



Neutral Citation Number: [2018] EWHC 2104 (Admin)

Case No: CO/230/2018

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**PLANNING COURT**

**In the Matter of a challenge under section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990**

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

Date: 03/08/2018

**Before:**

**HIS HONOUR JUDGE JARMAN QC**

-----  
**Between:**

**(1) ANTHONY JOHN CLAY**  
**(2) JULIET SARAH CLAY**

**Claimants**

**- and -**

**THE WELSH MINISTERS**

**Defendants**

**-and-**

**MONMOUTHSHIRE COUNTY COUNCIL**

**Interested**  
**Party**

**Mr Peter Wadsley (instructed by Thrings LLP) for the Claimants**  
**Ms Heather Sargent (instructed by Government Legal Department) for the Defendants**  
**The Interested Party did not appear and was not represented**

Hearing date: 12 July 2018

-----  
**Approved Judgment**

## HH JUDGE JARMAN QC:

1. The Claimants, Mr and Mrs Clay, own Wyndcliffe Court, St Arvans near to Chepstow. It is an early 20<sup>th</sup> century house built in the Arts and Crafts Jacobean Style and in 2001 was listed as Grade II\*. The original roof covering consists of stone slates from Collyweston Quarry in Northamptonshire. The house is in a prominent position overlooking the Severn Estuary and is severely if not very severely exposed. As a result, the slates are disintegrating and letting in water. There is limited availability now of such slates but in any event because of the exposed position of the house it is not viable to reroof the house in the original slate. After much research, Mrs and Mrs Clay and their architect considered that a reproduction slate called Cardinal provides the most authentic shape and look of the Collyweston slate. They applied to the Interested Party as local planning authority (the Council) for permission under the Planning (Listed Buildings and Conservation Areas) Act 1990 (the 1990 Act) to replace the roof with Cardinal slates, but that was refused. They appealed to an inspector (the Inspector) appointed by the Defendants, the Welsh Ministers, but the appeal was dismissed. They now seek statutory review by this court of that dismissal.
2. The application was accompanied by a structural assessment report, which noted that despite frequent repairs to the roof, its condition continued to allow damp penetration at various locations and pointed out that it would be disastrous if the ornate plasterwork of the Oak Room ceiling were to be damaged by damp.
3. The application also had the written support of The National Gardens Scheme, who added that it was a great shame that the garden has had to be closed due to disrepair of the roof. The Historic Houses Association also wrote to support the application, as did the Royal Commission on the Ancient and Historical Monuments of Wales, on the basis that of the options presented the Cardinal slate appeared most faithfully to “reproduce the texture of the original roof covering.”
4. The Council by notice dated 1 March 2017 refused permission. It gave its reason as follows:

“The proposed artificial slate by virtue of the material and appearance will have a detrimental impact on the special character of this highly graded listed building contrary to PPW Chapter 6 and Welsh Office Circular 61/96.”
5. The appeal before the Inspector was conducted on the basis of written representations. In its evidence, the Council proposed that a natural slate from Delabole Quarry in Cornwall or Westmorland Green slates would be more in keeping with the spirit of the architectural style. It was recognised that the latter was costlier than the former, which taking cost into account “would be a suitable alternative.”
6. The role of the Welsh Government’s Historic Environment Service (Cadw) in the appeal process is to advise the Inspector about the effect of proposals on any designated historic assets, and its views were invited. The response dated 12 October 2017 by its historic buildings inspector included the following passages:

“The issue seems to be what the alternative slate should be. The Council’s Conservation Officer has recommended that the

‘Delabole slate’ will be a better solution. The appellants disagree with this and argue that in heritage conservation terms, the proposed Cardinal Slate is the best roofing material for this house and will not have a detrimental impact upon this important listed building”

“The use of natural slate in the replacement of Cotswold Stone roof has been used before, in keeping the continuity of the style, design and affect created by a natural roof finish, through the use of ‘Delabole or Natural Welsh Heavy Slate finishes, as materials, in the material alternatives for roofs in the Arts and Crafts style.”

“In my opinion, the proposed replacement roof finish is inappropriate to this Arts and Craft Jacobean style country house and does have a detrimental effect and cause a significant visual intrusion, as it does not preserve or enhance the appearance of the grade II\* listed building or its setting within the listed II\* contemporary garden.”

