



Neutral Citation Number: [2020] EWHC 2721 (Admin)

Case No: CO/1044/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2020

Before:

SIR ROSS CRANSTON
Sitting as a Deputy High Court Judge

Between:

The Queen on the application of JANICE HEMMS	<u>Claimant</u>
- and -	
BATH AND NORTH EAST SOMERSET COUNCIL	<u>Defendant</u>
- and -	
KATE CHUBB	<u>Interested Party</u>

ESTELLE DEHON (instructed by **Richard Buxton Solicitors**) for the **Claimant**
KATHERINE BARNES (instructed by **Bath and North East Somerset Council Legal
Department**) for the **Defendant**

Hearing dates: 6 October 2020

Approved Judgment

Sir Ross Cranston:

1. This is a renewed application for permission to apply for judicial review following refusal on the papers by Holgate J. The claimant seeks permission to challenge the decision of the Bath and North East Somerset Council ('the Council') on 4 February 2020, refusing to exercise its power under section 102 of the Town & Country Planning Act 1990 ('the 1990 Act') to order the removal of a fence adjoining her property at Paper Mill Cottage, Leigh Lane, St Catherine, Bath.
2. Section 102(1)(b)(iii) of the 1990 Act confers on the Council the power to make an order that any buildings or works should be removed, if "having regard to the development plan and to any other material considerations, it appears...that it is expedient in the interests of the proper planning of their area (including the interests of amenity)."
3. The issue of removing the fence was the subject of a previous claim in judicial review in 2018, in which the claimant was granted permission on some of her grounds by John Howell QC in respect of an earlier refusal by the Council to make a section 102 order ('the 2018 judicial review'). In that claim the Council conceded that the officer making the decision did not have delegated authority. The claim was withdrawn by consent.
4. Delegated authority was also an issue in the current judicial review. There were late submissions on the matter, including during the hearing. As a result I ordered that the claimant provide further written submissions in light of the material that the Council had produced, with the Council having an opportunity to reply. Those documents have been produced and it is now possible to give judgment.

Background

5. The background to the Council's decision earlier this year not to exercise its section 102 power is as follows.
6. The claimant has owned Paper Mill Cottage since 2009. Its eastern boundary abuts parcel 1212, which is owned by the Beeks Mill Trustees, managed by Miss Chubb, the interested party. Parcel 1212 is a vacant field but is sometimes used for grazing cattle. Possibly since its construction in the 1700s, Paper Mill Cottage has enjoyed views across this neighbouring field to the woodlands beyond. It is located in the green belt and within the Cotswolds Area of Outstanding Natural Beauty.
7. Paper Mill Cottage consists of the main house and a two-storey stone built lodge which are connected by a stone wall. In 2010 the claimant carried out works to replace windows at Paper Mill Cottage, including the replacement and enlargement of what is now the kitchen window. These works did not require planning permission but were approved by Building Control on 29 November 2010.
8. In mid-2014 the claimant applied to the Council for a change of use of the lodge, which was then being used as a store and bedroom. The proposed use was for self-contained holiday accommodation, comprising a bedroom and a living and kitchen area. The external modifications proposed to the lodge included the addition of four windows in the eastern elevation, which would look over the neighbouring field,

parcel 1212. Three of these windows would be sited on the ground floor and one on the first floor. The Council granted permission in late November 2014.

