Neutral Citation Number: [2016] EWHC 2617 (Admin)

Case No: CO/2933/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2016

Before:

THE HON. MRS JUSTICE PATTERSON DBE

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Between:

THE QUEEN on the application of GRAND CENTRAL SOUND STUDIOS LIMITED	**Claimant**
- and -	
LORD MAYOR AND CITIZENS OF THE CITY OF WESTMINSTER	**Defendant**
- and -	
MARLBOROUGH HOUSE LIMITED	**Interested Party**

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- -

James Maurici QC and Richard Moules (instructed by **Sharpe Pritchard**) for the **Claimant**
Saira Kabir Sheikh QC (instructed by **Tri Borough Legal Services**) for the **Defendant**
Rhodri Price Lewis QC (instructed by **Baker & Mackenzie LLP**) for the **Interested Party**

Hearing date: 13 October 2016

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Approved Judgment

Mrs Justice Patterson:

Introduction

1. This is a renewed application for judicial review of the decision of Westminster City Council on 29 April 2016 to grant planning permission to Marlborough House Limited (MHL) for the redevelopment of 54 and 55 to 57 Great Marlborough Street (the site) in the centre of London. The site has a lawful use as offices. The grant of planning permission was to convert the majority of the site into residential accommodation.

2. The claimant is a highly successful company specialising in sound for television, cinema and radio commercials. It has a client base of top advertising agencies and a worldwide reputation for the quality and creative excellence of its work. It employs 31 people. It is based at 51 to 53 Great Marlborough Street (the premises). The premises are immediately adjacent to the site. They comprise eight studios, three at basement level, three at the ground floor and two state-of-the-art studios on the seventh floor. It is critical to the claimant's operation that it has a soundproof environment in its eight studios as external sound and vibration can have a significant impact on its day-to-day operations. The claim was issued on 9 June 2016. The defendant and interested party have both served summary grounds of resistance.

3. On 15 July 2016 Supperstone J refused permission on the following grounds:

> "*Ground 1*: There was no error with respect to paragraph 51 of the NPPF. There is an identified need for additional housing in the Defendant's area. The issue was one of planning judgment for the Defendant.
>
> *Ground 2*: The Defendant had the benefit of expert reports. It is not arguable that there was no/insufficient evidence in relation to noise mitigation. This ground amounts to no more than a disagreement with the balance struck by the Defendant in respect of noise disturbance and mitigation.
>
> *Ground 3*: The relevant considerations and assessment are properly addressed in both officer reports.
>
> *Ground 4*: The Defendant was aware of its ability to impose such a condition. It did not consider it necessary to do so. This was a decision it was entitled to make in the exercise of its planning judgment."

4. There are four grounds of challenge:

   i) That the defendant unreasonably treated the conversion of offices to residential use as acceptable in policy terms given that:

      a) It had announced on 18 March 2015 that changes of use from office to residential were unacceptable in policy terms;

b) The proposal was contrary to paragraph 51 of the National Planning Policy Framework (NPPF);

c) That there was no basis for treating MHL's application inconsistently, as it did, to the application at St Giles' House.

ii) That the defendant had no or insufficient evidence on noise mitigation because it composed a condition to protect the premises from construction noise and vibration without first satisfying itself that the harm was capable of being mitigated pursuant to the condition imposed;

iii) That the Council failed to have regard to a material consideration, namely, that its inability fully to protect Grand Central from noise and vibration would risk the loss of a policy protected noise sensitive use; and

iv) That the Council unreasonably failed to impose a planning condition on MHL's planning permission to protect the premises from adverse changes in vibration from underground trains despite including such a condition on the planning permission it granted on the same day in respect of the redevelopment of St Giles' House, 49 to 50 Poland Street.