7. Three comments in respect of the appeal, including from the National Garden Scheme were posted online in support of it.
8. In his decision letter dated 7 December 2017, the Inspector identified the main issue as whether the proposed roof covering would preserve the special character and interest of the Grade II\* listed building. At paragraph 4 he said this:

“There is no dispute that the original Collyweston Cotswold stone slates have reached the end of their useful life and need to be replaced. The appellant’s ‘Heritage Justification and Structural Assessment Statement’ explains why, due to the nature of the existing material and local weather conditions, it would not be advisable to replace like for like. This is not disputed by the Council. The Council, Cadw and others have suggested alternatives to the roof covering suggested by the appellants. It would not be appropriate for me to comment on the alternatives as doing so may fetter the decision of any body or person that may follow me. The matter I have to address is whether the proposed Cardinal reproduction Cotswold stone slates are suitable.”

9. He decided that they were not. In paragraph 7 he said:

“The Council provides a brief but useful summary of the Arts and Craft movement; ‘The Arts and Crafts movement emerged in the late 19<sup>th</sup> Century and early twentieth Century, based on a return to craftsmanship and a move away from the mass production and industrialisation of the time. It aimed to push the individual skills bases on natural materials and traditional methods of construction function and simplicity pioneered by William Morris.’ The use of man made rather than a natural

material created through industrial process, does not, in my view, honour the spirit of the Arts and Crafts movements.”

10. He stated that he agreed with the opinion of Cadw set out above. His conclusions were set out in paragraph 9 as follows:

“I acknowledge that a new roof is needed and alteration is, therefore, inevitable. However, to do so using the proposed artificial material would significantly undermine the ethos of the Arts and Crafts movement, of which this house is a fine example. Further, I am not satisfied that the Cardinal slate would weather in a way that would preserve the complementary relationship between the walls and roof covering so important to the special character of this building.”

11. At paragraph 10 he said this:

“For the reasons given above and having regard to all matters raised, I find that the proposed roof covering would not preserve the special character and interest of this Grade 11\* listed building and conclude that the appeal should be dismissed.”

12. Mr Wadsley, on behalf of Mr and Mrs Clay, submitted that this reasoning discloses three errors of law. First, the Inspector should have considered the alternatives and decided which one should be used to replace the Collyweston slates. Second, it follows from that that his reasoning is wrong. Given that the roof must be replaced, and the original slates are not a viable option, it was not just a question of whether Cardinal preserved the special character and interest of the house, but whether it was or will be in the future less harmful than the Delabole slate. Third, the reasoning was not adequately explained. Each of these are in dispute.
13. Under the first ground, Mr Wadsley’s primary submission was that the issue before the Inspector was whether the Claimant’s choice of Cardinal or the Council’s choice of Delabole was the more appropriate choice. Alternatively, the Inspector should also have considered Westmorland Green slate, as this was the second choice of the Council.
14. Section 16(2) of the 1990 Act provides that “In considering whether to grant listed building consent for any works the local planning authority or the [Welsh Ministers] shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.”
15. As Mr Wadsley submitted, this test applies to the preservation of the building itself, as well as its setting or any features of special architectural or historic interest which it possesses. As the roof is leaking and needs replacing in a material other than the original slate, then a choice needs to be made.
16. Whilst accepting that the analogy is not an exact one, Mr Wadsley likened this position to the consideration of alternative sites for development which is needed in the context of harm to heritage assets. He relied upon a decision of Foskett J in *R*

*(Gibson) v Waverly BC and others* [2015] EWHC 3784 (Admin). That case involved listed building consent to convert the former home of Sir Arthur Conan Doyle into eight dwellings. Its last use had been as a hotel, but it had since lain dormant and its structural condition had deteriorated.

17. At paragraph 69 of his judgment, Foskett J did not doubt the correctness of what was said by Lindblom J, as he then was, in the context of heritage harm in *R (Forge Field Society) v Sevenoaks DC* [2015] JPL 22 when he said this at [56]:

“If there is a need for development of the kind proposed, which in this case there was, but the development would cause harm to heritage assets, which in this case it would, the possibility of the development being undertaken on an alternative site on which that harm can be avoided altogether will add force to the statutory presumption in favour of preservation. Indeed, the presumption itself implies the need for a suitably rigorous assessment of potential alternatives.”