9. In June 2015 Miss Chubb, the interested party, wrote to the claimant that she would drop her objections to the windows if she was paid £20,000. The claimant did not pay.
10. In September 2015 Miss Chubb erected a fence along the boundary between Paper Mill Cottage and parcel 1212. Apparently it runs within 300mm from the cottage's kitchen window.
11. The Council took enforcement proceedings for the removal of the fence. Its enforcement notice of 31 May 2016 alleged that the fence was erected without planning permission. The interested party appealed against this notice under section 174 of the 1990 Act.
12. An inspector was appointed. In his decision letter, the inspector first considered ground (c) of section 174(2), that there has not been a breach of planning control. The inspector held that this ground failed and upheld the notice. However, he varied the notice so that it no longer required removal of the fence but rather – in recognition of permitted development rights – that it be reduced to a height of no more than 2 metres above ground level at any point.
13. The inspector then considered ground (a) under section 174, that planning control ought to be granted. First, as regards inappropriateness, the inspector said that there was no sound reason to doubt the interested party's claim that cattle regularly grazed in the field and sheltered from the prevailing wind alongside the property on its boundary. At paragraph [29] he concluded that the structure was a "reasonable response to a hazardous situation that has been created by installation of the windows and an oil pipe outside the fabric of the building".
14. Second, as regards character and appearance, the inspector said that the fence was not in keeping with traditional means of enclosure around a field in the Cotswolds, dry stone walls. Although it might be expected to weather that did not lead him to conclude that the structure was an appropriate form of development in what was an area of outstanding natural beauty: [36]. The inspector added that the fence was a form of development which adversely affected the natural beauty of the landscape of a designated area of outstanding national beauty, which LP Policy NE.2 said would not be permitted: [37]. Visible from a number of public vantage-points, the inspector said, the structure was inappropriate in an area of outstanding natural beauty: [38]. The interested party had offered to accept a condition to require hard and soft landscaping to give the fence a more rustic appearance and an indigenous hedgerow planted parallel to the permissive path but that, he said, would not address his concerns or achieve policy compliance: [38]. The inspector summed up his conclusion on character and appearance: the fence harmed the character and appearance of the area, failed to conserve the landscape and scenic beauty of the area of outstanding natural beauty, and conflicted with relevant policies in this regard: [39].
15. Third, as regards the effect of the fence on the occupiers of the Paper Mill Cottage, it harmed their living conditions by reason of loss of outlook and daylight in the kitchen and living room: [42]-[43], [47].

16. Summing up on ground (a), the inspector decided that his findings on the second and third issues lead to the conclusion overall that the fence was unacceptable on its merits: [49].
17. In April 2017 the claimant requested that the Council act under section 102. In July 2017 the enforcement officer managing the matter published a report for consideration by the Council's planning committee, recommending the making of an order. Prior to the committee meeting, the report was withdrawn in light of legal advice and in the hope that an agreement could be reached between the parties.
18. The following year, May 2018, the claimant wrote to the Council reiterating the request that it make a section 102 order, indicating that she was prepared to indemnify it for any compensation payable up to the sum of £5,000.
19. On 5 June 2018 the Council, via the enforcement officer, wrote to the claimant declining to make a section 102 order ("the 2018 Decision"). He noted that the fence had been reduced in height to 2 metres and that it had weathered so as to make it far less visually prominent than it was when first constructed. He said:

"In my view the reduced visual impact, the localised nature of any harm and the existence of permitted development rights weigh against making a s.102 Order."
20. That decision gave rise to the 2018 judicial review. Following the grant of permission, the Council agreed to reconsider the matter.

Council's November 2019 Report

21. On 7 November 2019 the Council published its report ('the November 2019 report'). A new planning officer had considered further representations and made two site visits on 27 February 2019 and 17 May 2019. He had been given specific delegated authority under the general officer scheme of delegation. The Council's decision was that it would not make a section 102 order.
22. As regards landscape impacts, the report stated that while the inspector's decision was a material consideration which carried significant weight, his conclusions two and a half years previously in respect of the fence's visual and landscape impact did not carry more weight than the Council's assessment at that point. Concerning residential amenity, the report noted that living conditions within the kitchen had been substantially harmed by the installation of the fence and that the fence was contrary to Policy D6. However, although the fence could be seen from a number of other windows within Paper Mill Cottage, including from the conservatory, that was at a greater distance, and the impact was much reduced and not unacceptable. Similarly, the fence also obstructed a number of windows in the eastern elevation of the holiday let, but these served an en-suite and bedroom, and for this reason the impact was not considered to be unacceptable or contrary to Policy D6.
23. As regards Article 8 ECHR, the right to private and family life, the report did not consider that this was engaged. Although there was an adverse impact to amenity as a result of the obstruction of the kitchen window, this was not sufficiently serious. Were Article 8 to be engaged, however, the interference with the right would be necessary

and proportionate having regard in particular to the need to protect cattle, as had been recognised by the inspector.

