



Neutral Citation Number: [2016] EWHC 972 (Admin)

Case No: CO/6625/2015

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

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 06/05/2016

Before :

HIS HONOUR JUDGE MILWYN JARMAN QC

Between :

R (on the application of COLIN THOMAS)	<u>Claimant</u>
- and -	
MERTHYR TYDFIL COUNTY BOROUGH COUNCIL	<u>Defendant</u>
MERTHYR MOTOR AUCTIONS	<u>Interested Party</u>

Mr Paul Stookes (instructed by **Richard Buxton Environmental & Public Law**) for Mr
Thomas
Miss Emma Dring (instructed by **Merthyr Tydfil County Borough Council**) for the council
The interested party was not present or represented

Hearing date: 25 April 2016

Approved Judgment

HH Judge Jarman QC :

Introduction

1. The claimant Mr Thomas seeks judicial review of the decision of the defendant as local planning authority (the council) dated 18 November 2015 approving the removal of a condition attached to planning permission dated 21 February 1997. The removed condition limited the hours of operation of floodlighting at a site known as the lower yard adjacent to the car auction premises of the interested party (Merthyr Motor Auctions) between 8.00 and 18.30 hours on weekdays and Saturdays. The effect of the decision challenged is that floodlighting can be used without restriction in terms of hours.
2. The original three grounds of challenge, in respect of which I granted permission in February 2016, are that the decision had been made without regard to the principle of sustainable development in accordance with national policy, without regard to the need for unrestricted floodlighting, and without regard to nature conservation policies. A month before the substantive hearing Mr Stookes for Mr Thomas gave notice that he intended to apply at the substantive hearing for permission to rely on a fourth ground, that the council had made the decision under section 73 of the Town and Country Planning Act 1990 and not as it should have, under section 73A and in any event had taken an overly narrow approach. The parties both argued that ground on the basis that permission and the substantive ground should be considered together and that is the approach which I adopt.

Background

3. The 1997 planning permission was granted as a result of Merthyr Motor Auctions challenging enforcement notices issued by the council in 1995, the first alleging breach of planning control by the use of land and building for the storage, parking and valeting of vehicles associated with the adjacent car auction premises, and the second relating to engineering works. The grounds of appeal included that planning permission ought to be granted for any breach under section 174(2) of the 1990 Act and that ground was upheld by the inspector appointed to determine the appeals.
4. In his decision letter dated 21 February 1997, the inspector described the appeal sites which are within the premises of Merthyr Motor Auctions and within the settlement limits of Dowlais, which is approximately two miles north east of Merthyr Tydfil. The A465(T) Heads of the Valleys Road is elevated as it crosses the northern part of the premises. On Pant Road, which runs along part of the premises, there is a chapel of rest, a children's playing area and terraced houses. Llewellyn Street runs from that road to the premises, on which there are older houses and two recently built houses, one of which, Rhosbren Fach, is the home of Mr Thomas. To the east of the premises and elevated above it are the ends of two terraces and south of those streets there is undeveloped land and a public path.

5. The inspector found that there was substantial complaint from local residences of noise and disturbance from the premises and was of the view that injury to amenity was demonstrable. At paragraph 51 he held that without substantial controls, such activities should not be granted planning permission. One such condition e) was that no activity should take place on site before 8.00 hours or after 18.30 hours on weekdays and Saturdays, nor at any time on public holidays with a very limited exception. Another condition imposed by the inspector without further elaboration read:

“h. details of any proposed floodlighting shall be submitted to and approved in writing by the local planning authority before the lighting is installed and any such floodlighting as may be approved shall be used solely during the authorised hours specified in condition e) above.”

