Neutral Citation Number: [2024] EWHC 440 (Admin)

Case No: AC-2022-LON-002430

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/02/2024

Before :

Neil Cameron KC
sitting as a Deputy High Court Judge

Between :

THE KING
ON THE APPLICATION OF

ZIPPORAH LISLE-MAINWARING — **Claimant**

- and –

THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA — **Defendant**

-and-

CLARE JAMES — **Interested Party**

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- -

Paul Brown KC (instructed by **Richard Max and Co. LLP**) for the **Claimant**
Brendan Brett (instructed by **Bi-Borough Legal Services**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing date: 18th January 2024

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JUDGMENT

The Deputy Judge (Neil Cameron KC):

Introduction

1. In this case Mrs Zipporah Lisle-Mainwaring has applied for an order to quash the decision made by the Royal Borough of Kensington and Chelsea to approve a construction traffic management plan ("CTMP") submitted pursuant to condition 3 attached to planning permission 19/01773.

2. Permission to proceed with the application for judicial review was refused on the papers by Eyre J by order dated 5th October 2022. Permission was also refused by HH Judge Jarman KC following an oral hearing held on 7th December 2022. By an order dated 17th February 2023 Stuart-Smith LJ granted permission to apply for judicial review and ordered that the application be returned to this court.

The Background Facts

3. On 12 March 2019, the Interested Party submitted an application to the Defendant for planning permission to develop land at 17 South End, W8 5BU ("the Site") by "Demolition of existing building to be replaced with new residential dwelling including construction of basement". That application was given the reference number PP/19/01773 by the Defendant ("the Planning Application").

4. By a decision notice dated 10th May 2019 the Defendant granted the Planning Application ("the 2019 Planning Permission"). The following were among the conditions attached to the 2019 Planning Permission:

"1. Time Limit

The development hereby permitted shall be begun before the expiration of three years from the date of this permission.

….

3. Construction Traffic Management Plan (CTMP)
No development shall commence until a Construction Traffic Management Plan has been submitted to and approved in writing by the local planning authority. The statement should include:
a) routeing of demolition, excavation and construction vehicles, including a response to existing or known projected major building works at other sites in the vicinity and local works in the highway;
b) access arrangements to the site;
c) the estimated number and type of vehicles per day/week;
d) details of any vehicle holding area;
e) details of the vehicle call up procedure;
f) estimates for the number and type of parking suspensions that will be required;
g) details of any diversion or other disruption to the public highway during preparation, demolition, excavation and construction work associated with the development;
h) work programme and/or timescale for each phase of preparation,

demolition, excavation and construction work associated with the development;
i) details of measures to protect pedestrians and other highway users from construction activities on the highway; and
j) where works cannot be contained wholly within the site a plan should be submitted showing the site layout on the highway including extent of hoarding, position of nearby trees in the highway or adjacent gardens, pedestrian routes, parking bay suspensions and remaining road width for vehicle movements.

The development shall be carried out in accordance with the approved Construction Traffic Management Plan. A one page summary of the requirements of the approved CTMP shall be affixed to the frontage of the site for the duration of the works at a location where it can be read by members of the public."

5. On 15th February 2022 the Interested Party submitted an application seeking to discharge conditions 3, 5, 6, 15 and 16 attached to the 2019 Planning Permission ("the February 2022 Application").

6. On 25th April 2022 the Defendant determined the February 2022 Application. The Defendant approved the details submitted in respect of Conditions 5, 6, 15 and 16. The Defendant refused to approve the details submitted in respect of Condition 3 (the Construction Traffic Management Plan ("CTMP")).

7. On 9th May 2022 the Interested Party submitted a further application for discharge of Condition 3 ("the May 2022 Application"). The May 2022 Application was accompanied by a draft construction traffic management plan CTMP(v7), for which approval was sought.

8. On 9th May 2022, being the day before the 2019 Planning Permission was due to expire, but before determination of the May 2022 Application, works were carried out in the garden of 17 South End. The works comprised the hand digging of a hole approximately 1m deep and 1m square. A series of photographs was sent on behalf of the Interested Party to the Defendant showing the works and evidencing the date on which they were carried out.

9. The Interested Party submitted to the Defendant a revised draft of the construction traffic management plan, CTMP(v8) dated June 2022.

