. The Claimant contends, by its second ground, that the variation was ultra vires section 73 of the 1990 Act.

35. I propose to deal with the Second Ground first, since that is a substantive challenge to the vires of what the Defendant decided, and then will return to the First Ground, which is a procedural challenge.

36. Before I do so I consider that it would be helpful if I set out here a helpful statement of the nature and purpose of the power now contained in section 73 of the 1990 Act, which will be relevant to both grounds of challenge.

37. In R v Leicester City Council, ex p. Powergen UK Ltd [2001] 81 P & CR 5 the Court of Appeal cited with approval what had been said by Sullivan J (as he then was) in Pye v Secretary of State for the Environment [1998] 3 PLR 72: see para 26 in the judgment of Schiemann LJ. In Pye Sullivan J said:

> "Prior to the enactment of (what is now) section 73, an applicant aggrieved by the imposition of the conditions had the right to appeal against the original planning permission, but such a course enabled the local planning authority in making representations to the Secretary of State, and the Secretary of State when determining the appeal as though the application had been made to him in the first instance, to 'go back on the original decision' to grant planning permission. So the applicant might find that he had lost his planning permission altogether, even though his appeal had been confined to a complaint about a condition or conditions.
>
> It was this problem which section 31A, now section 73, was intended to address …
>
> While section 73 applications are commonly referred to as applications to 'amend' the conditions attached to a planning permission, a decision under section 73(2) leaves the original planning permission intact and unamended. That is so whether the decision is to grant planning permission unconditionally or subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), because planning permission should be granted subject to the same conditions.
>
> In the former case, the applicant may choose whether to implement the original planning permission or the new planning permission; in the latter case, he is still free to implement the original planning permission. Thus, it is not possible to 'go back on the original planning permission' under section 73. It remains as a baseline, whether the application under section 73 is approved or refused, in contrast to the position that previously obtained."

The Second Ground of Challenge

38. On behalf of the Claimant Mr Parker advances two bases for the second ground of challenge. The first basis is that the 2012 permission was for 84 dwellings, whereas the 2016 permission was for 90 dwellings. Therefore, submits Mr Parker, there was a fundamental inconsistency between the operative part of the decision notice and the conditions in accordance with which the development must be constructed.

39. Mr Parker submits, secondly, that the 2016 section 106 agreement effected a fundamental alteration to the mechanism by which the heritage benefits of the residential development would be delivered.

40. For those two reasons Mr Parker submits that the decision was ultra vires the Defendant's powers under section 73 of the 1990 Act.

41. I reject the second of those submissions immediately. I accept the submission that was made in particular by Mr Simons on behalf of the Interested Party that section 73 is concerned with conditions and not with planning obligations, including section 106 agreements. The vires challenge, in so far as it relates to the new section 106 agreement, falls at that first hurdle.

42. I turn to the first basis on which Mr Parker advances this ground of challenge. He submits that, although it may be possible for a condition to restrict what is permitted by a planning permission, for example perhaps to reduce the number of houses that can be built under it, what section 73 does not enable a planning authority to do is to increase what was applied for by way of a condition attached to a planning permission.

43. In support of this submission Mr Parker relies on a decision which was not directly concerned with section 73 of the 1990 Act (or its predecessor) but was concerned with the alleged invalidity of a condition attached to a planning permission. In Kent County Council v Secretary of State for the Environment (1977) 33 P & CR 70 Sir Douglas Frank QC (sitting as a deputy High Court Judge) considered an argument that a planning condition was invalid "because it takes away a substantial part of the benefit of the planning permission." He held that:

> "It must always be a question of fact and degree whether a particular condition is such as to take away the substance of the permission, in which event that condition may be invalid. In this case, however, the development sought is the construction of an oil refinery and all else is ancillary to that purpose. Of course, if the condition had been such as to render the oil refinery unworkable that would be a different case, but the second respondents' acceptance of the condition is evidence that it certainly is not this case." (p.79).

44. In my view that passage does not bear the weight that Mr Parker sought to place upon it. What was said there was that, if a condition takes away the substance of what a planning permission permits, it may be invalid; and that the question whether it does have that effect is a matter of fact and degree. That case does not decide that a condition can never permissibly increase what is permitted.