6. Merthyr Motor Auctions wrote to the council on 30 October 2012 regarding proposed lighting columns at the premises, one of which was adjacent to Mr Thomas’s property. The council replied on 28 November 2012 saying that the details were satisfactory but stipulating that the lighting should comply with guidance to limit the effects of obtrusive light.
7. In May 2013, the council granted Merthyr Motor Auctions retrospective planning permission for the retention of two lamp posts housing CCTV cameras and a personal address system in the lower yard of the premises. The design and access statement which accompanied the application for permission said that CCTV throughout the premises provides 24 hour surveillance and that “adequate external lighting is provided to assist pedestrians’ movement from outside and on the site.”
8. By an email sent by Mr Thomas to the council at 12.44 am on 10 September 2014, he complained that the floodlights at the premises had been illuminated since the hours of darkness to the time of writing. Whilst he said that the intrusion of light into his home was “minimal” he asked for the reason why the floodlights were illuminated at this time to be investigated.
9. On 26 September 2014 the council received from Merthyr Motor Auctions an application for the removal or variation of a condition following the grant of planning permission. The proposal was described as “Variation of condition h specifically relating to times when floodlighting can be used.” In an attached document it was stated: “Without sufficient illumination the vehicles are at risk from vandalism and theft,” and reference was also made to the health and safety of employees during winter months. No further details relating to the perceived risk from vandalism and theft were given.
10. Mr Thomas, amongst others, objected to the application. In a letter dated 28 October 2014 he set out a number of grounds, the second of which was nuisance to residential amenity and included this paragraph:

“The screening between our boundary and Merthyr Motor Auctions’s boundary is mostly by deciduous species of trees, the boundary and floodlighting is very close to our home and has already been seen operating outside the permitted hours,

this has been visible despite full foliage of the trees (the Council was advised of this). The autumn season is now nearing halfway and much of the foliage has fallen from the trees. This will mean that the lighting will be most visible from our property due to trees shedding their full foliage during the period that the applicant suggests floodlighting is necessary.”

11. The next ground was that there was no genuine need for the removal of condition h because permission had been given for the installation of a CCTV system and there was a high security fence which extends to the whole perimeter of the premises.

12. Under other material considerations, he said this:

“Whilst it is recognised that lighting has been granted in a prior permission to suit Merthyr Motor Auctions’ needs up to 18.30 hours, any incorrect use of such light after that period and into the evening and night will almost certainly cause a problem, and so be a statutory nuisance, this also effects the environment by unwanted light intruding into properties and a waste of energy. It can also have an impact on the wider environment, influencing the night sky, visual amenity and wildlife, and appropriate measures need to be taken to limit the effects.

Lighting that falls outside the required area will affect our enjoyment of our property due to light through the windows and reduce our view of the night sky.

The release of light into the night sky brightens the horizon, creating sky glow (as can be seen over most towns and cities) and will reduce our enjoyment of the night sky reducing the visibility of stars.”

13. At the request of the council, Merthyr Motor Auctions commissioned an assessment and short survey for the potential or likelihood of bat use at the premises. The surveyor paid three visits to the premises in May and June 2015, and in a report in July 2015 concluded that no evidence of bats was observed in the premises and that the potential for and likelihood of bat use was low. However, bats were observed close to the boundary. As bats are likely to be present during summer months and that the floodlights were only likely to be illuminated during winter a compromise was suggested that such lights should be off from May to October. Merthyr Motor Auctions did not agree to this suggestion however, and on further consultation with the countryside officer it was indicated by the latter that it was unlikely that bat species will be “significantly affected by the application proposals.” National Resources Wales had not objected.

14. A report on the application was delegated to a case officer, who after setting out the proposal and the planning history, summarised five letters from two adjoining residents, including the issue of need and unwanted light intruding into properties and reducing the view of the night sky and the visibility of the stars.

15. The report then referred to the policy context and first dealt with national policies. Extracts from Planning Policy Wales (PPW) Edition 7 July 2014 were cited including the following:

“Paragraph 13.13.2 of Chapter 13 Minimising and Managing Environmental Risks and Pollution states that ‘...there is a need to balance the provision of lighting to enhance safety and security to help in the prevention of crime and to allow activities like sport and recreation to take place with the need to protect the natural and historic environment, including wildlife; retain dark skies where appropriate; prevent glare and respect the amenity of the neighbouring land uses; reduce carbon emissions associated with lighting.’”

