Case No: C1/2015/3383

Neutral Citation Number: [2016] EWCA Civ 1061
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT: PLANNING COURT
HIS HONOUR JUDGE DAVID COOKE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2016

Before:

LORD JUSTICE MOORE-BICK
LORD JUSTICE LEWISON
and
LORD JUSTICE HAMBLEN

- -

Between:

PALMER	**Appellant**
- and -	
HEREFORDSHIRE COUNCIL & ANR	**Respondent**

- -
- -

Mr James Burton (instructed by **Kidwells Law Solicitors Ltd**) for the **Appellant**
Mr Matthew Reed (instructed by **Herefordshire Council**) for the **Respondent**

Hearing date: 25/10/2016

- -

Judgment

Lord Justice Lewison:

1. On 15 December 2014 Herefordshire Council ("the Council"), as local planning authority, granted planning permission for the erection of four poultry broiler units and associated infrastructure at Flag Station, Mansel Lacy, Herefordshire. Mr David Palmer, who lives nearby at Shetton Barns and has a holiday lettings business, challenged that grant on a number of grounds. HH Judge David Cooke rejected all grounds of challenge in his judgment of 22 September 2015 ([2015] EWHC 2688 (Admin)). He granted permission to appeal to this court on one ground only, namely that the Council had failed to comply with its statutory duty under section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.

2. The judge described the proposed development thus:

> "The proposed development consists of four large sheds, each approximately 95m long, 25m wide and 6m high. Each will have three feed silos adjacent, somewhat taller than the shed, and accommodate 45,000 broiler chickens at any one time."

3. Some 50 metres from the broiler units lies Flag Station. It is a disused railway station, built in about 1863, and is a Grade II listed building. Flag Station is owned by, and under the control of, the developer and forms part of the same agricultural unit as the site of the proposed broiler sheds. Mr Palmer's case is that the Council failed to demonstrate that it gave appropriate weight to the desirability of preserving the setting of that listed building, and failed to consider in that context non-visual harm to its setting, in particular from the noise and smell that would be occasioned by the operation of the broiler units and the spreading of manure on open fields.

4. Section 66(1) provides, so far as material:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority … 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."

5. Since section 66(1) requires that "special" regard must be paid to the desirability of preserving a listed building or its setting, this means that that desirability must be given "considerable importance and weight:" *The Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303, 1319. In this context the concept of "preserving" the building or its setting means "doing no harm:" *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141, 150. Although the most obvious way in which the setting of a listed building might be harmed is by encroachment or visual intrusion, it is common ground that, in principle, the setting of a listed building may be harmed by noise or smell. The degree of harm (if any) is a matter of judgment for the decision maker, but if the decision maker decides that there is harm, he is not entitled to give it such weight as he thinks fit. To the contrary he must give it considerable weight: *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137, [2015] 1 WLR 45 at [22]. However, this does not mean that the weight that the decision maker must give to the

desirability of preserving the building or its setting is uniform. It will depend on, among other things, the extent of the assessed harm and the heritage value of the asset in question: *East Northamptonshire DC* at [28]; *R (Forge Field Society) v Sevenoaks DC* [2014] EWHC 1895 (Admin); [2015] JPL 22 at [49]. This is consistent with paragraph 132 of the National Planning Policy Framework ("the NPPF") which states:

> "When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be."

6. On the same theme paragraph 134 of the NPPF states:

> "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

7. The existence of the statutory duty under section 66(1) does not alter the approach that the court takes to an examination of the reasons for the decision given by the decision maker: *Jones v Mordue* [2015] EWCA Civ 1243; [2016] 1 WLR 2682. It is not for the decision maker to demonstrate positively that he has complied with that duty: it is for the challenger to demonstrate that at the very least there is substantial doubt whether he has. Where the decision maker refers to the statutory duty, the relevant parts of the NPPF and any relevant policies in the development plan there is an inference that he has complied with it, absent some positive indication to the contrary: *Jones v Mordue* at [28]. In examining the reasons given by a local planning authority for a decision, it is a reasonable inference that, in the absence of contrary evidence, they accepted the reasoning of an officer's report, at all events where they follow the officer's recommendation: *R (Fabre) v Mendip DC* (2000) 80 P&CR 500, 511; *R (Zurich Assurance Ltd) v North Lincolnshire Council* [2012] EWHC 3708 at [15].