45. In my view, the true principle which governs section 73 cases is to be found in R v Coventry City Council, ex p. Arrowcroft Group plc [2001] PLCR 7, in which Sullivan J held that, under that section, a local planning authority:

> "is able to impose different conditions upon a new planning permission, but only if they are conditions which the council could lawfully have imposed on the original planning permission in the sense that they do not amount to a *fundamental alteration* of the proposal put forward in the original application." (para. 33, emphasis added).

46. An insight into what Sullivan J had in mind when he referred to a "fundamental alteration" can be gained from his consideration of the facts of that case at paras. 32-33 and para. 35. In the latter paragraph he said:

> "… The variation has the effect that the 'operative' part of the new planning permission gives permission for one variety superstore on the one hand, but the new planning permission by the revised conditions takes away that consent with the other."

47. I also note that in Wheatcroft v Secretary of State for the Environment [1982] JPL 37 Forbes J held that conditions could not be imposed on a planning permission that had the effect of allowing development that was different in substance from that which was applied for. That test, again focussing on the substance of the matter, is consistent with the governing principle as it was formulated in Arrowcroft.

48. The question of whether an alteration is fundamental is one of fact and degree. Like such questions generally in planning law, it is one which falls primarily to the decision-maker to assess. Its assessment will only be questioned by the Court if it is irrational. Mr Parker framed his argument in this regard in terms of pure vires rather than irrationality. He submitted that an increase in the number of units permitted in 2016 even by one would render the permission granted then ultra vires section 73. I do not accept that submission. It depends on whether there was a fundamental alteration in what had been permitted in 2012, which is a question of fact and degree depending on all the circumstances. In my judgement, it has not been shown that the assessment by the Defendant (that it was not a fundamental alteration) was irrational.

49. Accordingly I reject the Claimant's Second Ground.

The First Ground of Challenge

50. It is common ground that the Defendant did not make the proposed section 106 agreement in 2016 available to the Claimant or give it an opportunity to comment on it in draft prior to the decision to grant planning permission.

51. The Claimant submits that, as a matter of procedural fairness, in the circumstances of this case, the Defendant was required to give the Claimant an opportunity to comment on the proposed section 106 agreement in 2016. Since it did not do so the Claimant submits that the resulting decision was unlawful and must be quashed.

52. The Defendant and Interested Party submit that there was no duty to give the Claimant notice of the proposed agreement or to comment on it, as alleged.

53. In this context Mr Parker relies upon the summary of the relevant authorities and principles which I set out in R (Dudley MBC) v Secretary of State for Communities and Local Government [2012] EWHC 1729 (Admin), at paras. 47-69. He places particular reliance on the decision of the Court of Appeal in R (Bhatt Murphy (a firm)) v Independent Assessor [2008] EWCA Civ 755, at para. 42 in the judgment of Laws LJ.

54. He also places reliance on R (Lichfield Securities Limited) v Litchfield DC [2001] EWCA Civ 304, at para. 20.

55. Mr Parker submits that the failure by the Defendant to consult the Claimant on the terms of the 2016 agreement amounted to an abuse of power. He submits that the decision effectively deprived the Claimant of a benefit which it enjoyed under the 2012 agreement and that the impact of that decision was "pressing and focussed." In using those terms and in framing the submission in terms of abuse of power, Mr Parker adopts the language used by Laws LJ in Bhatt Murphy.

56. He submits that, as the owner of Tone Works, the Claimant had invested a significant amount of time and money into the restoration project. It had a direct interest in the mechanism for delivery of the heritage benefit to Tone Works. That included, as Mr Roper explains in his second witness statement, a financial interest. That benefit was lost to the Claimant under the terms of the 2016 agreement.

57. Mr Parker submits that the fact that, pursuant to the 2016 agreement, it remains open to the Defendant (at some indeterminate point in time and on indeterminate terms) to transfer the HPC to the Claimant does not mean that the Claimant has not been deprived of the benefit of the mechanism for delivery of the heritage benefits which were set out in the 2012 agreement.

58. As I have mentioned, all parties before me drew my attention to the decision of the Court of Appeal in Bhatt Murphy. However, in my view, that case is on analysis a case about changes of *policy* by a public authority and the circumstances in which, before such a change can take place, there may be a duty to consult particular persons affected by that change. See my analysis of that judgment in the Dudley case, at paras 59-65, and in particular the citations set out there from the judgment of Laws LJ in Bhatt Murphy. In the present case there was no change of policy by the Defendant. There was simply an individual decision, which affects the legal rights of this Claimant.

