England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2009] EWHC 3631 (Admin)
Case No: CO/6795/2009 & CO/6796/2009

IN THE HIGH COURT OF JUSTICEADMINISTRATIVE COURT

Sitting at:
Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M3 3FX
26th November 2009

B e f o r e :

MR JUSTICE PARKER_____

Between:

WEST LANCASHIRE BC **Claimant**

- and -

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **Defendant**

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(DAR Transcript of WordWave International LimitedA Merrill Communications Company165 Fleet Street, London EC4A 2DYTel No: 020 7404 1400 Fax No: 020 7404 1424Official Shorthand Writers to the Court)

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Miss Sarah Reid appeared on behalf of the Claimant.Mr Charles Banner appeared on behalf of the Defendant.

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HTML VERSION OF JUDGMENT_____

Mr Justice Parker:Background

On 10 October 2008 West Lancashire District Council ("the Council"), the claimant in these proceedings, issued an enforcement notice pursuant to section 172 of the Town and Country Planning Act 1990 ("TCPA") in respect of land at Leisure Lakes, Mere Brow, West Lancashire ("the Site").

The breach of control alleged in the notice was, without planning permission, the mixed use of the land for recreational motor vehicle activities including bikes and cycles and for motor racing activities including bikes and cycles.

The Council issued a notice on the grounds that, firstly, the development was inconsistent with national guidance in Planning Policy Guidance 2: Green Belts ("PPG2") and the Council's Local Plan policy DS2 regarding the Green Belt; and, secondly, the noise level arising from the development was harmful to the residential amenity contrary to policy GB.1 of the Council's Local Plan.

Mr Philip Whitter, the second defendant in these proceedings, appealed the notice under section 174 of the TCPA on the grounds that planning permission should be granted for the matter set out in the enforcement notice, that the breach was immune from enforcement action and that the steps within the notice were excessive.

An inquiry was held before Mr David Pinner, the Inspector appointed by the Secretary of State, the first defendant in these proceedings, on 10, 11 and 13 February 2009 and 7, 8 and 9 April 2009. The Inspector also carried out a number of site visits.

By a decision letter dated 3 June 2009 the Inspector upheld the appellant's appeal on the first ground mentioned above. He quashed the enforcement notice and granted consent accordingly.

In this action the claimant seeks, firstly, pursuant to section 289 of TCPA, an order quashing the Inspector's decision to allow the second defendant's appeal against the enforcement notice and, secondly, pursuant to section 288 of TCPA, an order quashing the Inspector's decision to grant planning permission for the matters set out in the enforcement notice.

The grounds in play have narrowed to two. In short, it is first submitted that the Inspector erred in applying the national and local policy in respect of Green Belt development and, secondly, it is submitted that his approach to the issue of noise at the site was erroneous.

The legal framework

The site is located in the Green Belt. Section 172 of the TCPA, as applied in the context of appeals to the Secretary of State by section 79(4) of the TCPA, provides that, in dealing with an application for planning permission, the decision-maker:

"…shall have regard to the provisions of the development plan so far as material to the application and to any other material considerations."

Section 38(6) of the Planning and Compulsory Purchase Order Act 2004 provides that:

"(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Policy DS2 of the Council's local plan provides that:

"Planning permission will not be given except in very special circumstances for changes of use of land… unless they would maintain the openness of the land and would not conflict with

the purposes of including land in the Green Belt."

PPG2 is the national guidance in relation to the Green Belt. Paragraph 3.12 of the guidance provides that:

"…the making of material changes in the use of land are inappropriate development unless theymaintain openness and do not conflict with the purposes of including land in the Green Belt."

Paragraph 1.4 of PPG2 is in the following terms under "Intentions of policy":

"1.4 The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the most important attribute of Green Belts is their openness. Green Belts can shape patterns of urban development at sub-regional and regional scale, and help to ensure that development occurs in locations allocated in development plans. They help to protect the countryside, be it in agricultural, forestry or other use. They can assist in movingtowards more sustainable patterns of urban development."