5. The planning application involves the demolition of the existing buildings and redevelopment behind retained street facades to comprise a new building at basement, ground and first to seventh floor levels. The ultimate use is proposed to be for retail/restaurant use on the ground floor but mostly residential. The work is anticipated to take 28 months. The key concern of the claimant is that of ground-borne vibration. That could make it impossible for the claimant's business to function at all as ground-borne vibration would bypass sound insulation in the studios thereby rendering it difficult to make voice recordings which are very sensitive to any interference and background noise. That consequence was explained by the claimant to the defendant at a meeting at City Hall on 26 October 2015.

6. By that time the claimant had objected to the planning application.

7. There were two reports to Committee on the application. OR1 was for the Committee dated 17 November 2015. The application was recommended for refusal on the basis that the financial contribution in lieu of affordable housing on the site was inadequate.

8. Further discussion took place and the application was reported to Committee again on 8 March 2016. I shall refer to that report as OR2. On that occasion the recommendation was to grant conditional permission subject to a section 106 legal agreement to secure, amongst other things, compliance with the City Council's code of construction practice and submission of a SEMP (Site Environmental Management Plan) with an annual cap of £33,000. The Council resolved that permission should be granted and in due course, after the execution of the appropriate agreements, permission was issued.

9. Prior to then, on 18 March 2015, Councillor Robert Davis, Deputy Leader of Westminster City Council, announced a change in approach to applications seeking to convert office space into residential. The reason was because the balance of commercial to residential floor space had tipped too far in favour of residential use

within Westminster's Central Activity Zone (CAZ). Councillor Davis said in his statement that that was causing several damaging impacts which, if nothing was done to assuage the current trend, would have potential to worsen. They were:

i) Damage to the global competitiveness of the most significant business centre in the UK and, indeed, the world. The current trend of losses and undermining the strategic function of the CAZ in favour of housing, which could be delivered in more appropriate locations across London and the UK;

ii) Driving severe undersupply of office floor space in the West End and pushing up rents, thereby harming business activity in the economy; and

iii) Increasing "residentialisation of commercial areas, eroding their character by reducing employment densities and increasing expectations of residential amenity, impacting on legitimate business activities... For all of these reasons the City Council's current mixed-use and office to residential policies are now out-of-date, given that they are based on the market preferring to bring forward offices rather than housing in the CAZ. This is clearly no longer the case. Therefore, applications submitted from 1 September, will be determined under a presumption in favour of sustainable development in line with national policy."

10. OR1 dealt with the issue of noise disturbance from paragraph 6.3.4. Within paragraph 6.3.4.2, headed 'Noise disturbance during the course of construction', the report said:

> "The applicant's Acoustic Consultants have submitted an updated report dealing with the issue of construction noise. This report has been assessed by officers from the Council's Environmental Sciences Team. The report refers to the noise impact in relation to the relevant British Standard, which is the code of practice for noise and vibration from open sites.
>
> Limits have been suggested, in relation to noise from demolition and construction activities in accordance with British Standard Guidance. As these limits would be applicable to the flats immediately adjacent to the site, it is considered likely that the received noise level at the sound studio, which is likely to be soundproofed to protect the use from external noise sources, would be significantly lower. In addition, the applicant has confirmed that a commitment has been made to enter into a S61 agreement (Control of Pollution Act), ensuring that the quietest machinery is used, with silencers, and that acoustic screening is employed wherever possible. Noise and vibration monitoring will also take place continuously. The Environmental Sciences Officer has advised that whilst the proposed vibration levels are not appropriate for a noise sensitive business, lower levels will be imposed through the SEMP. The SEMP will also need to show how impacts on the studio are being reduced. The Council also expects the developer to do everything possible to engage and liaise with the neighbouring residents and businesses. Had the application

> been recommended for approval, a Site Environmental Management Plan (SEMP) would have been required which would have required the applicant to provide details of noise and vibration (including predictions, managing risks and reducing impacts) and details of monitoring (including predictions, managing risks and reducing impacts) and details of monitoring (including details of receptors, threshold values and analysis methods, procedures for recording and reporting monitoring results and remedial action in the event of any non-compliance). In addition, the applicant has also agreed to an annual contribution of £33,000 towards the Council's Code of Construction Practice and towards monitoring of the SEMP. In these circumstances, it is considered that the issue of construction noise has been satisfactorily addressed."