59. The second thing that can be derived from my judgment in the Dudley case is that it will not always be necessary for a claimant to establish that it had a legitimate expectation that there would be consultation, based on a defendant's promise or past practice of consultation. In the Dudley case I rejected the first argument which had

been made on behalf of the claimant in that case: see paras. 43-46. However, as I explained from para. 47, the claimant's second argument did not depend on either a promise or a past practice of consultation. I said there that:

> "… The starting-point is that, if a decision-maker intends to take a decision which affects a person's rights, the duty to act fairly (in earlier parlance 'natural justice') will usually be required by public law, which will imply such a duty into a statutory scheme even when none is expressly laid down: see e.g. Lloyd v McMahon [1987] AC 625, at 702-3 (Lord Bridge of Harwich)."

60. At para. 48 I said that:

> "It was recognised as long ago as Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149, at 171, that, even when, strictly speaking, there is no right at stake, there will be certain expectations which the law will protect, and which therefore are legitimate expectations. In Schmidt Lord Denning MR gave the example of 'a foreign alien':
>
> > 'He has no right to enter this country except by leave: and, if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked *before* the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time.' (Emphasis in original)"

61. At para. 49 I gave another example that readily comes to mind:

> "If a licence to carry on a certain activity is revoked before the end of its term, the duty to act fairly may be implied by law."

I mentioned in the same paragraph what Lord Diplock had described as his class b(i) in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, at 408, that is a decision which affects someone:

> "by depriving him of some benefit or advantage which … he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment …"

62. At para. 50 of my judgment in the Dudley case I explained that Lord Diplock's class b(i) corresponded to what Simon Brown LJ called a "category 2 interest" in his classification scheme in R v Devon County Council, ex p. Baker [1995] 1 All ER 73, at 90.

63. On the facts of the present case, it is right to observe that the Claimant was not *deprived* of some benefit or advantage which it had in the past been permitted to enjoy and which it could legitimately expect to be permitted to continue to do. Nevertheless the Defendant's decision in 2016 to enter into a new section 106 agreement with the Interested Party only, leaving out the Claimant, which was a party to the 2012 section 106 agreement, did create a new scheme which it would be open to the Interested Party to implement. By its decision the Defendant gave a choice to the Interested Party whether to implement the 2012 permission or the 2016 one. As I have indicated by reference to the authorities on section 73 of the 1990 Act, a developer has a choice about whether to implement the original planning permission with the conditions attached to it or to implement the new planning permission with different conditions attached to it. That was a significant change as a matter of law as to the respective legal positions of the parties, including this Claimant.

64. Ms Lean, supported by Mr Simons, makes several submissions as to why no duty of procedural fairness arose in the present case.

65. First, she submits that the 2012 section 106 agreement ran with the land, as all such agreements do, in accordance with the provisions of the 1990 Act, which I have set out earlier. She submits that the agreement did not enure for the benefit of the Claimant as such but for the benefit of the Heritage Landowner, whoever that person might be from time to time. While those propositions are correct, in my judgement, they do not meet the fundamental point that the Claimant was a party to the 2012 agreement and that it was still at all material times the Heritage Landowner within the meaning of that agreement. It therefore was as things stood in 2016 the person which had something to gain under the 2012 agreement, which it would not stand to gain under the 2016 agreement.

66. Ms Lean also submits that the 2012 agreement was never intended to benefit the Claimant as such but to benefit the heritage land, so that the public interest in restoration of the Mill could be served. That may be so but, again, in my judgement, it does not meet the fundamental point in this case, which relates to the *mechanism* by which the restoration was to be achieved. Under the terms of the 2012 agreement that mechanism was that the owner of the residential land (at present the Interested Party) had to pay the HAC to the Defendant and the Defendant had to pay it to the Heritage Landlord (at present the Claimant). The mechanism for payment of the sum of £780,000 was changed under the 2016 agreement, so that it had to be paid by the owner to the Defendant but the Defendant no longer had any obligation to pay it to the Claimant. That was a material difference in the terms of the two agreements, on which the Claimant would have wished to comment. In my judgement, fairness required that the Claimant should have that opportunity before the agreement was finalised.

