Neutral Citation Number: [2023] EWHC 492 (Admin)

Case No: CO/3733/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 March 2023

Before :

HHJ KAREN WALDEN-SMITH SITTING AS A JUDGE OF THE HIGH COURT

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Between :

BEST HOLDINGS (UK) LIMITED (trading as Wyldecrest Parks)	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendants**
(2) DOVER DISTRICT COUNCIL	

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DOUGLAS EDWARDS KC (instructed by **Stephens Scown LLP**) for the **CLAIMANT**
KILLIAN GARVEY (instructed by **the Government Legal Department**) for the **FIRST DEFENDANT**

Hearing date: 2 March 2023

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Approved Judgment

HHJ KAREN WALDEN-SMITH :

1. This the renewed oral application for permission to bring a planning statutory review pursuant to the provisions of section 288 of the Town and Country Planning Act 1990 (s.288 review).

2. The challenge is directed towards the decision dated 31 August 2022 of an Inspector, Grahame Kean, appointed by the First Defendant, the Secretary of State for Levelling Up, Housing and Communities ("the Decision"). The Decision by the Inspector was to dismiss the appeal brought by the Claimant, Best Holdings (UK) Limited (trading as Wlydecrest Parks), against the refusal of the Second Defendant, Dover District Council, to grant a certificate of lawful proposed use of land at Wass Drove Farm, Wass Drove, Westmarsh, Canterbury CT3 2LT ("the site").

3. Permission to bring the s.288 review was refused on consideration of the papers by Upper Tribunal Judge Elizabeth Cooke on 21 November 2022. In the reasons for that refusal, it was set out that the complaint was that the Inspector had failed to allow the parties the opportunity to comment on the view he took of the current use of the site and that he formed a view from the site visit without regard to the parties respective contentions. That challenge was rejected on the papers as a consequence of the explanation given by the Inspector in his own witness statement. The Claimant has now responded to that witness statement with a further witness statement of Benjamin Eiser, which has been responded to by a further statement from the Inspector. The Claimant makes the point that it is unusual for the Secretary of State to respond to a statutory review challenge with two witness statements, particularly at the permission stage. The Claimant relies upon that as support for the merits of the Claimant's case.

Standing

4. The First Defendant raised an issue of standing in its acknowledgment. That point was rejected by UTJ Cooke on the papers and is not proceeded with by the First Defendant. The Claimant plainly has standing to seek permission to bring this statutory review.

Factual Background

5. The Claimant sought a certificate of lawful development pursuant to the provisions of section 192 of the Town and Country Planning Act 1990 ("TCPA 1990"). That application was refused by the Second Defendant, Dover District Council. The First Defendant refused the appeal made by the Claimant against the refusal to grant a certificate of lawful proposed use, pursuant to the provisions of section 195 of the TCPA 1990.

6. The Claimant was seeking a certificate of lawful proposed development as follows:

> "The proposed stationing of up to 5 caravans for all year round residential occupation and up to 25 caravans for residential occupation during the period 1 March and 30 November each year."

7. The Claimant's predecessor in title as owner of the site had sought a certificate of lawful existing development pursuant to section 191 of the TCPA 1990 on 15 June 2015 as "sui generis (caravan park permanent residential use)". That application was refused by the Second Defendant by notice given on 21 October 2016. The decision was appealed and by a decision letter dated 15 June 2018, a certificate of existing lawful existing development was granted in the following terms:

> "The use of land as a caravan site in accordance with section 1(4) of the Caravan Sites and Control of Development Act 1960 for the all year round residential occupation of not more than 2 caravans falling with the statutory definition pursuant to section 29 of that Act and for residential occupation of not more than 25 caravans during the period 1 April to 31 October in any year" ("the 2018 LDC").

Grounds of Challenge

8. The first ground of challenge is that the Inspector appointed by the First Defendant reached a conclusion as to the existing use of the site being mixed use, including the siting of caravans and parts for storage, the siting of caravans for residential purposes and the deposit of waste: he concluded that this was a change of use from the 2018 LDC such that what was certified in the 2018 LDC no longer represented the current and existing use of the appeal site.