10. The application for approval of the CTMP was considered at a meeting of the Defendant's Planning Applications Committee held on 26th July 2022. The Defendant's planning officer prepared a report to inform the committee ("the OR"). In that report the officer recommended that the CTMP be approved. The OR included the following:

"1.3 Planning permission was granted on 10th May 2019 and the works have commenced on site without this pre-commencement condition being discharged. Condition 1 states that the development must be implemented within three years on which the date that permission was granted. As such, the permission should have been

implemented prior to expiration on 10th May 2022. The applicant has submitted the information for the pre-commencement condition prior to the expiry of the permission, and as such, the Council can still determine the information and to do so would not render the application unlawful.

…

6.2 Planning permission was granted on 10th May 2022 and the works have commenced on site without the pre-commencement condition being discharged. The permission was granted on the basis that the development would commence within three years prior to expiration on 10th May 2022. The applicant has submitted the information for the pre-commencement condition prior to the expiry of the permission, and as such, the Council can still determine the information.

6.3 An appeal regarding a similar situation was determined by the Planning Inspector for a site within the Borough where the 'Whitley principle' was applied (*FG Whitley & Sons Co Ltd v Secretary of State for Wales* [1992] 64 p. & C.R 296) (Appeal Ref. APP/K5600/W/17/3168385). The Whitley principle is essentially that a permission is controlled by, and subject to, its conditions and therefore operations carried out in contravention of conditions cannot properly be described as commencing the development authorised by the permission. However, there are certain exceptions to this as established in case law, one of which is explained in paragraph 13 of this appeal decision which states the following: "*The one relevant to this case being that if a condition requires an approval before a given date, but the developer has applied before that date for approval, and that approval is subsequently given so that no enforcement action can be taken, work done before the deadline and in accordance with the scheme ultimately approved can amount to a start to development. It does not matter if the subsequent approval was given after the deadline*". Very minor works are sufficient to commence a planning permission. Photographs have been submitted to the Council by the applicant on the 9th of May 2022 showing a small trench where building foundations would be laid. The operations were carried out using hand tools only and did not require large vehicles to access the site.

6.4 Therefore, given that the application was received by the Council on 09/05/2022 and if approval is given, works that commenced in advance of this date would not render the development unlawful.

The decisive issue is:

i. Whether the proposed CTMP is acceptable and if the proposed methodology would have any adverse impact upon local parking and traffic."

11. A transcript of the discussion which took place at the committee meeting held on 26th July 2022 is before the court. That transcript records that the officer advised members of the committee:

"Councillor Etty: Just to clarify, the planning permission is granted on the 10th May 2019, not expired on the 10th May, is that correct?

M1: Yes, the planning permission was granted in 2019 on 10th May and that was valid for three years.

Councillor Etty: Right, so-,

M1: So, in other words, it expired on the 10th May this year.

Councillor Etty: 10th May. Yes, I mean, the question is would-, a new CTMP plan is valid if the existing planning application is already expired? It's the same question that the objector was just asking.

M1: I think it's very important to understand that the only thing before the planning authority this evening is the CTMP, simple as that. There's no other matter before the planning authority this evening. If neighbours want to raise legal arguments in terms of the legality of carrying on work at the site, that's a matter for the enforcement team. The enforcement team are already aware of it. The applicants could submit an application for certificates of lawful developments. That could be considered. If there was any doubts then, I mean, the process of assessing that certificate would probably add clarity to it. So, there are a number of ways that clarity can be given to those questions, but the CTMP application is all that you have before you this evening. Should it transpire that somehow the applicants' find that they've lost their permission, then they would have a CTMP that they couldn't operate. So, you know, there's really no implication that flows from that."

12. By a decision notice dated 28th July 2022 the Defendant approved the construction traffic management plan.

The Grounds of Claim

13. Stuart-Smith LJ granted permission to proceed with an application for judicial review on a single ground, namely that the Defendant failed to take into account a material consideration being its ability, acting reasonably, to decline to determine the Interested Party's application to discharge the condition.

The Legal Framework

14. The principles to be applied when a challenge is based on criticism of an officer's report to a planning committee were set out by Lindblom LJ at paragraph 42 in ***Mansell v. Tonbridge and Malling BC*** [2017] EWCA Civ 1314.

<u>Applications for consent, agreement or approval required by a condition attached to a planning permission</u>

15. Article 27 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the DMPO") provides:

"(1) Subject to paragraph (3), an application for any consent, agreement or approval required by a condition or limitation attached to a grant of planning permission must—

(a) be made in writing to the local planning authority and must give sufficient information to enable the authority to identify the planning permission in respect of which it is made; and

(b) include such particulars, and be accompanied by such plans and drawings, as are necessary to deal with the application.

(2) The authority must give notice to the applicant of their decision on the application within a period of 8 weeks beginning with the day immediately following that on which the application is received by the authority, or such longer period as may be agreed by the applicant and the authority in writing."