8. In reading an officer's report, the court must not impose too demanding a standard: *R (Morge) v Hampshire County Council* [2011] UKSC 2, [2011] 1 WLR 268 at [36]. Such reports are addressed to a knowledgeable readership including members of the planning committee who, by virtue of that membership, may be expected to have substantial local and background knowledge. That background knowledge includes a working knowledge of the statutory test for determination of a planning application: *R (Zurich Assurance Ltd) v North Lincolnshire Council* at [15]. Where a claim for judicial review is based on alleged deficiencies in an officer's report to the planning committee it normally needs to be shown that the overall effect of the report significantly misleads the committee about material matters which remain uncorrected at the meeting of the planning committee before the relevant decision is taken: *Samuel Smiths Old Brewery (Tadcaster) v Selby District Council* (18 April 1997). The ultimate test is whether the reasons enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues. The reasoning must not give rise to a substantial doubt (as opposed to what has been called a "forensic doubt") as to whether the decision maker erred in law, although such an inference will not be readily drawn: *South Bucks DC v Porter (No 2)* [2004] UKHL 33, [2004] 1 WLR 1953 at [36].

9. The first question, as it seems to me, is to consider whether the Council (through the advice it got from its officers) identified any (and if so what) harm to Flag Station. There was a debate about whether the judge found that the Council had identified harm. This turned upon a meticulous examination of the language of the judgment. But that is a sterile debate, since we have the primary documents.

10. Before the planning officer prepared his reports for the committee, the Council took the advice of internal consultees: Ms Tinkler, a landscape consultant, and Ms Lowe, a senior buildings conservation officer. In her report of 1 May 2014 Ms Tinkler reported that there were several heritage assets with "could potentially be affected" by the proposals, and went on to consider potential effects. In paragraph 5g of her report she said:

> "It is possible that the buildings would be visible from Flag Station and they would certainly adversely affect its setting. The amenity of the residents here is also likely to be adversely affected by traffic, activity, noise, smell and so on. It should be demonstrated that any adverse effects can be satisfactorily mitigated."

11. Her conclusion in paragraph 6 was:

> "I do not object to the proposals in principle but effective and appropriate mitigation is required in order to avoid adverse effects in the longer term, and to safeguard the amenity of residents at Flag Station and Shetton Barns to the south west. Without it, the development would be contrary to planning policy including UDP Policy LA2 Landscape character."

12. Paragraph 5g is not, in my judgment, a statement that the proposals *would* adversely affect Flag Station or its setting. Rather it is a statement that they would adversely affect Flag Station or its setting *in the absence of satisfactory mitigation*. That is the only reading with is consistent with the last sentence of paragraph 5g and also Ms Tinkler's overall conclusion. What is noticeable about her conclusion is that with the mitigation measures adverse effects would be *avoided*, not that they would be outweighed by countervailing benefits of the development. In addition policy LS2 states that:

> "Proposals for new development that would adversely affect either the overall character of the landscape … or its key attributes or features will not be permitted."

13. Ms Tinkler concluded that the proposals would comply with that policy. That is consistent with her view that the proposed mitigation measures would avoid adverse effects. The effects she discussed were not limited to visual matters, but also included such matters as noise and smell.

14. Ms Lowe ticked the box on her response stating that there was no objection to the proposed development. She began by saying:

> "Given the proximity of the proposal to the grade II listed Flag Station and its platform it is necessary to ensure that there is compliance with policy HBA4, Setting of Listed Buildings."

15. The reference to policy HBA4 is a reference to the part of the development plan that states:

> "HBA4 Setting of listed buildings
>
> Development proposals which would adversely affect the setting of a listed building will not be permitted. The impact of the proposal will be judged in terms of scale, massing, location, detailed design and the effects of its uses and operations."

16. She said that the current proposal would not significantly affect the setting of Flag Station, and gave reasons for her view. Her conclusion was that:

> "Overall the proposal should have no detrimental impact on the setting of the listed building, Flag Station, given the mitigation measures proposed."

17. Again, her conclusion was not that a detrimental impact on Flag Station would be outweighed by countervailing benefits, but that there would be *no* detrimental effect. Mr Burton, for Mr Palmer, placed some reliance on a later e-mail from Ms Lowe of 12 September 2014 but that, in my judgment, simply repeated the points that she had already made, and added observations about other heritage assets which play no part in this appeal.