67. Ms Lean further submits that, under the 2012 agreement, the Claimant was not guaranteed of any payment. Its rights were contingent as they were dependent on a number of other factors, some of which would be within the control of other persons. For example, if the Interested Party did not commence development for the purposes of the agreement, the obligation to pay the HAC would never arise.

68. Mr Parker submits in response that there is nothing in the authorities to suggest that *contingent* benefits cannot give rise to a legitimate expectation which will be

protected by the law in the sense that procedural fairness will be required. I agree with that submission. It seems to me right, as a matter of principle, that the law should and does protect the interests of a person such as the Claimant under the 2012 agreement, even if they are contingent ones. They are nevertheless legal rights under a contract.

69. In the circumstances of this case I have come to the conclusion that the Defendant did have a duty to act fairly, and in particular to give notice to the Claimant of the proposed section 106 agreement and to give the Claimant an opportunity to comment upon that before it was concluded.

70. If it were necessary to do so I would reach the view that the impact on the Claimant was indeed (to use the concepts used by Laws LJ in Bhatt Murphy) "pressing and focused" and it would be an abuse of power for the Defendant not to afford procedural fairness in this case.

71. Accordingly, in my judgement, there was a breach of the duty to act fairly in the present case.

Relief

72. The Defendant has suggested, that even if a duty to consult the Claimant arose and was breached on the facts of this case, the Court should refuse to quash the permission because consultation would not have made a difference to the outcome. The Interested Party does not make the same submission. The Claimant submits that the submission should be rejected.

73. Despite the way in which the parties have formulated this argument, it seems to me that the Court has to consider the matter under the terms of section 31(2A) of the Senior Courts Act 1981, as amended by section 84 of the Criminal Justice and Courts Act 2015. Under that provision, this Court must refuse relief "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred." For this purpose, "the conduct complained of" is "the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief": section 31(8).

74. Section 31(2A) alters the previous position (Simplex GE (Holdings) v Secretary of State for the Environment (1989) 57 P & CR 306) in three ways. First, the test is modified in that the court no longer needs to be satisfied that the outcome *would* have been the same, only that it is highly likely. Secondly, the outcome need not be exactly the same, provided it would not have been substantially different. Thirdly, the court does not have a discretion; where the conditions set out in the statutory provision are met, it is under a duty to refuse relief. This is subject to the power to disregard that requirement if the Court "considers that it is appropriate to do so for reasons of exceptional public interest": section 31(2B).

75. At the hearing before me Ms Lean suggested that, if the Court should find that the claim should succeed on the First Ground but not the Second Ground (which is the

conclusion to which I have come in this judgment), the parties should be given the opportunity to make written submissions on the question of relief. I considered that to be a sensible suggestion and one which would avoid the need for a further hearing, with the attendant cost and inconvenience that would entail. Accordingly, when a draft of this judgment was circulated to counsel in the usual way, I made directions for there to be exchange of written submissions on the question of relief and any other ancillary matters. I have taken account of those submissions and have reached the following conclusions.

76. I have already held that the Defendant did breach its duty of procedural fairness in this case. That is accordingly the conduct complained of for the purpose of section 31(2A). It seems to me that two features of the present case are of particular importance in answering the question which is posed by that provision. First, if the Claimant is now given a fair opportunity to comment on the terms of the section 106 agreement in draft form, and assuming (as one must for this purpose) that the Defendant will listen with an open mind to what it has to say, the outcome might well be substantially different. Even if the Defendant did not accept all of its representations it might accept some and so modify the proposed agreement. Secondly, the issues which will have to be considered by the Defendant are quintessentially ones of planning judgement, which fall within its province rather than the Court's. In the circumstances of this case I have reached the conclusion that the criteria in section 31(2A) are not met.

77. Without prejudice to her other submissions, Ms Lean accepts that, if I should come to that conclusion, the appropriate relief would be for the Court to quash the planning permission granted under section 73 so that the Interested Party's application for such permission will have to be re-determined: see para. 10 of her written submissions dated 7 July 2017.

Conclusion

78. For the reasons I have given this claim for judicial review succeeds on the First Ground (procedural fairness) only and the planning permission granted to the Interested Party under section 73 of the 1990 Act will be quashed.