16. Paragraph 4 of Technical Advice Note 5-Nature Conservation and Planning (2009) was also cited to the effect that the development control process is a critical stage in delivering the protection and enhancement of nature conservation required by PPW.
17. Finally, two policies of the Merthyr Tydfil Local Development Plan 2006-2021 (LDP) were referred to but not quoted from, namely BW5 Natural Heritage and BW7 Sustainable Design and Place Making. So far as relevant, the latter provides that “The Council will support good quality sustainable design and require development to...not result in unacceptable impact on local amenity in terms of visual impact, loss of light or privacy, disturbance and traffic movements.”
18. The report referred to the 1997 planning permission and the inspector’s decision letter and then said:

“The concerns of local residents with regards to light pollution and the loss of amenity due to light spillage are fully appreciated. The case officer and the Countryside Officer/Ecologist assessed these impacts during a site visit to Rhosbren Fach, on the 12th November 2014 at approximately 6:00pm. At least two of the floodlights were visible from the garden and rear bedroom windows of this property, however the light spillage/glare of the floodlights into the bedrooms and garden was minimal and did not have an adverse impact or cause a significant nuisance. Any impact is minimised by the floodlights being erected so that they are facing downwards and being located at least 2 metres away from the boundary with nearby residents (Gerwnllwyn Fach and Rhosbren Fach). Thus, any light spillage from the floodlights is directed towards the lower yard only. Furthermore, there are trees and other vegetation along the boundary which largely screen the floodlight structures.”

19. The report then set out the history of the bat survey and indicated that the countryside officer and NRW had confirmed that the removal of the former’s suggested compromise would not change the original decision not to object to the proposal. On this point the case officer concluded: “It is therefore considered that the operation of

the floodlights without time restrictions would not cause an adverse impact upon protected species.”

20. The final conclusion read as follows:

“Planning Policy Wales points out there is a need to balance the provision of lighting to enhance safety and security to help the prevention of crime with the need to protect wildlife, protect glare and respect residential amenity. It is considered that in this case any harm to neighbouring residents from light spillage/glare is outweighed by the additional security measures needed by the site owner by extending the hours the floodlights can operate. Given that NRW and the Council’s Countryside Officer have not raised any objections, the proposal is also considered acceptable in terms of the impact on bats, protected species and their habitat. The proposal therefore accords with LDP Policies BW5 and BW7 and the application is therefore recommended for approval.”

21. In the case officer’s report the development was described as the removal of condition h. The recommendation was: “Be approved” subject to the condition that the floodlights shall be operated only in accordance with specification details and light spillage diagram received two weeks earlier. It was then stated: “This permission only relates to the removal of condition h of the appeal decision...dated 21st February 1997. As such this permission shall be read in conjunction with the other conditions attached to the decision.” The recommendation was then endorsed by the signature of the head of town planning, to whom the decision had been delegated.

Ground 4

22. Both counsel dealt first with ground 4, as that ground goes to the fundamental approach which ought to have been adopted, and I shall do the same. Miss Dring, on behalf of the council, accepted that the application which led to that recommendation was approached on the basis that it was made under section 73 of the 1990 Act.

23. That section, as it applies in Wales at the time of the decision, reads as follows so far as material:

“(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.”

24. It is difficult to see what “development of land” was involved in the application to vary or remove condition h. As Miss Dring accepted, the illumination of floodlights beyond the hours permitted by the 1997 permission does not of itself amount to such development, but she submitted that the use of the lower yard for the uses identified in that permission does amount to such development.

25. Mr Stookes submitted that the application ought to have been determined under section 73A of the 1990 Act which reads:

“(1) On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.

(2) Subsection (1) applies to development carried out -...

(c) without complying with some of condition subject to which planning permission was granted.”

26. On the face of it, this section would appear more apposite for the application in question, which relates to a development already carried out as the inspector recognised in paragraph 70 of his decision letter, namely the change of use of the appeal site for the storage parking and valeting of vehicles associated with the adjacent car auction premises.