18. In the next paragraph Foskett J continued:

“Whilst that observation was made in the context of harm to heritage assets and the need to consider alternative sites, I accept there is a need to consider alternative less harmful, uses of the same site when evaluating a proposal that would cause harm to a heritage asset: *R(Langley Park School for Girls Governing Body) v Bromley LBC* [2010] 1 P&CR 10 at [44-46]. However, the way in which that evaluation may be carried out will vary from case to case. The planning history from 2005 spoke for itself and it was fully articulated in the Officer’s Report. It was, of course, a “material consideration” in any event.”

19. Mr Wadsley submitted that in the present case, as development is needed, namely replacing the original slates on the roof of the house with some other type of slate, then there is a need to consider which option is the least harmful to the house or its setting or any features of special architectural or historic interest which it possesses. The parties to the appeal fully set out their respective cases as to whether Cardinal slates or Delabole slates would be least harmful in that regard, and the Inspector should have chosen. If the further alternative of Westmorland Green slates should also have been considered, then there was sufficient evidence before the Inspector to evaluate that option. If he came to the view that he did not have sufficient evidence on that option, he could have asked for further information upon it from the parties under the Town and Country Planning (Referred Applications and Appeals Procedure) (Wales) Regulations 2017 or determined under Regulation 25 that the written representations procedure was no longer suitable so that a hearing could take place.
20. Ms Sargent, for the Welsh Ministers, accepted that in some cases an evaluation of alternatives may be called for but submitted that that depends on the facts and is a matter of planning judgment. Here, the alternatives before the Inspector included not only the Delabole slate, but the Council’s preference for the Westmorland Green slate

and Cadw's reference also to Natural Welsh Heavy slate. The 1990 Act does not expressly or impliedly require the Inspector to evaluate these alternatives and whether he did so was a matter for his planning judgment.

21. Ms Sargent relied heavily upon the decision of Carnwath LJ, as he then was, sitting as a judge of the High Court in *Derbyshire Dales District Council and another v Secretary of State for Communities and Local Government and another* [2010] 1 P&CR 381, which involved a challenge to the grant of planning permission for wind turbines which impacted on the Peak National Park. The inspector in that case was not persuaded that the appeal proposal was "one of the narrow range of cases...where alternatives should be considered as a matter of law."
22. Carnwath LJ took as his starting point the judgment of Simon Brown J (as he then was) in *Trust House Forte Ltd v Secretary of State* (1986) 53 P&CR 293, to the effect that where there are clear planning objections to development upon a particular site then it may well be relevant and necessary to consider whether there is a more appropriate alternative site elsewhere. At paragraph 17, Carnwath LJ said that to hold that a decision maker has erred in law by failing to have regard to alternative sites "it is necessary to find some legal principle which compelled him (not merely empowered) him to do so."
23. Of the many cases referred to him, the only one in which an error of that kind was found by the courts was *Secretary of State v Edwards* (1994) 60 P&CR 607. In that case there was an acknowledged need for two motor service stations on each side of a particular trunk road, and there were several competing sites before the Secretary of State on appeal but there were clear planning objections to them all. In those circumstances, Carnwath LJ said this at paragraph 22:

"...it seems odd that the Secretary of State declined to adopt the obvious means of enabling the selection to be made on a comparative basis. It was arguably "irrational" or "*Wednesbury* unreasonable" for him not to do so. However, that was not how the case seems to have been presented or decided. Instead it was put as a failure to have regard to "material considerations", contrary to section 78. It is noteworthy that the Court regarded it as "crucial" that alternative sites had not only been identified, but were before the Secretary of State on appeal. That case does not bind me to reach the same conclusion in a case where no alternatives have been identified, and it simply the possibility of such sites which it is said to be material."
24. Pausing there, in the present case the grounds for appealing the refusal of the Council were drafted on behalf of the Claimants by Dr David Hickie, an expert in heritage management and planning. Those grounds dealt with a comparison of only two options, Cardinal slate as favoured by the Claimants and Delabole slate as favoured by the Council. Photomontages of these options as they would appear were included in the grounds. In the summary, it was contended that the Cardinal slate was the most appropriate conservation solution and that the alternative suggested by the Council was not suitable and would harm the character of the house. The Inspector was requested simply to uphold the appeal.

25. In its written statement, the Council at paragraph 5.8 said:

“Therefore it is clear and accepted that an alternative material is required. In light of the issue of costs and the worsening condition of the roof it was suggested the Delabole slate or Westmorland Green slate would be the more appropriate...However these are more expensive than Delabole which taking cost into account, would be a suitable alternative.”

26. In conclusion, the Council submitted that the Claimants’ proposal would have a detrimental effect on the special character and significance of the house and requested simply that the appeal should be dismissed.