11. The application then went back to Committee for the second time. OR2 referred to a further objection from the claimant which specifically requested clarification on the following:

    i) Whether the Council accepted the Environmental Sciences officer's view that the proposed vibration levels (within the submitted CMP) would not be acceptable for noise-sensitive business; and

    ii) If so, whether the Council decided that the SEMP could, in practice, achieve lower levels of noise and vibration that would be sufficient to protect the claimant and, upon what evidence it reached that conclusion.

12. On point (i) OR2 said that the original report to Committee had set out that "the Environmental Sciences officer has advised that whilst the proposed vibration levels are not appropriate for noise-sensitive business, lower levels will be imposed through the SEMP."

13. On point (ii), OR2 said that officers are of the view that Environmental Sciences have sufficient recourse through section 61 (Control of Pollution Act) and the SEMP process to ensure that appropriate levels will be met and the developer will be required to reduce noise and vibration impact to reasonable levels, taking into consideration best practicable means, and this may include specific action in relation to the claimant. It is likely that such mitigation could be delivered through a number of mitigation methods; not just by controlling noise and vibration absolute levels, e.g. working times, "quiet periods" and stakeholder engagement working time agreements, amongst other methods.

14. On the same day, 8 March 2016 the defendant granted planning permission for the redevelopment of St Giles' House, which is to the rear of the application site, subject to condition 27 which reads:

> "The design and structure of the development shall be of such a standard, that it will not increase existing noise and vibration levels in adjacent properties from re-radiated ground-borne noise and vibration from the transmission of underground train

> operations, where historical data is available to demonstrate the noise and vibration baseline conditions prior to development."

15. The law is not in dispute between the parties. The main issue turns upon the officer reports presented to committee. A summary of the relevant principles is set out in **R (Zurich Assurance Limited (trading as Threadneedle Property Investments)) v North Lincolnshire Council** [2012] EWHC 3708 (Admin) and was expanded somewhat by Holgate J in **R (Luton Borough Council) v Central Bedfordshire Council** [2014] EWHC 4325 (Admin) at [91] to [97]. I turn then to deal with the grounds.

Ground 1: That the defendant took an unreasonable approach to the MHL application to convert office floor space to residential use

16. The claimant submits that the defendant was irrational to perpetuate the harm that it had identified by allowing MHL's planning application when a new approach was to be brought in from as 1 September which presumed against the conversion of offices to residential use.

17. The defendant's basis for the introduction of the new measure was that:

    i) The scale of conversions from office use was having a damaging impact;

    ii) The announcement of the new approach meant that the existing development plan was out-of-date and it should not, therefore, form the basis of any grant of planning permission;

    iii) The March announcement meant that there were strong economic reasons for refusing planning permission.

18. The application should therefore be treated as contrary to paragraph 51 of the NPPF which the defendant had misunderstood.

19. The claimant identified three errors. First, that the defendant acted in a way that was irrational, given its announcement. The starting point for its analysis should be that office conversion to residential use should be rare. It was exceptional to grant planning permission. The date of 1 September for the introduction of the new measures was arbitrary. The new approach should have applied from its announcement.

20. Second, the test in the NPPF was that unless there were strong economic reasons why, conversion from office to residential use was inappropriate. Councillor Davis' statement provided strong economic consequences for not allowing a further application to convert a former office building to residential use.

21. Third, the defendant acted inconsistently. In considering the planning application for St Giles' House it applied the interim measures even though that application was determined before 1 September.

