



Neutral Citation Number: [2024] EWHC 120 (Admin)

AC-2023-CDF-000081

Case No: AC-2023-CDF-000081

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

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

Date: 26 January 2024

Before :

HIS HONOUR JUDGE JARMAN KC

Sitting as a judge of the High Court

Between :

R (on the application of BARBARA LAING)

- and -

THE CORNWALL COUNCIL

-and-

EBC PARTNERSHIPS LTD

Claimant

Defendant

**Interested
Party**

Mr Andrew Parkinson (instructed by **Richard Buxton Solicitors**) for the **claimant**
Mr Sancho Brett (instructed by **Cornwall Council Legal Services**) for the **defendant**

The interested party did not appear and was not represented

Hearing dates: 10 January 2024

Approved Judgment

This judgment was handed down remotely at 10.30 am Friday 26 January 2024 and sent to the parties and to the National Archives

HHJ Jarman KC:

Introduction

1. Outline planning permission was granted to the interested party (the developer, which phrase includes its predecessor) by the defendant as local planning authority (the authority) for the construction of nine dwellings on a site (the site) adjoining Bassett Road, Illogan. Condition 6 of the permission required the submission and approval of a landscape and ecological management plan before the development commenced. The developer submitted such a plan (the ecological plan) which the authority, acting by a planning officer under delegated powers, has approved and discharged the condition, as set out in a decision letter dated 2 June 2023. The claimant who lives next door to the site challenges that decision with the permission of HHJ Keyser KC sitting as a judge of the High Court.
2. There is one ground of challenge subdivided into three sub-grounds, namely that the authority in making the decision misinterpreted condition 6, failed to take into account material considerations and failed to give adequate reasons for the discharge of condition 6. Each of the sub-grounds is disputed by the authority. The developer did not take part in the hearing.

Background

3. The application for planning permission was submitted by the developer accompanied by an indicative site plan and a preliminary ecological appraisal report (the ecological appraisal). The nine dwellings were shown in a row fronting Bassett Road, which is separated from the site by a Cornish hedge, which typically includes earth and stone as well as shrub. The ecological appraisal showed a loss of 5m of the hedge for access between the site and Bassett Road.
4. The ecological appraisal made five recommendations in respect of ecology on the site, one of which related to the loss of the hedge. That recommendation was dealt with at [4.2] as follows:

“Hedgerow (loss): Under the current proposals development of the site will result in a c. 5m net loss of hedgerow habitat (UK BAP priority habitat) to create an access. A c. 10m new native hedgerow will be planted elsewhere on-site to mitigate this loss (not currently shown on the proposals)... Each new section of Cornish hedgerow will be planted with native trees and shrubs and should be bordered by a minimum 3m development free buffer seeded with a native wildflower/ grass seed mix. New sections of hedgerow must be positioned to maximize connectivity across the site by connecting directly to retained hedgerows; and must be of the same construction type and width as the hedgerow lost.”

5. Section 4.3 concerned specific measures in respect of badgers, hedgehogs, bats, reptiles and invasive plants. Section 4.4 under the title “Opportunity for Biodiversity Enhancements” set out recommendations for bat boxes, bird boxes and bee bricks.

6. In the summary of the ecological appraisal, this was stated:

“Hedgerow (loss and degradation): Development of the site will result in a c. 5m net loss of hedgerow habitat (UK BAP priority habitat) to create an access. To mitigate this loss, new native hedgerow habitat must be constructed elsewhere on-site, measuring double the length of hedgerow to be lost in accordance with Cornwall Council’s pending Biodiversity Supplementary Planning Document (SPD).”

7. The latter document (the supplementary document) was emerging at the time of the appraisal and was later adopted. The importance of creating a greater length of hedge than that lost was explained in it as follows:

“If you are losing features of ecological interest then you need to compensate for them. Compensation is nearly always required at a greater level than the loss incurred because newly created habitats tend to have much smaller biodiversity value than the old features which have been lost. Note that compensation is not always acceptable. Loss of well established features such as mature trees and hedges, or coastal or benthic habitats are very hard to compensate adequately for and your ecologist will be able to advise you on whether this option is likely to be viable”

For example if you are losing a line of hedge you would usually try and provide around double the original length as compensation, or if you lost a bat roost you would nearly always need to provide greater provision of roosting facilities on site.”

8. The importance of a Cornish hedge in ecological terms was also dealt with thus:

“Bees and other insects feed on pollen providing food for birds and other wildlife - Sanctuary and movement corridor for birds and other wildlife - Refuge for locally distinctive wildflowers and other plants - Wildlife linkage features to other habitats.”