27. In *Pye v Secretary of State for the Environment and another* [1998] 3 PLR 72 at 85 and 86, Sullivan J, as he then was, observed that a decision under section 73(2) leaves the original planning permission intact and continued:

“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.”

28. In *Wilkinson v Rosendale BC* [2002] EWHC 1204 (Admin) [2003] JPL 82, Sullivan J at paragraphs 49-54 reiterated that position and contrasted such an application with an application for planning permission under section 73A. The latter, he said, is in all respects a conventional planning application, save that development will have been commenced, and that the local planning authority must have regard to the provisions of the development plan, so far as material, and to any other material consideration. He held that notwithstanding the applicants’ formulation of their proposal in that case, the application under section 73A was an application for retrospective planning permission to continue the use without complying with condition 2. That was a

condition which inter alia provided that the permission should not be exercised by any one other than the applicants. At paragraph 54 Sullivan J said: “It was essential for the Council to address the planning merits of the continuance of that use.”

29. The issue of what approach is appropriate under the two different sections was dealt with by Pitchford LJ in *Lawson Builders Ltd and another v Secretary of State for Communities and Local Government and another* [2015] EWCA Civ 122 [2015] PTSR 1324 at paragraph 33 as follows:

“I accept that an application for retrospective planning permission under section 73A may, and often will, require engagement with wider planning considerations than those raised by a reconsideration of conditions imposed on an existing permission under section 73. However, it would be a mistake to assume that a section 73 examination of conditions will never involve the study of wider planning considerations. Although the planning merits of the development will not be under consideration, the conditions may have been imposed so as to ensure compliance with an important aspect of policy. The task of the planning authority and the planning inspector under section 73 is “only” to judge whether the conditions originally imposed should be adhered to or varied but that task may require, depending on the purpose of the condition, a wide ranging inquiry. As to section 73A, it can be seen from the terms of section 73A(2) that there is scope for wider or narrower examination of the planning merits depending on the nature and stage of the development and the circumstances of the application.”

30. Accepting for present purposes the submission of Mr Stookes that the application should have been considered under section 73A, it does not follow that, as he also submitted, the council should have considered wider planning considerations than just whether the restricted hours of operation of floodlighting should be removed. The condition under consideration in *Wilkinson* was very different and went to the fundamental planning merits of the use and whether it should be carried on by anyone other than the applicants. As Pitchford LJ observed in *Lawson Builders Ltd*, even under section 73A there is a scope for wider or narrower examination of the planning merits depending on the nature and stage of the development and the circumstances of the application.
31. As Miss Dring submitted the nature of the development in the present case was the change of use identified in the decision letter of the inspector which he found as at that date of his report in 1997 had already been carried out. That use has been carried out since, and the floodlighting scheme was approved in 2012, and remained subject to condition h restricting the hours of illumination. The application was to vary or remove that restriction. Whether consideration is given under section 73, or more appropriately under section 73A, in my judgment the ambit of the consideration of the planning merits of the application was the narrower one of whether the hours of permitted illumination should be extended. That of course had to be considered having regard to the development plan and to other material considerations. Subject to what I say below, that is the approach which the council adopted.