27. In my judgment, therefore, the further alternative of Westmorland Green slates was put before the Inspector by the Council. Moreover, given that the role of the Cadw was to advise the Inspector during the appeal process, yet another alternative of Natural Welsh Heavy slate was also before him. However, it is noteworthy that neither of the parties invited the Inspector to choose between these alternatives. What he was invited to do was either to uphold the appeal or to dismiss it.

28. Mr Wadsley did not put his case on the basis of irrationality and accepted the need to show some legal principle which compelled the Inspector and not merely empowered him to choose between the alternatives. He submitted that this legal principle is to be found in section 16(2) of the 1990 Act. Notwithstanding the fact that no-one had invited the Inspector to choose between the alternatives, let alone said that he was under a duty to do so, Mr Wadsley submitted that the Inspector was under a clear statutory duty to do so.

29. Ms Sargent referred to further passages in *Derbyshire* to support her submission that the statutory duty to have special regard to the matters set out in section 16(2) does not impose a positive obligation to consider the alternatives but is a matter of planning judgment. Similar statutory protection was considered by Carnwath LJ in that case, who at paragraph 36 said this:

“Returning to the present case, it seems to me impossible to say that there is anything in the statute or relevant policies which expressly or impliedly required the Inspector to consider alternatives, particularly as none had been identified...The statutory provision and policies relating to the National Park and Conservation Area required special regard to be paid to their protection, but they fell short of imposing a positive obligation to consider alternatives which might not have the same effects. That is left as a matter of planning judgment on the facts of any case.”

30. Mr Wadsley made the valid point that in the present case alternatives had been identified. He submitted that by not considering the alternatives, the Claimants are left with having to reformulate proposals and to resubmit an application without any certainty as to whether permission would be granted for any particular proposal. In my judgment that is putting the matter too highly. As Ms Sargent submitted, the

Claimants know that the Council would accept Delabole or Westmorland Green, and that Cadw have put forward a further alternative of Natural Welsh Heavy slate.

31. In my judgment, the real issue was not which option should be chosen, but whether the replacement slates should be a manufactured product which looks the most authentic on the one hand, or a natural product which looks less authentic on the other. The Inspector rejected the former for the reasons he gave.
32. I am not persuaded that section 16(2) of the 1990 Act imposed upon the Inspector the wide duty to consider alternatives as contended for on behalf of the Claimants. It is true that Carnwath LJ in *Derbyshire* in dealing with statutory duties to have special regard to the need to protect the National Park and Conservation Area referred in particular to the fact that in the case before him there were no alternatives put forward. But he then went on to say that those duties fell short of imposing a positive obligation to consider alternatives. That was a matter of planning judgment. In my judgment, such reasoning also applies where alternatives are put forward. It is a matter of planning judgment whether to consider them.
33. There remains, however, one narrower aspect of the implementation of the duty under section 16(2) which I should refer to. The Inspector dealt with the duty by reference to the special character and interest of the building. However, the duty also required the Inspector to have special regard to the “desirability of preserving” the house itself. This was not referred to by the Inspector. He referred to the investigation of the roof but not expressly to the damp penetration. It was not one of the grounds of the appeal that the condition of the roof was such as to require urgent action to preserve the house. Had there been evidence to suggest such, then the Inspector should have considered it, but the evidence fell short of suggesting such urgency.
34. Accordingly, I am not persuaded that ground 1 is made out. Mr Wadsley realistically accepted that in such event ground 2 falls away.
35. That leaves the adequacy of the reasoning. It is not in dispute that the Inspector should give proper and adequate reasons which deal with the substantial points raised. Mr Wadsley, under ground 3, submitted that the Claimants had made it clear that there was a choice between competing slates, which was not dissented from by the Council or Cadw. If the Inspector thought that this approach was wrong, he should have explained why it was so and why he was taking a different approach.
36. It will already be apparent that I do not accept the premise of this ground. As indicated, no one invited the Inspector to choose between competing slates. Each side contended that its preferred slate was the appropriate option and the other preference was not. The Inspector was requested either to uphold the appeal or to dismiss it, not to make a choice. In those circumstances, in my judgment his reasoning adequately dealt with the issues raised.
37. Accordingly, there are no grounds for interfering with the Inspector’s decision. Counsel helpfully agreed that any outstanding consequential matters can be dealt with by written submissions, which should be filed and exchanged within 14 days of handing down.