18. The views of these two specialist officers were accurately summarised in the planning officer's report for the planning committee's meeting of 24 September 2014. That report also adverted to objections to the development which included "noise, dust, pests (flies) and odour issues in relationship to residential amenity". Paragraph 6.12 of the report, under the heading "Landscape and Heritage" stated that the setting of Flag Station "will be affected as a result of the proposed development" and referred expressly to the duty under section 66(1). The report then concluded in paragraph 6.14:

> "The Conservation Manager (Historic Buildings) has considered the impact of the proposal on these historic assets and concludes that, with mitigation, including retention of woodland, the proposal is considered to meet the requirements of key policies HBA4 and LA4 of the HUDP and section 12 Conserving and enhancing the historic environment. (NPPF)"

19. This rather condensed statement needs to be unpacked a little. Compliance with policy HBA4 must mean that in the opinion of the officer the development would not adversely affect the setting of a listed building. Policy HBA4, it will be recalled, deals not only with visual impact but also the effects of the "uses and operations" of the proposed development. The reference to policy LA4 is a reference to the part of the development plan that states, so far as material:

> "LA4 Protection of historic parks and gardens

> Development which would destroy, damage or otherwise adversely affect the historic structure, character, appearance, features or setting (including the designed visual envelope) of a registered park or garden will not be permitted."

20. Compliance with this policy must mean that in the opinion of the officer the development would not damage or otherwise adversely affect the character, appearance, features or setting of the heritage assets.

21. Mr Burton argued that paragraph 6.14 of the officer's report (a) did not encompass Flag Station and (b) was the officer's own view rather than that of Ms Tinkler and Ms Lowe. The first point is, in my judgment, wrong. The reference in paragraph 6.14 to "these assets" is a reference to the assets previously discussed in that section of the report which included Flag Station. I do not think that the second point is right either, since paragraph 6.14 appears to be recording the views of Ms Lowe. It correctly records that her conclusion was that the proposal met the requirements of HBA4. That was expressly so in her first report in relation to Flag Station and was impliedly so in her second report in relation to Flag Station and the other listed buildings. Compliance with LA4 in relation to parks and gardens is also to be inferred from her second report and compliance with section 12 of the NPPF follows from meeting the requirements of HBA4 and LA4. But even if it is right, I cannot see what difference it makes. The officer who prepared the report was a professional planning officer, and he was entitled to form his own view for the benefit of the committee having informed himself by reference to the views of his specialist colleagues.

22. The proposal was deferred at the September meeting of the planning committee and came back before them at the meeting on 19 November. The planning officer prepared an updated version of his report. (In fact it was a different officer but that, I think, is immaterial). In paragraph 4.4 he reported that the Environmental Health Manager did not expect "any nuisance from light, dust, noise or odour (providing best practice is observed as per EP)." In paragraph 4.6 he addressed the question of odour, and concluded by saying that the Environment Agency did not "perceive odour to be a problematic issue." He again reported the view of the Conservation Manager (Building Conservation) that:

> "Overall the proposal should have no detrimental impact on the setting of the listed building, Flag Station, given the mitigation measures proposed."

23. Paragraph 4.9 again accurately recorded the view of the Conservation Manager (Landscape) that effective mitigation measures were required in order to "avoid adverse effects." In his summary of objections he recorded that there had been objections based on:

> "Odour issues – all in relation to residential amenity"

24. Paragraph 6.12 again referred expressly to the duty under section 66 (1) and the officer reached the conclusion in paragraph 6.14 as he had in the report for the September meeting with minor and immaterial linguistic changes. Once again that conclusion referred to policies HBA4 and LA4, as well as to section 12 of the NPPF (which deals with heritage assets).

25. The important point is that his advice was that with mitigation measures, the proposed development complied with policy HBA4 (i.e. no adverse effect on the listed building or its setting) and with policy LA4 (i.e. no damage or adverse effect on the historic structure, character, appearance, features or setting). It was also said to comply with section 12 of the NPPF which says in terms that "great weight" must be given to the conservation of a heritage asset. In paragraph 6.31 the report stated:

> "There have been a number of competing elements to consider, not least of which have been the economic and amenity issues, landscape and historic heritage issues. The preceding sections of this report set out these and other issues and how they have been addressed through the application submission and/or the imposition of conditions."