22. In my judgment, the announcement on 18 March by Councillor Davis meant that policy S47 in the City Plan and other Development Plan policies were out-of-date. The announcement was clearly a material consideration. OR1 expressly recognised

that the adopted Development Plan policies relating to office and mixed-use were out-of-date and, given recent pressures to convert office buildings to residential use, that there was an undersupply of office accommodation which affected the character of commercial areas and the need to protect office floor space. However, the report went on that that objective needed to be balanced against the requirement to provide new homes. The officer report set out that as the application had been submitted in April 2015 it was not subject to consideration under the interim measures or emerging policies but should be considered in light of the adopted development policies which do not protect existing office users. As a starting point, that was an accurate statement of the legal position. The starting point, by virtue of section 38(6) of the 2004 Act is the Development Plan. The weight to be attached to the policies within the Development Plan is entirely a matter for the defendant: see **Suffolk Coastal District Council v Hopkins Homes Limited** [2016] EWCA Civ 168. Members were not misled and certainly not significantly misled. They were told about the starting point and the change in circumstance since the Development Plan had been adopted.

23. In the circumstances, it cannot be said that the defendant acted in a way that was irrational. How the planning balance was struck was entirely a matter for the defendant provided it was advised appropriately, which it was. The prospective change to the interim measures as from 1 September was known to members and was brought to their attention. The setting of a date for the implementation of the new measures allowed the public and the developers to adjust and plan for a different approach. It cannot be said, however, given the way that the Committee were advised, that it was irrational on the part of the defendant not to apply the measure from the date of its announcement. The Development Plan remained extant and was the correct legal starting point.

24. Paragraph 51 of the NPPF does refer to office to residential conversions being acceptable unless there were strong economic reasons why that was inappropriate. Councillor Davis' statement set out economic reasons for such conversions not to occur within Westminster. Members were told of the undersupply of office accommodation, the effect of that upon the commercial areas and the need to protect existing office floor space. The issue of balance between preserving office floor space and provision of new homes was then introduced in OR1. Ultimately, whether there were strong economic reasons for not allowing the permission to be granted was a matter for the planning judgment of the Committee weighing as it had to do the economic case against the need for new homes. It determined, as it was entitled to do, that there was not an economic case for the retention of offices on the application site. There was no misunderstanding of the NPPF.

25. On the St Giles' application, which involved the loss of office use and predominant replacement with a hotel, the application was received before 1 September. In the report on that application officers recognised that the adopted Development Plan policies relating to office and mixed-use were out-of-date, that there remained an undersupply of office accommodation within the borough, eroding the character of commercial areas and that consequently interim measures had been drawn up for implementation from 1 September. A further statement on the incoming measures confirmed that loss of uses would be acceptable where they were replaced by other commercial uses. The members took the view that the replacement of offices by hotel use was acceptable due to the replacement of commercial use with commercial use.

That application was, therefore, dealing with an entirely different circumstance to that which was presented by the impugned planning permission. In each case, it was a matter of planning balance and there is nothing to show that the defendant acted in any way that was inconsistent or arguably unlawful.

26. This ground is not arguable.

Ground 2: That the defendant acted on no or insufficient evidence in relation to ground-borne vibration

27. The claimant submits that in OR1 the interested party had submitted a further updated report to deal with the issue of construction noise. That report had been assessed by members of the Council's Environmental Sciences Team. The report referred to noise impact in relation to the relevant British standard, which is the Code of Practice for noise and vibration from open sites.

28. The limits suggested by the interested party were subject to advice from the Environmental Sciences officer that the proposed vibration levels were not appropriate for a noise-sensitive business. It is clear, the claimant submits, that what was proposed was not sufficient to deal with the sensitive nature of the claimant's business. The officer, therefore, advised that lower levels would be provided through the Site Environmental Management Plan (SEMP). What is to be contained within the SEMP is governed by the terms of the section 106 agreement dated 29 April 2016. In that, the SEMP was described as a management plan to cover various matters, including, under 'Environmental Management' at B(iii), "Noise and vibration (predictions, managing risks and reducing impacts)."

29. In OR2 the advice was that:

> "Lower levels will be imposed through the SEMP. The SEMP will also need to show how impacts on the studio are being reduced. The Council also expects a developer to do everything possible to engage and liaise with the neighbouring residents and businesses."