9. Ground 2 also alleges that the Inspector's handling of the appeal was procedurally unfair. Ground 3 alleges an error of law, a failure to give adequate reasons and irrationality on the part of the Inspector in reaching his alternative conclusion that there would be a definable change in the character of the use of the land of the site.

10. Both the Claimant and the First Defendant agree that if the Claimant cannot establish that permission ought to be granted under Ground 1, that as Grounds 2 and 3 challenge the alternative findings made by the Inspector, had he not taken the view he did about current use, these are not determinative to the outcome of the appeal, so they would fall away. In essence, if Ground 1 is unsuccessful grounds 2 and 3 become academic.

11. The complaint of the Claimant is that at no time, either at the hearing itself or after the hearing, did the Inspector raise either with the Claimant or the Second Defendant that his view was that there was, or that there may have been, a material change of use subsequent to the grant of the 2018 LDC. In his witness statement dated 16 February 2023, the Inspector accepts that *"the parties did not suggest that the use of the site was a mixed use including for the deposit of waste materials"* (para 6) and that it *"is correct to state that I did not raise any specific issue with the current use that may have constituted a change of use following the grant of the 2018 LDC. I had not yet visited the site. However, I was concerned that Mr Eiser* [the Claimant's planning consultant] *might be conflating the (current) lawful existing use of the site with the certified use in the 2018 LDC."* This statement indicates that the Inspector reached his conclusion that there had been a change of use since the 2018 LDC from his site visit.

12. The Claimant's challenge is that the Inspector had reached his own conclusion that there had been a material change of use since the grant of the LDC 2018, such that the existing use was now a sui generis mixed use:

> "I find on the facts that the current use of the unit is a mixed use for the siting of caravans and caravan bodies for storage purposes, siting of caravans for residential purposes, and for the deposit of waste materials, and that the mixed use subsists on the appeal site within a single planning unit" [paragraph 30 of the Decision Letter].

13. This determination was contrary to the common position of the Claimant and the Second Defendant and, while the Claimant does not seek to suggest that the Inspector is not entitled to reach his own conclusions and that he is not obliged to accept the position taken by the principal parties, the Claimant does submit that the Inspector is obliged to refer the matter back to the parties in order for them to have opportunity to comment and persuade.

14. Counsel for the Claimant referred to Part III of the Planning Encyclopaedia (Oct 2015 update) where it is set out, in summary form, that the Secretary of State (the First Defendant) has a duty to have regard to all material considerations and not merely the issues raised by the parties at the inquiry; he is not obliged to accept uncontested evidence; and is not obliged to accept an agreement between the parties on any issue (Willis J. *Lewis Thirkell Ltd v SoS for the Environment* [1978] JPL 844) but *"in such a case he will be required to refer the matter back to the parties"*; and where he proposes to base his reasoning on a matter not canvassed at the inquiry he would be expected to refer back to the parties (Willis J. *H Sabey &Co v SoS for the Environment* [1978] 1 All ER 586). It is effectively a matter of natural justice.

15. In *Castleford Homes v Secretary of State for Environment, Transport and the Regions & RB of Windsor and Maidenhead* [2001] EWHC Admin. 77, Ouseley J. described the principle as follows:

> "Was the claimant deprived of an opportunity to present material by an approach on the part of the Inspector which he did not and could not have reasonably anticipated? Or is he trying to improve his own case subsequently, having been subsequently, having been substantially aware of, or alerted to, the key issues at the inquiry? Did he simply fail to realise that he might lose on an aspect which was fairly and squarely at issue and hence fail to put forward his fall-back case? Those are the sort of questions which can be used to guide a conclusion as to whether the manner in which a particular issue was dealt with at an inquiry involved a breach of natural justice and was unfair."