Paragraph 3.4, so far as is material, provides:

""**3.4** The construction of new buildings inside a Green Belt is inappropriate unless it is for the following purposes:"And one of those is:"essential facilities for outdoor sport and outdoor recreation, for cemeteries, and for other uses of land which preserve the openness of the Green Belt and which do not conflict with the purposes of including land in it"And finally paragraph 3.2 provides: "Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to

the Green Belt when considering any planning application or appeal concerning such development."

I now turn to the first ground of challenge. At paragraph 10 of the report the Inspector said this:

"The first issue in both cases is whether the use of the land represents inappropriate development in the Green Belt. Both developments raise an issue as to the effect of the use on the character and appearance of the area. The motor sports use of the site in Appeal B raises an additional issue regarding the effect of noise arising from the use on the living conditions of the people living in the surrounding area and on the enjoyment of people using various nearby fishing lakes. Finally, depending on my conclusions on these other issues, in both cases there is an issue of whether very special circumstances exist to outweigh any harm by reason of inappropriateness and any other harm."

Paragraphs 22 to 24 of the decision are as follows:

"22. The use of motorcycles and other vehicles in the open air does not affect the openness of the Green Belt, but there are further aspects of the use that need to be considered. These are the bringing onto the site of shipping containers for storage purposes and the construction of the track itself, which involved engineering operations. I do not regard other manifestations of the use, such as bunting and hay bales as having any effect on the openness of the Green Belt because of their temporary and insubstantial nature. I doubt that they could be properly regarded as structures or erections in any case.23. Openness in Green Belt terms means the absence of built development. The shipping containers are moveable but are likely to remain in the same place for considerable periods. To that extent, they are akin to buildings and have some effect on the openness of the Green Belt. The fewer their number, the less would be their impact on openness. They also have a detrimental effect on the character and appearance of the area but this could be minimised by careful siting, landscape screening and painting the containers in

a way that would help them to merge with the background. These are matters which could be covered by conditions. 24. The Leisure Lakes complex was created out of former gravel workings and the lakes themselves are man-made. I suspect that the area of woodland, around which the motorcross track is centred, occurred as a result of nature reclaiming the disturbed ground around the flooded workings. Whether or not that is the case, the point is that the terrain in this part of the complex can be differentiated from the flat open fields that are so characteristic of the area generally. Although the construction of the track involved substantial earthworks, I think that, if planting had been carried out on those parts that are not the running surface, the earthworks would not be readily apparent. As there would be no obvious sign of built development, the openness of the Green Belt would not be unduly affected. Landscaping conditions could achieve the necessary planting. I therefore conclude that the use of the land for recreational motor vehicle activities etc. does not harm the openness of the Green Belt or conflict with any of the purposes of including land in it and is therefore not appropriate development."

The Inspector granted relevant planning permission, but imposed among other things the following condition:

"the use hereby permitted shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed within 3 months of the date of failure to meet any one of the requirements set out in (i) to (iv) below:-(i) within 3 months of the date of this decision a scheme for: 1. the location, number and external paint finish of any shopping containers to be used for storage purposes in connection with the use of the land hereby permitted;2. the provision of parking and manoeuvring facilities, including the laying of a surface appropriate to this rural area; 3. the landscaping of the non-running surface parts of the motorcross track and of the area around any shipping containers or similar structures brought

onto the land for storage purposes, including arrangements for its future maintenance;shall have been submitted for the written approval of the local planning authority and the scheme shall include a timeable for its implementation.(ii) if within 11 months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period an appeal shall have been made to, and accepted as valid by, the Secretary of State.(iii) if an appeal is made in pursuance of (ii) above, that appeal shall have been made finally determined and the submitted scheme shall have been approved by the Secretary of State.iv) the approved scheme shall have been carried out and completed in accordance with the approved timetable;"

Mr Banner, who appeared on behalf of the Secretary of State, contended that the analysis followed and conclusion reached by the Inspector were consistent with the national and local Green Belt guidance to which I have referred. The Inspector found that the storage containers were "akin to buildings and had some effect on the openness of the Green Belt". The Inspector had visited the site and had had the opportunity to assess the extent to which the relevant containers presently affect the openness of the Green Belt and the extent to which it could be expected so to affect the openness if appropriate conditions were imposed.