24. In considering whether it was expedient to make a section 102 order, the report weighed in favour of a removal order that the fence was clearly contrary to the development plan by virtue of the substantial harm to the living conditions of the occupants of Paper Mill cottage in respect of its kitchen. Weighing against making an order were (i) the fence was permitted development and whilst its impact on the kitchen window was substantial, the magnitude of the harm was reduced (a) by the presence of the other window and (b) the fact that only one residential property was affected; (ii) making an order carried with it an unknown financial risk, despite the claimant's offer to indemnify the Council up to £5000; and (iii) permitted development rights would not preclude erection of a further fence when the land in question was in agricultural use and a stock proof fence was clearly needed. The Report concluded:

“Given the limited scale and magnitude of the harm set out above, it is considered grossly disproportionate and indeed unreasonable for the Council to intervene and issue a s 102 Order requiring the removal or alteration of a lawful fence, when weighed against the disadvantages of doing so as set out above. It is therefore determined that the Council will not issue a s102 Order in this case.”

25. The decision prompted a pre-action letter from the claimant which resulted in the Council agreeing to reconsider the delegated decision.

Council's February 2020 Addendum Report

26. On 4 February 2020 the Council in an Addendum report confirmed its earlier refusal to make a section 102 order. The Director (Development and Public Protection) granted express delegated authority to the author of the addendum report and personally reviewed and endorsed it.
27. After introductory matters, the addendum report considered 'Landscape Impact'. It stated the inspector had concluded 'that the fence was harmful to the character and appearance of the area'. In reaching this conclusion, it said, the inspector attached considerable weight to the Cotswolds AONB Management Plan as well as the Landscape Character Assessment and the Cotswolds AONB Landscape Strategy and Guidelines. It then quoted from paragraphs 36, 37, 38 and 39 of the inspector's decision letter, referred to earlier in the judgment.
28. The report then said that it disagreed with the inspector's conclusion in respect of the landscape impact of the fence. The 'principal reason' was the weathering of the fence in the years since it was erected, and that there was an element of regrowth in its vicinity.

“The change in physical circumstances resulting from the passage of time is a material consideration to which the Council affords considerable weight and which ultimately has led the Council to reach a different conclusion to that of the

inspector... The actual impact of two years' worth of weathering has been seen and assessed by the Council and the Council has legitimately, given this material change in circumstances, reached a different conclusion in respect of the impact of the fence on character and appearance.”

29. With respect to residential amenity, the addendum report agreed that the fence being close to one (not all) of the kitchen windows of the cottage had a negative effect on amenity because of the significant erosion of both outlook and light. The fence obstructing the bedroom window and en-suite in the holiday let was not considered unacceptable.
30. The Council then set out the three key elements weighing against the issuing of a section 102 order (i) the owner of the field had permitted development rights; (ii) the need for an Article 4 Direction removing permitted development rights for the section 102 order to have a meaningful effect, including the need for strong justification in agricultural cases; and (iii) the compensation payable, which would be payable, coupled with the material amount of officer time which would be better deployed in the public interest elsewhere.
31. The Addendum Report reiterated that if the failure to make a section 102 order constituted an interference with the claimant's Article 8 ECHR rights, all of the factors mentioned provided reasons why the interference was justified and proportionate.

Ground 1: material considerations and/or irrationality in Council's approach to impact on character and appearance

32. Under this head Ms Dehon for the claimant contended that the Council failed to take material considerations into account. It was obliged to address the inspector's conclusions on the central matters concerning the planning and amenity impact of the fence and, if it disagreed with them, to give cogent reasons why it did so. It failed to do so.
33. In her submission the delegated and the addendum reports focused on visual impact only, namely, the extent to which the fence had weathered. However, that failed to address the inspector's crucial findings that the fence was a form of development adversely affecting the AONB and how its inappropriateness derived from its very nature and its proximity to Paper Mill Cottage, none of which were affected by the weathering. In this regard Ms Dehon underlined the inspector's rejection of the interested party's offer to give the fence a more rustic appearance, since that would not address his concerns or achieve policy compliance.
34. There was also the loss of amenity, Ms Dehon added, since the inspector had set out with care the loss of amenity to the claimant as a result of the fence. Specifically he had concluded that the fact that rooms might be served by other windows did not alter his assessment that it harmed the living conditions of the residents of Paper Mill Cottage by reason of the loss of outlook and daylight. Loss of amenity is especially crucial to judgments on amenity.