16. If a local planning authority do not give notice to the applicant of their decision within the prescribed period, an applicant may appeal to the Secretary of State (section 78(2) Town and Country Planning Act 1990 ("TCPA 1990")).

The Whitley Case

17. The issue before the court of appeal in ***Whitley and Sons v. Secretary of State for Wales*** (1992) 64 P.& C. R. 296 was identified by Woolf LJ at page 298:

"The issue which was before the deputy judge and is now before this court, is whether the developers have lost the benefit of a planning permission, which had been granted to them to carry out mining operations, as a result of their failure to comply with the conditions to which the permission was subject."

18. The principle to be applied is stated at page 302:

"As I understand the effect of the authorities to which I am about to refer, it is only necessary to ask the single question; are the operations (in other situations the question would refer to the development) permitted by the planning permission read together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful."

19. One of the recognised exceptions to the principle is described by Woolf LJ at page 306:

"In the absence of express provision of the sort contained within section 42, in the case of permissions other than outline permission, I take the the (sic) view that it can accord with the intent of the legislation if the approval is obtained after the expiration of the time limits as long as the application has been made before the specified time limits and either the operations which have place are immune from enforcement or the approval is obtained prior to enforcement action."

20. Woolf LJ also stated (at pages 306-307):

"Obviously if the planning authority or the Secretary of State does not regard it as desirable where a time limit has expired to give approval to reserved matters they are

not under a duty to give approval. They can take the stand (as long as they act reasonably) that the developer has lost his chance."

The duties imposed upon planning authorities when considering planning applications and applications for approval pursuant to conditions

21. In ***Bovis Homes (Scotland) Limited v. Inverclyde District Council*** (1982) S.L.T. 473 (at page 477) the Court of Session Outer House held that the duty imposed upon a local planning authority to consider a planning application is a continuing obligation and continues to apply after the time period for determination has expired.

22. In ***R (Billings) v. First Secretary of State*** [2005] EWHC 2274 (Admin) (at paragraph 26) Sir Michael Harrison applied the principle in ***Bovis*** to consideration of an application for approval of reserved matters, stating:

"26. Although the Inspector was technically correct in saying that there was no planning permission that could "currently" be implemented because the reserved matters applications had not yet been determined, there was, on the evidence, no reason why the reserved matters should not be determined so that, in that sense, there was an extant planning permission which was not time-barred because the Council have a continuing duty to determine the reserved matters applications (see *Bovis Homes (Scotland) Limited v Inverclyde District Council* [1983] JPL 171)."

23. A planning authority has a statutory obligation to determine a planning application which is before it, unless and until the Secretary of State makes a direction under Article 31 of the DMPO or calls the application in for his or her own determination (***R (on the application of GOESA Limited) v. Eastleigh BC*** [2022] EWHC 1221 (Admin) at paragraph 64).

The Ground of Claim

24. Mr Brown KC for the Claimant, submits that

i) On the basis of the obiter dicta of Woolf LJ at page 307 in ***Whitley*** the Defendant had a discretion to decline to determine the May 2022 Application.

ii) ***Bovis***, ***Billings*** and ***GOESA*** can be distinguished as they were not concerned with circumstances in which the time limit for beginning development had expired.

iii) The advice given by officers, in particular at OR 6.4, and in the oral advice quoted at paragraph [11] above materially misled members of the committee, by stating that the only thing before them was the CTMP (and that there was no other matter before them) as the officers did not tell members that they had the option of declining to determine the application.

iv) The Defendant fell into legal error as a result of that misdirection.

v) If an error of law is established the proper remedy is to quash the decision as it is not known what decision members of the committee would have taken if the existence of the discretion had been drawn to their attention.

25. Mr Brett, for the Defendant, submits:

i) If the Defendant did have a discretion to decline to determine the May 2022 Application:

a) It was not a mandatory material consideration, or an obviously material consideration.

b) The ability of the Defendant to decline to determine the May 2022 Application was not drawn to the attention of the Planning Applications Committee by the Claimant, and she did not ask the committee to decline to determine the application.

c) The advice given to members of the Defendant's Planning Applications Committee did not materially mislead them. In particular, the words 'the only thing' meant the only matter before the committee was consideration of the May 2022 Application, and that they were not required to consider whether the works referred to at paragraph [8] above constituted a material operation comprised in the development (as referred to in section 56(2) TCPA 1990).

ii) In the alternative, the Defendant had a continuing obligation to determine the May 2022 Application and did not have a discretion not to determine it.

a) The obiter dicta of Woolf LJ in ***Whitley*** are not authority for the proposition that a local planning authority has the power to decline to entertain an application on the sole basis that it falls to be determined after the time limit for beginning development has expired.

b) A power to decline to determine the application would be inconsistent with the statutory scheme. If Woolf LJ's obiter dicta is to be read as indicating that a planning authority has a discretion to decline to determine an application for discharge of a condition, they are per incuriam.

iii) If the Defendant fell into legal error the court should exercise its discretion to refuse to grant relief in the light of the Claimant's failure to raise the matter with the Defendant at the time that the decision was made.