This court has not had the advantage of inspecting the site, nor does it have the experience or expertise of the Inspector in determining the relevant planning issues. It was rational for the Inspector to find that the smaller the number of containers on the site the less the impact on openness. The proposed condition allowed the local planning authority to control the number of permissible containers, and strict enforcement of the condition would minimise the impact on openness, as would strict enforcement of the other conditions.

It seems to me that implicit in Mr Banner's submission was the premise that the Inspector enjoyed some measure of flexibility in the application of the Green Belt guidance and that it was open to him to decide that a material change in the use of land did affect openness, but that the effect was, or could be by the imposition of conditions, rendered so minimal as not to matter from the planning point of view. Mr Banner referred, for example, to paragraph 3.4 of PPG2, to which I have referred, that permitted essential facilities for outdoor sport etc. This, he argued, showed that the policy on openness was not absolute. Essential facilities would be likely *ex hypothesi* to affect openness, but were capable of justification in the particular context.

I do not deny that Mr Banner's approach would constitute a rational planning policy, but I have difficulty in accepting that it is the policy in fact contained in PPG2. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open. The most important attribute of Green Belts is their openness. Material changes of the use of land are inappropriate development unless they maintain openness. In my view, and agreeing with Miss Reid who appeared on behalf of the claimant, the policy in PPG2 simply does not accord any latitude to the Inspector to decide that a material change of use of land does affect the openness of the Green Belt but that the extent of such effect does not, in the Inspector's opinion, matter sufficiently to raise significant planning concerns.

In this case the Inspector concluded that the containers were akin to buildings in terms of their impact on the openness of the Green Belt. No one challenges that finding. However even if there were fewer containers (at the Limit, one), there would still be built development and an adverse impact on openness. Consistently with the express terms of PPG2, the inevitable

conclusion was that the material change of use would detrimentally affect, not maintain, openness and would therefore be inappropriate. Following the actual scheme of PPG2 inappropriate development is harmful (see paragraph 32), and consent should only be granted if the appellant showed that there were very special circumstances that outweighed the harm by reason of inappropriateness and any other harm. It is agreed that that was not the analysis followed by the Inspector in this case. Although Condition 2 dealt with harm to the character and appearance of the area, it left untouched the central problem, namely that one or more containers would remain on the site; they would affect the openness of the green belt; and the material change in user being treated as inappropriate required special justification. The Inspector did not therefore accurately follow the scheme laid down by PPG2 and his approach was, accordingly, flawed in law.

The second ground

As regards noise the Inspector said this:

"28.The motor bikes were a different story. I could easily hear even the smallest bikes for junior riders from the various locations that I listened from. The overall noise level was affected by factors such as type of bike, the number of riders on the circuit, wind direction and the level of background noise, but the intermittent revving of the bikes as they negotiated the circuit produced a very intrusive high-pitched noise that I found impossible to ignore. I accept that some of the time, the noise was not particularly loud, but it was nevertheless irritating.29. That said, Leisure Lakes is a recreational facility that already accommodates noise-generating activities from the jet ski and aqua track uses. Also motor bike activity has been carried out there for many years in some form or other. Furthermore, although a significant number of local people have complained about the noise, there are many other residents who have not complained. I think that a reasonable balance has to be struck

between protecting the amenities of residents of the area and allowing for the enjoyment of the considerable number of riders who use the circuit. In view of my earlier conclusions on the Green Belt issues, it is clear that planning permission could be granted in some way that would permit some of the present motor sport activities to continue."The Inspector then set out a number of conditions, namely conditions 3, 4, 5, 6, 7, 8, 12 and 13, intended to regulate and minimise the noise effect of the site from motor cycles.