32. Accordingly I give permission in respect of ground 4, but I dismiss that ground.

Ground 1

33. In seeking to make good ground 1, Mr Stookes made wide ranging submissions attacking the approach of the council to the application. He referred to many of the principles and objectives set out in PPW and in chapters 2 and 4, and to One Wales: One Planet, the sustainable development scheme adopted by the Welsh Assembly Government under the Government in Wales Act 2006. The principles are not in dispute and I only need summarise them. They include putting people and their quality of life now and in the future at the centre of decision making, mitigating climate change by reducing greenhouse gas emissions, and protecting and enhancing biodiversity. Chapter 4.4 set out a number of sustainability objectives which should be taken into account in the preparation of development plans and in taking decisions on individual planning applications.
34. However, as Miss Dring pointed out, and as is clear from the introductory chapter of PPW, chapters 2 and 3 describe the planning system in Wales and its principal procedures, and chapter 4 sets out the main policy objectives and principles which underpin the remaining chapters which deal with particular subjects. It is clear from Annex 2 that the particular parts of chapters 2 and 4 referred to by Mr Stookes do not inform locational policies in LDPs.
35. I do not accept Mr Stookes' submission that because these particular references in PPW were not recited in the case officer's report that the head of town planning did not have regard to them. The court should focus on the substance of the report in context to see whether it has sufficiently drawn attention to "the proper approach required by law and material considerations, rather than to insist upon an elaborate citation of underlying background materials" (per Sales J as he then was in *R (on the application of Maxwell) v Wilshire Council* [2011] EWHC 1840 at paragraph 43 and cited with approval by Holgate J in *R(on the application of Barr) v North Somerset Council and others* [2015] EWHC 1735 (Admin) at paragraph 25).
36. In my judgment there is sufficient reference in the case officer's report to the national policies, and in particular to the need to balance the provision of lighting to enhance safety and security with the need to protect the natural and historic environment including wildlife, retain dark skies where appropriate, prevent glare and respect the amenity of neighbouring land uses and reduce carbon emissions associated with lighting. The cited paragraph of PPW neatly encapsulates the balancing exercise which in my judgment the council had to undertake in respect of this particular application.
37. Mr Stookes went so far as to submit that no or little regard should have been had to policy BW7 of the LDP in this case, because the LDP in this regard is out of date. No objection to that effect was raised before the decision was made. He accepted that the council had undertaken annual monitoring reports of the LDP, pursuant to the Planning and Compulsory Purchase Act 2004, which included the identification of any changes to key parts of the plan which would need to be considered in a review and possible plan revision. The last such report before the decision in question was up to the year ending March 2015. The council as part of that report reviewed changes to national policy and concluded that such changes did not require the LDP to be

immediately amended or changed but that they should be considered further as part of a four year review.

38. Paragraph 2.8.4 of PPW provides:

“It is for the decision maker, in the first instance, to determine through monitoring and review of the development plan whether policies in and adopted LDP are outdated for the purposes of determining a planning application. Where this is the case, local planning authorities should give the plan decreasing weight in favour of other material considerations such as national policy, including the presumption in favour of sustainable development.”

39. In this case the council had not determined that any relevant policy of the LDP was out of date, and in my judgment was entitled to have regard to both national policy and the LDP which was adopted in 2011. The former is more detailed in respect of the issue of sustainability, as might be expected of a national policy, but it has not been shown that BW7 is out of date so as to require less weight to be applied.

40. Having found that national policy was sufficiently set out in the report, it must also be considered whether sufficient regard was had to it in the present case. The fact that it is sufficiently set out gives rise to the expectation that proper regard was had to it. However, on close analysis of the remainder of the case officer’s report I have come to the conclusion that in one important aspect a material consideration was omitted.

41. In dealing with light pollution and the loss of amenity due to light spillage, the report made clear that these impacts were assessed on the site visit to Mr Thomas’s property. The conclusion was that light spillage/glare of the floodlights *into* the bedrooms and garden was minimal (emphasis added). This is hardly surprising because Mr Thomas himself in his earlier email to the council accepted that this was the case. He referred to such an effect in his letter of objection, without using the word minimal, but he also went on under other considerations to mention the reduction of the view of the night sky and sky glow.

42. Although he referred to this in terms of his property, that is a factor which needs consideration in my judgment from the perspective of viewers from other homes, and indeed from other viewpoints in the area such as paths, roads, the chapel of rest, playground and undeveloped ground nearby. As Miss Dring accepted, there is no express indication in the report that this was considered, and in my judgment such indications as there are tend to show the contrary. In dealing with any impact in this regard reference is made to the fact that floodlights are facing downwards and located at least 2 meters from the boundary of nearby residents. This strongly suggests that what was still being contemplated was the light spillage/glare into nearby homes (and in particular that of Mr Thomas) rather than pollution of the night sky. This conclusion is reinforced by the reference in the last paragraph of the report to harm to neighbouring residents from light spillage/glare, and to no other harm associated with light pollution.