35. A material considerations challenge must demonstrate that as a matter of legal obligation in the relevant legislation or policy they require direct consideration, or alternatively, on the facts of a case, they are so obviously material that they must be considered. It is not enough that, in the judge's view, consideration of particular matters might realistically have made a difference: e.g., *R (Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council* [2020] UKSC 3, [31]-[32].
36. As to legal obligation the Council under section 102(1) of the 1990 Act had to consider whether it was expedient in the interests of the proper planning of their area, including the interests of amenity, to make the order. Expediency encompasses a wide discretion as Ouseley J held in *R (Usk Valley Conversation Group) v Brecon Beacons National Park Authority* [2010] EWHC 71 (Admin), [201]. It is to be distinguished from the issue whether planning permission should be granted which, as I have described, the planning inspector addressed.
37. In my view the Council did not ignore material considerations, assuming for the moment that the considerations Ms Dehon identifies were, as characterised in *Samuel Smith Old Brewery* case, so obviously material that they had to be considered. The Council stated in the addendum report the inspector's conclusion 'that the fence was harmful to the character and appearance of the area'. It then referred to the AONB aspect and went on to quote at length from the inspector's report, paragraphs [36]-[39] as summarised earlier in the judgment. It was a matter for the Council to attach such weight as it considered to the material considerations. It took into account amenity, indeed agreed with the inspector's approach. The inspector addressed it from the planning permission perspective, not whether or not in light of the unacceptable impact it was expedient to make a section 102 order. That was a different issue and, as such, his reasoning in this regard while a material consideration by no means dictated the outcome of the section 102 decision.
38. As to explaining why it took a different view from the inspector on these matters, the Council set out why in terms of the visual aspect it reached a different conclusion from the inspector on character and appearance. I do not accept Ms Dehon's submission that the Council had to explain why it differed from the inspector on every matter he raised. Failure to mention a material consideration does not demonstrate an error of law, or justify an inference that the matter was ignored: cf. *South Bucks DC v Porter (No 2)* [2004] 1 WLR 1953, [36] The council dealt at some length with the 'principal reason' for it taking a different view from the inspector, namely the passage of time and the weathering. That was sufficient.
39. Consequently, in my view the material considerations challenge fails. As for irrationality, this is a very high threshold. Ms Dehon's argument is that the Council irrationally changed its position. As I have said the Council set out its reasoning explaining why it was departing from the inspector's findings on landscape impact. It agreed that the claimant's amenity was adversely affected. The irrationality argument goes nowhere.

Ground 2: Breach of Article 8 ECHR and A1P1

40. The claimant contends that in failing to make a section 102 order the Council breached her rights under Article 8 ECHR and Article 1 of Protocol 1 ("A1P1"). Here the articles are engaged because there is a significant impact on the claimant's

amenity given the impact on her home arising from an external factor within the regulatory control of the Council as the relevant public authority. The interested party's A1P1 rights were engaged, but not her Article 8 rights. Since the articles were engaged, it was necessary for the Council to undertake a proportionality analysis of the steps to be taken. Where there is a choice of measures or, in the context of a positive obligation a choice between action and inaction, recourse should be had to the least onerous measure in relation to the individual whose Article 8 rights are engaged. Moreover, the Council had not assessed the compensation it might be required to pay the interested party if it exercised its discretion under section 102 to make an order. The only evidence available was that provided by the claimant, in a report by a registered valuer, which showed the level of compensation to be minimal.