Miss Reid attacks the first two sentences of paragraph 29 of the Inspector's decision that I have just quoted. She argues that the Inspector treats the matters there identified as a fallback. That is, whilst he finds that the use of the site for motorcycle activities was irritating, he assesses that harm against the fact that the site already accommodates noise-generating activities in any event. The Inspector takes the other noisy uses into account in determining the balance that is to be struck between recreational use and the amenity of residents. Miss Reid contends that the Inspector failed to address his mind to two important matters. First, the motorcycle use was unlawful. The current use of the site for motorcycle activities was the subject of the enforcement action in question. And, secondly, the use of the aqua track was unlawful and the subject of ongoing enforcement investigations. This was drawn to the Inspector's attention at paragraph 2.2 of Miss Woollacott's proof of evidence and also in the Council's closing submissions at the inquiry.

Given therefore that the aqua track and use of the site for motorcycle activities were unlawful, Miss Reid submits the Inspector took into account irrelevant considerations.

However, in my judgment Miss Reid's analysis of paragraph 29 is over-legalistic. In my view the Inspector is not in that paragraph

proceeding on a fall-back basis. He is not saying that there would in any event, whatever the outcome of the planning appeal, be a certain level of putatively lawful noise at the site and then comparing that level of noise with the level that could reasonably be expected if planning permission were granted. In my view, in the first two sentences of paragraph 29 he is doing no more than noting what had been the actual position in the preceding years. There had been a certain level of noise at the site, whether the activities were lawful or not. The local residents and other users of the site had become accustomed to that level of noise. It is a fact of human nature that we can grow to accept and even find tolerable what we have become accustomed to. There will of course be those who become increasingly irritated with some noise levels the longer they have to bear them. Their point of view has also been taken into account.

However, these are no more than common-sense observations about human nature which the Inspector was fully entitled to take into account in the present context. The fact that there had been noise from motorcycles in the past had also given the opportunity for local residents to complain, and the Inspector noted that a significant number of residents had complained and a significant number had not. These were matters that the Inspector was entitled also to take into account.

On that basis the Inspector sought to achieve a reasonable balance between protecting the amenities of the residents of the area and allowing for the enjoyment of the considerable number of riders who use the circuit and, no doubt, the enjoyment of those who, benefiting from the fresh air and openness of the countryside, come along to spectate. He set out conditions with a view to striking a fair and proportionate balance between these potentially competing and legitimate interests. In my view, in

these paragraphs the Inspector therefore had regard only to material considerations and his treatment of the issue of noise was entirely lawful.

MISS REID : Just bear with me one moment, please, my Lord.

MR JUSTICE PARKER : Yes.

MISS REID : My Lord, sorry. I have here a draft order that has been prepared. If I could just hand that up to you.

MR JUSTICE PARKER : You anticipated my judgment.

MISS REID : Well we didn't want (inaudible) My Lord you will see at point 1, point 1 indicates that the claimant's claim and appeal in respect of grounds 1 and 6 are allowed and the Inspector's decision is quashed. The reason the appeal reference is being ….

MR JUSTICE PARKER : (inaudible) ground 1 now.

MISS REID : Yes sorry, didn't quite anticipate…

MR JUSTICE PARKER : Ground 1.

MISS REID : Yes, so "is allowed".

MR JUSTICE PARKER : "Is allowed".

MISS REID : And the Inspector's decision is quashed. The appeal reference is given there because of course there are two appeals …

MR JUSTICE PARKER : Is it "quashed to that extent"?

MISS REID : No, my Lord, the way that these matters usually work in the planning sphere if the Inspector's decision fails on one ground the whole … the whole thing goes back to the Inspector for redetermination (inaudible) action.

MR JUSTICE PARKER : All right.

MISS REID : The second point, the second defendant's appeal to the Secretary of State under Section 174 of the Town and Country Planning Act 1990 is remitted to the Secretary of State for redetermination.