16. The use of the phrase "fair crack of the whip" used in *Castleford Homes* has since been deprecated, but the principle remains: what the court is looking for is whether *"there has been procedural unfairness which materially prejudiced the applicant"* per Jackson LJ in *Hopkins Developments Limited v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470. While an Inspector is not expected

to give regular updates as to his thinking, and he is not bound by his agenda setting out the main issues, the parties to a planning enquiry are entitled *to "(a) know the case which has to meet; and (b) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case."*

17. The common baseline of both the Claimant and the Second Defendant was that the 2018 LDC was still the use of the site. In his decision letter, the Inspector departed from that common baseline in finding that *"the current use of the of unit is a mixed use… Such a mixed use is a sui generis use which is a material change of use distinct from that permitted under the 2018 LDC"* (paragraphs 30 and 31)

18. In *R (oao Poole) v SoS for Communities and Local Government* [2008] EWHC 7, Sullivan J made it clear that parties are entitled to focus their attention on the issues that are in dispute and while, where there are third parties who raise other matters that depart from an agreed statement, adjournments may be necessary to allow further representations to be made. In this case, the Claimant and the Second Defendant had agreed that the use was as provided for in the 2018 LDC.

19. In *Kerry v SoS for Housing, Communities and Local Government* [2020] EWHC 908, HHJ Robinson sitting as a Judge of the High Court, had found there was no unfairness as the claimant in that case knew the case which he had to meet on landscape harm and had a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case. That is plainly a decision on the facts of that particular case. The overarching question the court has to determine is *"whether a party has had a reasonable opportunity to present its case on a live issue and, if that party has not had such an opportunity, whether it has suffered material prejudice as a result"* (per John Howell KC, sitting as a Deputy High Court Judge, in *Thorpe-Smith v SSCLG* [2017] EWHC 356).

20. While the Inspector was entitled to reach a different conclusion to that agreed by the Claimant and the Second Defendant, he was obliged to give them the opportunity to comment and seek to persuade. The witness statement of Mr Eiser on behalf of the Claimant says that he would have explained what was on the site and provided much more detail. Mr Eiser accepts that the Inspector did raise lawful use of the planning unit orally at the hearing and that the Inspector put the issue on the agenda circulated in advance of the hearing, but that was with respect to the detail contained in the 2018 LDC not whether there had been a material change of use subsequent to the 2018 LDC.

21. As a matter of law, where an Inspector is reaching a finding of fact which is contrary to that which is agreed between the parties, those parties are entitled to have a proper opportunity to make representations to the Inspector. This is an expert tribunal but that does not abrogate the need for fairness. The evidence submitted from both Mr Eiser for the Claimant and from the Inspector himself establishes that there is a properly arguable case that the Claimant was not given opportunity to put forward his submissions to persuade the Inspector.

22. The First Defendant relies upon the agenda circulated before the hearing which identified the main issues as being:

> "the lawful use of the planning unit, the effect of the proposed development on the character of the lawful use, and whether there would be a material change of use"

23. The reading of that agenda has to be undertaken with care and it is, at the very least, arguable that the description of the main issues is with respect to the effect of the proposed development and whether there would be a future material change of use, not whether there had been a change of use since 2018 LDC.

24. The "*lawful use of the planning unit*" (the site) was said by Mr Eiser to reference the lawful use of the site within the 2018 LDC. It is clearly arguable that the Claimant was not given the opportunity it was entitled to in making representations to the Inspector if, as transpired to be the case, the Inspector was considering whether there had been a material change of use from the 2018 LDC, when the Claimant and the Second Defendant considered the issue to be whether the use as set out in the 2020 LDC Application constituted a material change of use from the 2018 LDC, which reflected the current use of the site.

25. Permission to bring the s.288 statutory review is granted on Ground 1. Ground 2 deals with what the Inspector's findings on the existing lawful use would have been had his findings been based on the scope of the 2018 LDC. Again, it is arguable that the Inspector proceeded to make findings as to the meaning and scope of the 2018 LDC with respect to the location and siting of the caravans without giving the Claimant and the Second Defendant an opportunity to make representations. For the same reasons for giving permission pursuant to Ground 1, permission to bring the s.288 statutory review is also granted on Ground 2.

26. In giving permission on Grounds 1 and 2, the issues raised in Ground 3 are academic and I am not considering those further at this stage.

Conclusion

27. Permission to bring the s.288 statutory review is therefore granted on Grounds 1 and 2.

28. I am happy to receive submissions with respect to the appropriate form of order to enable this matter to proceed to a substantive hearing. If the parties could communicate with each other prior to the formal hand down which I intend to deal with remotely, and without attendance, on Thursday 9 March 2023 at 10.30am.