Discussion

26. I will first consider whether the ground of challenge is made out on the assumption that the Defendant did have a discretion to decline to determine the May 2022 Application.

27. When considering a challenge based upon advice given in a planning officer's report the question is whether, on a fair reading of the report as a whole, the officer has

materially misled members on a matter bearing on the decision, and the error has gone uncorrected before the decision is made. (***Mansell*** at paragraph 42). In my judgment similar principles apply when reliance is placed on advice given orally at a committee meeting to supplement advice given in a report. In my judgment the obligation to treat advice with reasonable benevolence applies with even greater force to advice given orally at a committee meeting. In addition, unless oral advice is said to change, alter or correct advice given in writing, it is to be considered as supplementing the advice given in writing, and must be considered in conjunction with that written advice.

28. At paragraph 6.5 of the OR the officer advised members that the decisive issue was whether the CTMP was acceptable. That advice has to be read in context. The advice follows a reference to the ***Whitley*** principle and the relevant exception to it. In my judgment the reference to the acceptability of the CTMP as being the decisive issue did not mislead members, let alone mislead them in a material, significant or serious way. That advice directed members (present at the meeting held on 26th July 2022) that it was not for them to form a view on whether or not the works carried out at the Site on 9th May 2022 constituted a material operation comprised in the development sufficient to satisfy the requirements of condition 1 attached to the 2019 Planning Permission. The matter before the members of the committee was an application for approval of details submitted pursuant to condition 3 attached to the 2019 Planning Permission. The advice that the acceptability of the CTMP and whether the proposed methodology would have any adverse impact upon local parking and traffic was correctly described as the decisive issue for the members to consider. Even if the members had a discretion to decline to determine the application, the officers' advice that the acceptability of the CTMP submitted was the decisive issue did not materially mislead. Further, it did not constitute a material defect in the advice given.

29. The Claimant also relies upon the advice given orally at the committee meeting and, in particular, on the advice that the only 'thing' before the committee was the CTMP, and that there was no other matter before the planning authority. The application before the Defendant was an application for approval of details made pursuant to condition 3 attached to the 2019 Planning Permission. The details submitted constituted the CTMP. Therefore the only application before the committee was for approval of the CTMP. The reference to 'thing' or 'matter' in the oral advice has to be considered in context. The discussion which preceded the answer given by the officer related to the time limit set by condition 3 attached to the 2019 Planning Permission. The officer's answer made plain that the application before the committee was for approval of the CTMP. That advice did not materially mislead; indeed it reminded the members of the application before them, and that their role was to determine that application, not to consider other issues such as whether a material operation comprised in the development permitted by the 2019 Planning Permission had been carried out before the time limit imposed by condition 3 expired.

30. For those reasons, in my judgment, there was no material misdirection as referred to in paragraph 69 in ***R (on the application of Ashchurch Rural Parish Council) v. Tewkesbury BC*** [2023] EWCA Civ 101.

31. In the course of argument before the court a discretion to decline to determine the application was also characterised as being a material consideration. The three categories of material consideration are identified in ***R (on the application of Friends of the Earth Ltd.) v. Heathrow Airport*** [2020] UKSC 52 at paragraphs 117-121.

32. Insofar as the discretion to decline to determine the May 2022 Application was a material consideration:

    i) That consideration was not a mandatory material consideration.

    ii) Neither the Claimant nor any other party put that consideration before the Defendant.

33. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion (***Friends of the Earth*** at paragraph 120).

34. A decision maker is not required to cast around for other approaches to a determination which have not been put before him or her (***R (on the application of AB) v. Secretary of State for the Home Department*** [2018] EWCA Civ 383 at paragraphs 48 and 49).

35. In this case the existence of a discretionary power to decline to determine the application was not put before the Defendant. No party asked the Defendant to exercise such a discretion. In my judgment the exercise of such a discretion was not such an obviously material consideration that to fail to take into account would render a decision unlawful. Further the Defendant was not required to cast around to find alternatives to deciding whether to approve or refuse an application for approval of details submitted pursuant to a condition attached to a planning permission.