41. *Lough v Secretary of State* [2004] EWCA Civ 905, [2004] 1 WLR 2557 is determinative as regards this ground. There Pill LJ (with whom Keene and Scott Baker LJJ agreed) held that there had to be a substantial lack of respect for the home before Article 8 was engaged: [43]. I accept Ms Barnes' submission that a reduction in light to one room which is unacceptable in planning policy terms, in circumstances where the room still benefits from another window or other windows, is not serious enough to fall within the scope of Article 8.
42. Moreover, Pill LJ made clear in *Lough* that there was no requirement before a development was permitted that it be established that its objectives could not be achieved in some other way or on some other site: [49]. Ms Dehon sought to distinguish *Lough* by arguing that it applied to permitting development, not in the context of a local authority deciding whether or not to make a section 102 order, but Pill LJ's words are wide enough to capture this. I also accept Ms Barnes' submission that there is no requirement on the Council to quantify the likely compensation payable in the event of a section 102 order being made, and that in any event it would impose a disproportionate burden on the Council to do so. I accept the Council's case that an important factor weighing against the grant of the section 102 order was that the issue would absorb officer time, which would be better deployed in the public interest elsewhere.

Ground 3: Improper delegation

43. The claimant sought an amendment of ground 3 to challenge the Council's delegation of the making of the section 102 order to an officer under its general scheme of delegation, not under planning powers. At the hearing I asked Ms Dehon why I should allow the amendment when it was clear from the November 2019 report and February 2020 addendum report that the Council stated that it was delegating the decision under the general scheme of delegation. However, it became evident at the hearing that the delegation issue raised more general issues than what occurred in this case, and I invited the claimant and the defendant to make short written submissions on the issue.
44. The Council's Constitution is divided into eight parts, part 1 - summary; part 2 - articles; part 3 - responsibility for functions; part 4 - procedural rules; part 5 - terms of reference; part 6 - codes of conduct and working protocols; part 7 - allowances; and part 8 - management structure.

45. In part 2 of the constitution, article 12.1 provides that the full council can engage officers to carry out its functions. Article 12.1 continues that the management structure of the Council is set out at part 8 as amended.
46. Part 3 of the constitution, 'Responsibility for functions and delegation schemes', comprises four sections. Section 2 deals with Council functions. One aspect is that the Planning committee has the function of determining all applications for planning and other permissions, and for delegation relevant to it one is referred to the terms of reference and delegations to officers. Section 3 is entitled 'Responsibility for executive functions' and lists the cabinet (stating, inter alia, "For delegations to officers see Section 4") and bodies other than the Council such as regional bodies.
47. Part 3, section 4, refers to 'Delegation of functions to officers'. Under section 3.4A, directors have delegated power to take any decision 'falling within their area of responsibility other than...an issue which, under section 4E, should be referred to a Cabinet Member or Cabinet Members for resolution'. Under section 3.4B, 'General provisions', the officers identified in section 3.4A, including directors, 'are authorised to take all action and decisions deemed necessary to enable those responsibilities to be effectively discharged...', subject to the limitations in section 3.4D, which are not relevant. Without prejudice to the generality of the provision, section 3.4B goes on to provide that it includes the ability to "serve any notices and make, amend or revoke any orders falling within his/her area of responsibility". Under section 3.4D, 'Scheme of delegation to officers – general provisions', paragraph 9 states: "An officer to whom a power, duty or function is delegated may nominate or authorise another officer to exercise that power, duty or function, provided that officer report to or is responsible to that delegator."
48. Included in part 3 of the constitution are a number of specific delegation schemes. One of these is the 'Planning scheme of delegation'. This lists matters delegated to the director of development and public protection and named deputies, including the head of planning. For example, they may determine applications for planning and other permissions, but subject to certain exclusions and exceptions. There is no mention of delegation in relation to the making of a section 102 order.
49. Part 5 of the constitution, 'Terms of reference', contain the terms of reference of the Planning committee. Paragraph 1 states: "The Committee will exercise all the Council's powers and duties in respect of Development Management (subject to the scheme of delegation set out in the Constitution...)." Paragraph 3 states that in exercising its powers and duties the committee may '(b) delegate any of its functions to a sub-committee and to (sic) delegate any of its non-policy making functions to officers (see delegation scheme)'.
50. Part 8 of the constitution, 'Council departments', shows that the Director of development & public protection oversees, amongst others, the head of planning.
51. Ms Dehon contended that it was arguable that the Council wrongly relied on the general scheme of delegation in part 3, section 4, to delegate a decision which should have been taken by the planning committee, in light of the specific scheme of delegation concerning planning matters in part 5 of the constitution. That committee had the power to decide on a section 102 order so it, not the director of development

& public protection, should have delegated the power to the officer. As the Council accepted, the director of development & public protection did not have a specified power under the 'Planning scheme of delegation' to make a section 102 order.