MR JUSTICE PARKER : Yes.

MISS REID : And thirdly, the first defendant do pay the claimant's costs in respect of grounds 1 and 6 to be subject to detailed assessment if not agreed.

MR JUSTICE PARKER : I don't usually like carving up on the basis of issues on a lost …

MISS REID : My Lord, that would be my submission. Ultimately …

MR JUSTICE PARKER : Well , someone there will have to decide how the carve-up is to be done. That is often not easy

MR BANNER : My Lord, if I may because I just need to address your Lordship. We had already agreed we are going to carve up because in relation to 2, 3, 4 and 5 we had already agreed that by not having to address you on that the most appropriate order would be no orders to costs, so the inevitable result is there will be a carving up exercise. On that basis I can't ask for costs in ground 1 but I do …

MR JUSTICE PARKER : No.

MR BANNER : … primarily ask for my costs on ground 6

MR JUSTICE PARKER : Ordinarily in judicial review if claimants are successful they get all their costs subject to a possible discount taking into account that they have failed on one issue.

MISS REID : My Lord, that's correct. The normal order for costs is that the losing party pays the winning party's costs and I don't see that there is any reason in this case to depart from that principle, so that the council should have to pay some of the Secretary of State's costs. That simply isn't the normal rule. And in respect of carving up the costs, my Lord …

MR JUSTICE PARKER : So that the first defendant pay the claimant's costs in respect of ground 1 …

MISS REID : Well, my Lord I …

MR JUSTICE PARKER : So you would only get your … so there would have to be some assessment of how much your costs related to ground 1.

MISS REID : Well, my Lord in the first instance I asked for all of the claimant's costs on the basis that the claimant was successful in his action.

MR JUSTICE PARKER : Yes … well that's the normal practice.

MISS REID : That's the normal rule and …

MR JUSTICE PARKER : And subject to …

MISS REID : …subject to detailed assessment.

MR JUSTICE PARKER : Probably here quite a significant discount given that there was significant argument on the second point. I mean 30 per cent would occur to me.

MR BANNER : Yes, my Lord, can I just be clear that we are talking about all the costs of ground 1 and 6, because I think it has been agreed all along that the other grounds there is going to be no order for costs, so yes one way your Lordship could do it would be a discount, all of grounds 1 and 6 subject to a discount, but I would ask your Lordship simply to take into account the fact that you have found that the essence in my favour on ground 6 …

MR JUSTICE PARKER : Yes.

MR BANNER : And that should be reflected in my submission in some way in the order. It is obviously ultimately a matter for you

MR JUSTICE PARKER : Do you say the discount should be more than 30%?

MR BANNER : I mean my Lord the way I would do it would be to say no order for costs as to 6 (inaudible) but I would have thought 30%…

MISS REID : My Lord can I just …

MR BANNER : I think 30% is fair my Lord given the way that the arguments ran before you.

MR JUSTICE PARKER : Yes.

MISS REID : My Lord the alternative way of doing it was simply,

given that, as my learned friend said, ground 2, 3, 4 and 5 have to be excluded, and so there has to be some carving up in any event, simply to make an order the first defendant do pay the claimant's costs in respect of ground 1 to be subject to detailed assessment if not agreed.

MR JUSTICE PARKER : All right that is another way of doing it. Yes?

MISS REID : That would be the simpler way unless somebody can …

MR JUSTICE PARKER : Given there is a carve-up already. No order as to costs. You are going to sort that out among yourselves are you?

MISS REID : Yes.

MR JUSTICE PARKER : 2, 3, 4 and 5?

MISS REID : Yes.

MR JUSTICE PARKER : I am happy with those changes.

MISS REID : My Lord, do you require a copy of this to be emailed to the court or are you content with the one that you have in front of you?

MR JUSTICE PARKER : No you better … there are changes to it so I think it's better to have the tidied up version.

MISS REID : I am very grateful

MR JUSTICE PARKER : Thank you very much for your submissions.

MR BANNER : Thank you, my Lord.