9. The application for planning permission was refused by the authority but granted on appeal by an inspector in March 2019. Taking all matters into account, he found no conflict with the development plan, and significant social and economic benefits which, within this context, outweigh the moderate conflict with the emerging site allocations document and the Illogan neighbourhood plan.

10. The inspector attached conditions to the grant of permission, two of which are relevant to the claim, conditions 1 and 6. In doing so, he said this:

“The Council has requested conditions to be applied. Where necessary I have amended the wording of these in the interests

of precision and clarity in order to comply with advice in the Planning Practice Guidance...I have added a condition in the interests of biodiversity to secure the mitigation and enhancements pursuant to the Preliminary Ecological Appraisal which was submitted at the appeal.”

11. Condition 1 reads:

“Details of the appearance, landscaping, layout and scale (hereinafter called the reserved matters) shall be submitted to and approved in writing by the local planning authority before any development begins and the development shall be carried out as approved.”

12. Condition 6 provides as follows:

“No development shall commence until a Landscape and Ecological Management Plan (LEMP) setting out the management and maintenance of green infrastructure to be managed for biodiversity and landscape purposes has been submitted to and approved in writing by the Local Planning Authority. For the avoidance of doubt the LEMP shall comply with the recommendations, mitigation and enhancement measures contained within the Preliminary Ecological Appraisal Report.

All elements of the Landscape Scheme shall be implemented and maintained in accordance with the approved details unless otherwise agreed in writing by the local planning authority. All work shall be completed in accordance with the timetable agreed.”

13. The developer then made a reserved matters application for the discharge of condition 1. By the time of that application, the layout of the dwellings had changed. Instead of nine dwellings in a row along the roadside, the site plan submitted with the application showed that three of them were set back from the front six. This allowed a greater visibility splay from the site onto the road, entailing the loss of hedge there of some 23 meters. The authority refused the application, on the basis that the appearance and layout of the scheme proposed would cause material environmental harm to the character and appearance of the area.

14. There was another appeal to another inspector, which was allowed. The inspector in his decision letter dated December 2022 dealt with ecological issues at [17] in this way:

“Third parties have also raised concern in terms of the impact of the proposed development on the ecology of the area. However, the outline planning permission requires, via condition, that mitigation and enhancement measures pursuant to the Preliminary Ecological Appraisal Report are secured via the submission of a Landscape and Ecological Management Plan (LEMP) prior to the development of the site. I am therefore satisfied that a mechanism is in place for appropriate ecological mitigation despite the removal of a part of the existing roadside hedgerow habitat to form the access.”

15. The developer then made an application to discharge condition 6. The ecological plan submitted with the application showed the removal of about 23 meters of the hedge between the site and the road, and replacement with two hedges of a total length of 25m. The replacement hedges were not shown as connecting directly into the retained hedges.
16. A principal planning officer of the authority, who in the event also determined the application under delegated authority, prepared a report on the application. Such a report is not usual on this type of application, but was provided in this case because of the contentious planning history of the site and the claimant's objections. It referred to the ecological plan as setting out recommendations for biodiversity mitigation and enhancements and stated that "these follow on from the recommendations contained in the [ecological appraisal] submitted with the original application." It was said that measures include but are not exclusive to the creation and management of new and existing Cornish hedges and provision of in-built bat tubes, bee bricks and bird boxes etc. The report continued as follows:

"The condition can therefore be discharged as the [ecological plan] is deemed to be acceptable and in accordance with the general requirements set out in the originally submitted [ecological appraisal]."

17. The report referred to the case of *R(on the application of Cathie) v Cheshire West and Chester Borough Council* [2022] EWHC 2148 as authority for the proposition that "the appropriate test for discharging a condition is whether the application is "satisfactory" (per [65]) which does not mean "ideal"" and that "a condition "cannot be read in a way that imposes unreasonable requirements on the interested parties" (per [59])," and continued:

"In view of the above relevant case law, the [authority] is satisfied that the submitted plan and drainage strategy will, on the whole, 'satisfactorily' secure the management and maintenance of green infrastructure on the site for biodiversity and landscape purposes. This is deemed to be within the spirit and intentions of both the outline and reserved matters consents and their respective conditions."

18. The officer's report recommended discharge of the condition, and a decision was then issued to that effect.

Legal principles

19. The applicable well established legal principles were not in dispute before me and may be summarised briefly here.
 - i) The weight which should be given to a consideration is a question of planning judgment which is within the exclusive province of the local planning authority provided that there is no irrationality: *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759.