52. However, Ms Dehon continued, the general scheme of delegation under section 4A was of executive functions, as demonstrated by the cross reference to part 3, section (entitled 'Responsibility for executive functions') and the wording of the delegation in part 3 section 4A, with its exception for issues under Section 4E referable back to the cabinet or cabinet members. Moreover, the terms of reference for the planning committee in Part 5 delegate to it all the Council's powers and duties in respect of planning, subject to the scheme of delegation set out in the constitution. Use of the singular, Ms Dehon submitted, arguably means that this is a reference to the subject-specific scheme of delegation in part 3, not the general scheme of delegation.
53. The Council's constitution consists of hundreds of pages and gives the impression of being cobbled together from disparate documents. The terminology for its different parts is not helpful. The 8 parts are subdivided, but some of the subdivisions are not numbered. Labelling of the subdivisions is sometimes confusing; for example, preceding section 4 of part 3 is 'part 3A' and the different aspects of section 4 are themselves labelled as 'section' A, B, C and so on. (I have called them section 4A, 4B and so on.) I could well understand if residents of the district found the constitution difficult to follow.
54. In my view, however, it is clear that, if the constitution is construed as a whole, the general scheme of delegation to directors contained in part 3, section 4A, applies to all the Council's functions. I accept Ms Barnes' submission that were it otherwise, the constitution would say so. Instead the language is general, that directors have delegated power to take *any* decision falling within their area of responsibility. That includes non-executive functions. Indeed, there are examples of non-executive functions expressly listed in section 4B. The cross-references in other parts of the constitution to section 4 cannot undermine its general import.
55. Part 8 of the constitution sets out the areas of responsibility of the chief executive and the directors. One of the areas of responsibility of the director of development and public protection is the head of planning. Part 8 is not confined to lines of management. It is referred to in article 12.1 of part 2 of the constitution as providing how the full council can engage officers to carry out its functions. In other words, the director of development and public protection has delegated power to take 'any' decision falling within the planning context, one function within her area of responsibility.
56. Nothing in the specific delegation provisions for planning undermines this conclusion. Planning functions may be delegated in accordance with the terms of reference and delegations to officers (part 3, section 2). The terms of reference in Part 5 delegate to the planning committee all the Council's powers and duties in respect of planning, subject to the scheme of delegation set out in the constitution. In my view there is nothing significant about use of the singular in this context; in any event as a matter of interpretation the singular can include the plural: cf. Interpretation Act 1978, s. 6(c). Thus I accept Ms Barnes' submission that the reference to 'scheme of delegation' means that decisions of the planning committee are subject to the applicable schemes

of delegation in the constitution, depending on the specific decision being taken. Relevant in our case is the general scheme of delegation.

Conclusion

57. Accordingly, none of the grounds are arguable.
58. Let me add this. In addressing the court, the interested party, Miss Chubb, stated that if the claimant had approached her at the time of the alterations to her property, the situation could have been resolved. For the claimant Ms Dehon replied that it was not through lack of trying on the claimant's part that matters had escalated and has added that the claimant had made a number of attempts to mediate. Miss Chubb has written to the court to dispute aspects of Ms Dehon's claims. It is not for me to establish the facts, to attribute blame, or to suggest a resolution. However, I understand from what Ms Chubb told me that she is now willing to negotiate to resolve matters between the claimant and herself. Given Ms Chubb has given this indication in open court I very much hope she will follow through with a suggestion to the claimant as to how matters can be resolved. That would be to the public benefit, not just to the benefit of these two parties.