30. The claimant submits that although it did not produce its own acoustic reports for the MHL application it had been involved with an earlier application on the same site and commissioned a report dated 31 March 2011. It had submitted that report as part of its objections on this occasion. That made it clear that for that application the demolition activity was above the design threshold and was extremely likely to cause disruption to the claimant's commercial studio operations. The claimant submits, therefore, that inadequate protection was made for its operation. Neither the condition which deals with vibration, namely condition 9, nor section 61 of the Control of Pollution Act 1974, provide the absolute guarantee of vibration levels that would be acceptable to the claimant. There has been no investigation made about the effect upon the claimant's business. OR2 recognised that there needed to be further investigation such as working time arrangements. That would impact upon the claimant's business. To leave that until the approval of the SEMP was too late. It was something that should be taken into account prior to the grant of permission.

31. The defendant submits that it is not necessary for there to be no impact. The duty upon the defendant is to look at all factors and to minimise the impact of any vibration. There was no report from anyone other than the interested party and the defendant. The earlier report from the previous application produced by the claimant was not relevant.

32. In OR2 the claimant had asked for clarification on two points. The defendant was aware of them and struck a balance between all factors necessary to form a planning judgment. Those were each dealt with by the Environmental Sciences officer. The view of Environmental Sciences was that there was sufficient recourse through section 61 (Control of Pollution Act) and the SEMP to ensure that appropriate levels would be met and that the developer would be required to reduce vibration impact to reasonable levels taking into account best practicable means. It was likely that mitigation could be delivered through a number of mitigation measures, not just by controlling noise and vibration absolute levels, e.g. working times, quiet periods, stakeholder engagement and working time agreements, amongst others.

33. Under the section 106 agreement the covenant on the developer was that demolition works were not to commence until the SEMP had been submitted and approved and there had to be compliance with requirements of the Code of Construction practice and the SEMP from commencement of demolition throughout the construction of a development until completion of a development and the issue of certificate of practical completion. That combination of factors meant that the defendant was acting appropriately in striking the balance that it did in granting the permission.

34. The interested party points out that the claimant did not take any opportunity to gainsay the contents in the officer reports where they said that lower levels would be imposed and that, without the approval of the SEMP, nothing would occur. With the other measures proposed the claimant's contentions were unarguable.

35. The report submitted by the claimant is not of any real assistance. It related to a previous planning application about which demolition and construction methods and their application to the MHL application are unknown. Accordingly, the only technical evidence before the defendant was contained within the reports submitted by the interested party and advice from the Environmental Sciences Team. The defendant's own officers said that lower levels of vibration would be imposed. That means that the defendant's own scientific team were confident that those lower levels would not only be imposed but could be met. Absent any contrary technical evidence the Committee were entitled to take their officer advice into account.

36. By the time of OR2, in March 2016, although the claimant put in a further letter of objection it did not take any opportunity to gainsay the position with regard to lower levels with any comparable technical evidence to that submitted by the interested party or technical evidence at all.

37. Accordingly, the approach adopted by the defendant, namely, to secure low levels of vibration within the SEMP which, unless approved, meant that no demolition or construction on the site which would be causative of vibration could occur was sound. The defendant was plainly aware, not only of the importance of the SEMP, but of the other range of measures available to it that enabled it to control the risk of vibration to a level that was manageable so far as the claimant was concerned. It was a matter

entirely for the defendant as to whether it had sufficient evidence to enable it to reach a conclusion on the issue. It was satisfied that it did. Absent any irrationality, which is not alleged here, the defendant was quite justified in striking the planning balance that it did.

38. This ground is not arguable.

Ground 3: Failure to have regard to the proper interpretation of policy COM8

39. The claimant contends that the defendant erred in its consideration of the policy by focusing unduly on the health issues. In fact, the policy operates to protect premises that contain light industrial floor space that will be affected by redevelopment proposals. It is a matter for the court to interpret the policy. The defendant's failure to have regard to its proper meaning meant that there was a risk of the loss of the claimant's business which contributed to the character of the area.