- ii) Local decision makers are assumed to have a working knowledge of the statutory tests. The court will not readily draw an adverse inference that the local authority acted unlawfully: *South Buckinghamshire v Porter* (No. 2) [2004] 1 WLR 1953.
 - iii) An officer's report is required to be read with reasonable benevolence, fairly and as a whole, and without undue rigour, excessive legalism or criticism. Only if the effect of the report is significantly to mislead on a material issue will the court interfere: *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314 [42].
 - iv) In considering that question, the court will read the report fairly, as a whole and with a reasonable degree of benevolence, not forgetting that it has been addressed to an audience familiar with local circumstances: *R (Whitley Parish Council) v North Yorkshire County Council* [2023] EWCA Civ 92 at [37].
 - v) There are no special rules for the interpretation of planning conditions. The test is what a reasonable reader would understand the words to mean in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense: *DB Symmetry Ltd v Swindon Borough Council* [2022] UKSC 33 at [66].
20. Before dealing with the issues in the case, I shall make some general observations. It is readily apparent from the site plan approved under condition 1 that there is limited room on site for the provision of new hedge and/or connection with retained hedge, not least because of a required 3 meter buffer zone in which no development may be carried out. It is accepted on behalf of the authority that the discharge of condition 1 cannot alter the wording of condition 6. Moreover, it was not suggested in the application before the authority or in the case before me that such provision, or at least more provision, is impossible as opposed to difficult. There is an outstanding application by the developer under section 73 of the Town and Country Planning Act 1990 to vary the approved site plan by the relocation of one of the dwellings which would allow the provision of a longer connected new hedge. That application is still pending and I must not speculate as to the outcome and nothing I say in this judgment should be taken as impacting in any way upon the outcome. The fact that it is made, however, would seem to underline that there is scope for more provision.

Interpretation of condition 6

21. Dealing first with the issue of interpretation, Mr Parkinson for the claimant submits that the officer's report in concluding that the ecological plan was deemed to be acceptable and in accordance with the general requirements set out in the originally submitted ecological appraisal, interpreted condition 6 too liberally. There was no scope for the application to comply with the ecological plan or the ecological appraisal provided it did so in a general or satisfactory manner, otherwise the condition could have said so. The reference to the case of *Cathie* in the officer's report was misleading, as that turned on its own facts and the interpretation of particular conditions relating to odour management of a slurry pit to take waste from a herd of dairy cows.

22. Mr Brett submits that the officer's report must be read fairly as a whole, which of course is the proper approach. He further submits that there was no requirement in condition 6 for the ecological plan to comply strictly with the recommendations of the ecological appraisal. Although that recommendation was that a hedge "must be" constructed elsewhere on site of "double the length" of the hedge to be lost, the recommendation also stipulated that such provision should be "in accordance with" the supplementary document. That in turn refers to compensation "nearly always" requiring a greater length of hedgerow provided than lost, and that one would "usually try to provide around double" the length.
23. I accept that those words connote an element of planning judgment, as to what circumstances may be usual, what is required by the word "try" and what is "around double." The court cannot interfere with such a judgment. However, condition 6 requires that the ecological plan "shall comply" with the recommendations of the ecological appraisal, which is a site specific appraisal. That referred to the replacement of 5 meters of lost hedge with 10 meters of new hedge. I reject any suggestion that the reference to 10 meters should in any way inform the approach to the recommended when the loss increases from 5 meters to 23 meters. It is clear from the summary and from the requirement in the ecological appraisal and from the requirement that the compliance should be in accordance with the supplementary document, that when the loss increased to 23 meters that the recommended compensation is 46 meters.
24. Unlike the ecological appraisal, the supplementary document sets out generic, not site specific, recommendations. In deciding whether the approved site plan was also in accordance with condition 6, I have already accepted that the latter may involve some planning judgment. For example, if the proposed compensation was a hedge of say 40 meters, a planning judgment may have to be made as to whether that is "around" double 23 meters. However, it has not been suggested in the present case that 25 meters is "around" double the length of 23 meters. Another example may arise if it were impossible to provide "around" double in any particular scheme, and a planning judgment might have to be made as to whether that amounted to an exception to the references to "nearly always" or to the requirement to "usually try" to make around double the provision. Again however, it has not been suggested in the present case that the recommended provision on the site, or at least a greater provision, cannot be made despite efforts to do so.
25. Those references in the supplementary document do not provide answers to the claimant's assertion that the recommendation in the ecological appraisal that new sections of hedge must be positioned to maximise connectivity across the site "by connecting directly to" hedges. Whilst the reference to maximising connectivity may of itself involve some planning judgment, the ecological appraisal goes on to recommend that the way this is to be achieved on this site is by direct connection to retained hedge. The officer's report does not appear to deal with how, if at all, the proposed new hedge connects directly with retained hedge.
26. I accept that the reference in the officer's report to the case of *Cathie*, insofar as the citation indicates that conditions should be interpreted so as not to impose unreasonable requirements is an accurate summary of the relevant legal principle. However, insofar as it goes further and suggests that *Cathie* is authority for the proposition that the test for discharging a condition is whether the application is satisfactory, in my judgment that is a misreading of the judgment. His Honour Judge Bird, sitting as a judge of the

High Court, considered in that case an application to discharge a condition requiring the submission of an odour management plan in respect of a slurry pit associated with a dairy herd, and approval of the plan by the local planning authority. The condition referred to best practice and required that the plan should include all measures to minimise odour emissions, including meteorological details and processes for emptying the pit. The reason for the condition was to protect neighbouring amenities.