36. This case can be clearly distinguished from ***Ashchurch***- that case did not concern a failure to take into account a discretionary material consideration, as is made plain at paragraph 69 of the judgment.

37. For those reasons, on the assumption that the Defendant had a discretion to decline to determine the May 2022 Application, the claim is dismissed as:

    i) The officer's report and oral advice given at the committee meeting did not materially mislead the members of the committee.

    ii) The exercise of a discretion to decline to determine the application was not an obviously material consideration; and

    iii) The Defendant was not obligated to cast around and find an alternative to refusing or approving the application which had been made to them.

38. Although it is not necessary to do so in order to determine whether the ground of challenge should succeed, I have considered whether a local planning authority has a discretion to decline to determine an application to discharge a condition when such an application is made before the time in which development can be begun pursuant to a planning permission expires, and is determined after the time in which development can be begun has expired.

39. The Claimant's case is based upon the statement made by Woolf LJ at page 307 in ***Whitley***. Both Mr Brown and Mr Brett agree that the statement was obiter dicta. Further Mr Brown acknowledged that Woolf LJ did not make clear the basis upon which he

said that a local planning authority can take the stand that the developer has lost his chance.

40. A planning authority seized of a planning application has a continuing obligation to determine the application (***Bovis*** and ***GOESA***). A planning authority to whom an application for approval of reserved matters has been made also has a continuing obligation to determine it (***Billings***). It would be inconsistent with the principles established in that line of authorities to hold that no such continuing obligation to determine an application applies in the case of applications for approval of details pursuant to a condition.

41. Mr Brown argues that the circumstances in this case are different to those considered in ***Bovis***, ***GOESA*** and ***Billings***, as the May 2022 Application was considered after the time limit imposed by condition 1 on the 2019 Planning Permision had expired, and as the exceptions to the ***Whitley*** principle are judge-made law which supplements the statutory code.

42. The addition to the statutory code created by the exception to the ***Whitley*** principle under consideration in this case was justified, in part, by reference to the provisions which relate outline planning permission (as referred to in the passage from Woolf LJ's judgment quoted at paragraph [19] above). It may thus be said that the addition to the statutory code is consistent with the code. Further the addition to the statutory code is focussed on the issue of whether a planning permission has been implemented (in the sense of development being begun in accordance with the terms of the planning permission) and not on the question of how applications for approval of details required to be submitted pursuant to a condition are to be dealt with.

43. When he said (at page 307 in ***Whitley***) that " [t]hey can take the stand (as long as they act reasonably) that the developer has lost his chance", it is not clear that Woolf LJ was intending to make a further addition to the statutory code by indicating that a local planning authority could decide not to determine an application. Woolf LJ's statement could be read as indicating that a local planning authority could, if they acted reasonably, refuse to approve details.

44. In my judgment these obiter dicta remarks of Woolf LJ do not establish that the Defendant had a discretion not to determine the May 2022 Application. In my judgment the general principle that applies to applications for planning permission and for approval of reserved matters, that once a valid application has been made, a local planning authority has a continuing duty to determine it, also applies to applications for approvals required under a planning condition. I do not consider that the fact that such an application is made before the time limit on a planning permission has expired, and is determined after it is expired, is a good reason to disapply that principle.

Relief

45. Mr Brett argued that if the court had found that the Defendant acted unlawfully, it should exercise its discretion to refuse the relief sought, and should not quash the Defendant's decision. He argued that it was improper for the Claimant to rely on her own failure to raise the existence of a discretion not to determine the May 2022 Application.

46. Mr Brett also relied upon section 31(2A) of the Senior Courts Act 1981. He submitted that there is no reason to suggest that the Defendant would have taken a different view absent the unlawfulness complained of, and that the Claimant has never put forward any reason why the Defendant ought not to have determined the May 2022 Application if it had the ability to decline to determine it.

47. Mr Brown submitted that if there was an error of law, the decision should be quashed. He submitted that it was impossible to know what members would have done if their attention had been drawn to the existence of a discretion to decline to determine the May 2022 Application. He relied upon the fact that two members of the committee had expressed views which indicated that they were concerned about the consequences of the decision.

48. As no ground of claim has been made out, the question of relief does not arise.

49. If the question of relief had arisen, I would have held that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. The Defendant found that the CTMP was acceptable. Once the Defendant had found that the CTMP was acceptable it is highly likely that they would have approved it, even if they had the option of declining to determine it.

Conclusion

50. For the reasons I have given the claim is dismissed.