40. The defendant and interested party contend that the relevant policy is ENV6 which applies to protect noise-sensitive properties. Under that, where a proposed development adjoins other buildings the applicant is required to demonstrate that, so far as reasonably practicable, schemes will be designed and operated to prevent the transmission of audible noise or vibration through the fabric of the building. That was clearly done here.

41. Policy COM8 reads:

> "Proposals for redevelopment, rehabilitation or other development affecting premises containing light industrial floorspace will not be granted planning permission where:
>
> 1. the site is located within the Creative Industries Special Policy Area
>
> 2. this would result in the loss of industrial activities which contribute to the character and function of the area."

42. Policy COM8 is clearly pertinent for proposals for redevelopment which affect premises containing light industrial floor space. It sets out two criteria which, if the proposal does not meet, prescribe that planning permission will not be granted. The first is that the site is located within the Creative Industry Special Policy Area. The second is that the proposal will result in the loss of industrial activities which contribute to the character and function of the area. The policy is directed towards whether the proposal for redevelopment is acceptable or not but, even then, the wording of the policy is such that permission will not be granted where it would result in the loss of industrial activities. By the brace of various noise and vibration measures set out above the defendant was satisfied that there would be no such loss. There was no evidence, apart from assertion, from the claimant that that would be the case. There was no need, in the circumstances for the defendant to refer to COM8. ENV 6 was considered and dealt with noise sensitive premises.

43. Further, as Sullivan J (as he then was) said in **R v Mendip District Council ex parte Fabre** (2000) 80 P&CR 500:

> "Part of a planning officer's expert function in reporting to Committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy Committee with excessive and unnecessary detail."

In this case the issue of vibration was at the forefront of the officer's mind; that is evident in both OR1 and OR2. There was, therefore, no omission of any material consideration. The impact of vibration upon the claimant's business was dealt with extensively in both reports.

44. This ground is unarguable.

Ground 4: Whether the defendant erred in failing to impose a condition in relation to vibration from underground trains

45. The claimant contends that it raised the requirement for such a condition but one was imposed only on the St Giles' House planning application. That was unreasonable because:

i) The claimant objected to both applications;

ii) The defendant considered a condition to be necessary on the St Giles' site because it had imposed such a condition there;

iii) At the meeting between the claimant and the defendant on 26 October 2015 the claimant had explained that there was no difference between the two planning applications;

iv) The claimant's business benefitted from policy protection and the defendant was aware of the need to protect it from adverse changes in noises and vibration.

46. The defendant contends that the MHL scheme and that at St Giles' were materially different. That at St Giles' had an extended basement. It was necessary in that case to impose a protective condition. In the MHL application that did not apply and no protective condition was necessary to do so. It did not need to be dealt with in the officer report as it was not raised by the claimant in any written objection but only in the meeting.

47. The interested party contends that if the condition was important one would have expected it to be raised in correspondence after the meeting.

48. It is of note that the issue of ground-borne vibration which could arise after piling had taken place on the site such that it alters ground conditions was not raised in any written submissions either before or after the meeting on the part of the claimant with the defendant. In those circumstances it is not surprising that the issue of the disputed condition does not appear on the face of the report. As Baroness Hale said in **Morge v Hampshire County Council** [2011] UKSC 2 at [36]:

> "…the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated…"

To expect officers to mention all matters from a meeting with the claimant when the apparent importance of the condition had not been emphasised by them in subsequent correspondence is to impose too exacting a standard upon the defendant's officers. It follows that there is no error of law on the part of the defendant in not mentioning such a condition. Not only that, it is not even arguable that there was such an error given the circumstances in which the matter was raised with the defendant.

49. This ground is not arguable.

50. It follows that this renewed application for permission fails.

51. I invite submissions on the terms of the Order and costs including the issue of whether this is an Aarhus Convention claim. Although I do have written representations on that matter, nothing was raised in oral argument. If the parties are content for me to determine that matter on the basis of their written submissions so far, I am happy to do so, if not, can they please supply further written submissions with their corrections on this judgment.