27. Unlike the present case, the condition did not go into detail as to how the best practice or minimising of odours should be achieved. In the present case, condition 6 does do so, by requiring compliance with the recommendations of the ecological appraisal. In *Cathie*, it is unsurprising that HHJ Bird concluded that the test for whether the condition there had been satisfied was whether the plan was satisfactory. HHJ Bird was careful at [65] to confine his conclusion to “the present case,” that is the case before him, and did not purport to pronounce for any broader application. Accordingly, in my judgment, that case is not authority for the broad proposition set out in the officer’s report that that is the test for the discharge of “a” condition, and that amounts to a significant misreading of the case on this point. The test depends on the proper interpretation of the condition in question, which is the exercise in which HHJ Bird was engaged in when interpreting the condition before him, and the exercise in which I am engaged (and which the authority should have been engaged in) when interpreting condition 6.
28. Condition 6 requires compliance with “the recommendations” in the ecological appraisal, not some of them, or the majority of them. There is no hierarchy of the recommendations in the ecological appraisal or in condition 6. There is no requirement to have regard to every sentence of the ecological appraisal, but simply to comply with its recommendations, read in light of the appraisal as a whole.
29. In my judgment for the reasons set out above, the authority in approaching the application on the basis of whether the ecological plan was acceptable or satisfactory or in accordance with the general requirements of the ecological appraisal, approached its task too loosely. The question it should have asked itself, but did not, is whether the ecological plan complied with the recommendations of the ecological appraisal.

Material considerations

30. In light of that conclusion, in my judgment the determination of the second issue, whether the authority did not take into account material considerations, adds very little, if anything, to the determination of the first issue. The missed considerations are said to be the non-compliance with the ecological appraisal in terms of the length of new hedge and its connectivity to retained hedge. This is a different way of putting my conclusions above.

Reasons

31. There was an interesting debate between the parties as to the third issue, namely whether adequate reasons were giving for the discharge of condition 6. In light of the conclusions which I have already come to, the resolution of that issue may not much matter, but in case it does I shall deal with it but shall do so briefly.
32. In my judgment, there is no general requirement to give reasons on an application to discharge a condition attached to a planning decision. As the evidence before me

suggests, the authority does not usually compile an officer's report on such an application. Mr Parkinson, for the claimant, relied on regulation 7 of the Openness of Local Government Bodies Regulations 2014 which creates a duty to give reasons for certain delegated decisions. One of the specified circumstances is where the decision affects the rights of an individual. He submitted that the decision to discharge condition 6 affected the rights of the claimant as a neighbouring property owner. I do not accept that it does. Outline planning permission and a layout and landscaping plan have already been granted and approved on appeal. The decision under challenge relates to the biodiversity of the site and it is not clear how it is said that that affects the claimant's rights as an individual, albeit as a one having an interest in neighbouring property.

33. However, on behalf of the authority Mr Brett accepts that where reasons are given, even where there is no duty to do so, if those reasons disclose an error of law then the decision can be reviewed on the basis of that error. It follows from my conclusions above that in my judgment there is such an error and it is reasonably clear from the decision how the authority approached the application. This does not change the conclusions I have already come to.

Relief

34. In my judgment those conclusions are sufficient for the challenge to be made out. Mr Brett, on behalf of the authority, submitted that relief should be refused pursuant to section 31 (2A) of the Senior Courts Act 1981 on the basis that it is highly likely that the outcome would not have been substantially different if the authority had interpreted condition 6 correctly. I do not accept that submission. The authority interpreted condition 6 too narrowly, and consequently did not grapple with the non-compliance of the ecological plan in two important respects, namely the length of new hedge and direct connectivity with retained hedge. It cannot be said that it is highly likely that the outcome would be the same once those issues are grappled with. Whether it will or not is a matter for the authority, applying the correct interpretation of condition 6, and not for me. The decision on the application must be quashed and resubmitted to the authority for redetermination.
35. I am grateful to counsel for their assistance. They helpfully indicated that it is likely that any consequential matters which cannot be agreed can be dealt with by way of written submissions. I would be grateful if they could file a draft order, agreed as far as possible, within 14 days of hand down of this judgment, together with any such submissions which may be necessary.