43. In my judgment, what is required by the paragraph of PPW cited in the report is not just consideration of that aspect of light spillage/glare, but the need to protect the

natural environment, retain dark skies where appropriate, prevent glare and respect the amenity of neighbouring land uses. In my judgment that wider need was a material consideration which ought to have been weighed in the balance and, in that wider sense, it was not. To that very limited extent ground 1 is made out.

Ground 2

44. I now turn to ground 2. Mr Stookes also put this as a failure to take into account a material consideration rather than a reasons ground. However in my judgment, it is clear that need was considered. It was considered on very scant information put forward by Merthyr Motor Auctions, but it was a conclusion which in principle was open to the council. However, what is missing is an explanation as to why that conclusion was reached in light of Mr Thomas's points that the high security fence and the 24 CCTV surveillance did reasonably meet that need.
45. The reasons for a decision must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, and in particular must not give rise to substantial doubt whether the decision maker erred in law for example by misunderstanding some "important matter or by failing to reach a rational decision on relevant grounds" (see *South Bucks District Council v Porter (No 2)* [2004] UKHL 33 [2004] 1 WLR 1953 and *Jones v Mordue* [2015] EWCA Civ 1243).
46. In my judgment the issue of need for unrestricted floodlighting at the premises was a principal controversial issue and the absence of reasons does give rise to a substantial doubt as to whether the council made an error of law in this regard and substantially prejudices Mr Thomas in his understanding on how the required balance was struck.

Ground 3

47. Finally, the attack by Mr Stookes under ground 3 was also put on the basis of a failure to consider a material consideration, namely the potential adverse affect of the floodlighting on the local bat population, rather than whether there was likely to be a significant effect on the species as a whole. He also submitted that the failure to adopt the surveyor's compromise is contrary to BW5 that proposals will only be permitted where they maintain enhance or do not cause harm to protected species, and contrary to the statutory duty under section 40 of the National Environment and Rural Communities Act 2006. That imposes on the council in the exercise of its functions to have regard, so far as is consistent with the proper exercise of its functions, to the purpose of conserving biodiversity.
48. Although certain references in the assessment and in the case officer's report can taken as referring to "significant impact" on bat species, reading the whole of each of the documents it is reasonably clear in my judgment that in each case regard was had to the local population and to the potential of the buildings at the premises for roosting. This was found to be low due to the long hours of staff presence servicing vehicles, bright lights, noise and type of construction. The suggested restriction of illumination during winter months was put forward as a "compromise" which "may be the best recommendation."

49. The case officer's report had regard to the fact that the unacceptability of the compromise to Merthyr Motor Auctions did not change the lack of objection to the proposal by the countryside officer or NRW. In my judgment sufficient regard was had to this factor and ground 3 is not made out.

Relief

50. Miss Dring submitted that even if the conclusion is that one or more of the grounds are made, then any relief should be refused on the basis set out in section 31(2A) of the Senior Courts Act 1981 that it is highly likely that the outcome would not have been substantially different, having regard to the fact (so far as relevant to ground 1) that the acceptability of floodlighting was not in issue, and that Mr Thomas accepted that visual intrusion into his property was minimal.
51. In my judgment my finding in relation to ground 1 means that the decision cannot stand and should be quashed. The decision may well have been the same had this consideration been properly brought into the balance, but on the evidence before me that is not a conclusion at which I can safely arrive. My finding on ground 2 might not have of itself justified exercising the discretion to quash the decision, but will have to be taken into account on any reconsideration, as well as the findings on ground 1.
52. Counsel helpfully indicated that they would attempt to agree any consequential matters and would make written submissions in respect of any which could not be agreed. Such submissions should be filed electronically only within 14 days of handing down this judgment.