26. Finally in paragraph 6.34 the report concluded that having considered the HUDP and the NPPF "it is considered that the proposal complies with the relevant policies contained therein". Those policies (which were mentioned in the body of the report) included policy HBA4 and policy LA4 (on which I have already commented).

27. Before the meeting Ms Hamilton, a planning consultant retained by the objectors, wrote in to say (among other things) that the officer's report made no mention of any impacts other than visual ones and said that Flag Station would be "affected by the most intense odours". This point was reported to the planning committee as an additional representation. Under the heading "Officer comments" the planning officer said:

> "Flag Station is in the control of the applicant, it is not unusual for dwellings on poultry units to be in close proximity to the buildings."

28. The planning committee met on 19 November when the proposal was discussed. At some stage they had made a site visit. The question of odour was raised once again and the Environmental Health Officer said that even if properties were within 200 metres of the development "noise and odour levels would be acceptable." At the end of the debate the local ward member said that odour would rarely be detectable because of the prevailing wind. The committee resolved to grant the permission.

29. It seems to me that the clear thrust of the reports to the planning committee, and the views of the specialist officers that underlay and were summarised in those reports, was that if the mitigation measures were put in place there would be no adverse effect on the setting of the listed building. I would accept Mr Reed's submission for the Council that where proposed development would affect a listed building or its settings in different ways, some positive and some negative, the decision maker may legitimately conclude that although each of the effects has an impact, taken together there is no overall adverse effect on the listed building or its setting. That is what the officers concluded in this case. That is borne out by the overall conclusion that the proposed development would comply with policies HBA4 and LA4. Mr Burton submitted that policies in development documents pull in different directions, and referred to policy E16 which dealt with intensive livestock rearing. I have no difficulty with the proposition that different policies can point in different directions. In such a case the decision maker may have to decide whether to prefer one policy over another and to grant planning permission even though the requirements of one relevant policy have

not been satisfied. But that is not this case. The report did not say that policy E16 overrode or outweighed policy HBA4: it said that policy HBA4 had been complied with. It is difficult to think of a policy that gives greater weight to the desirability of not harming a listed building or its setting than a policy that says that development that would adversely affect the setting of a listed building "will not be permitted". (I pause to note that the relevant policy considered in *Jones v Mordue* was in much less absolute terms).

30. In my judgment the conclusion that the proposals would comply with policy HBA4 necessarily entails the proposition that there is no adverse effect on the setting of a listed building and that either section 66(1) is not engaged, or if engaged, the policy itself is sufficient compliance. Likewise the explicit reference to section 12 of the NPPF, in the absence of contrary evidence, points to the conclusion that any duty under section 66(1) was complied with.

31. Mr Burton suggested that if that had been the Council's conclusion it would have been perverse, but the grounds of challenge do not include a perversity challenge and the permission to appeal does not permit the point to be taken either.

32. Mr Burton next argued that in coming to its conclusion the Council did not consider the effect of odour in the context of its statutory duty under section 66(1), even if it did consider the question of odour as a material consideration. It is thus argued that the Council carried out a flawed balancing exercise, in the same way as the inspector did in *East Northamptonshire DC*, by not considering odour through the filter of the special regard required by section 66(1). The first point to make is that Ms Tinkler did consider the potential effects of, among other things, noise and smell and in my judgment the mitigation measures she proposed were intended to deal with all those aspects of what she compendiously described as "amenity". Her consideration included the setting of Flag Station. Second, policy HBA4 also deals with the effect of the uses and operations of the proposed development, and the officers' view was that policy HBA4 had been complied with.

33. The judge's conclusion on this argument is at [55]. He said:

> "Taken in the round, it seems to me that the sensible inference from all this is not that the officers and the committee failed to take account of impacts other than visual ones on the setting of the Flag Station, but that they reached a conclusion about the impact on the setting of the listed building in which they considered that the main potential impact on that setting was visual, and so naturally concentrated on that. It is not in my judgment necessary for officers to refer individually to every potential aspect of the impact on the setting, nor is there any requirement that any detailed or structured assessment should be made of every such aspect. It is not therefore a proper inference from the fact that they have failed to mention a particular point that it has been ignored. Given the amount of focus on noise and odour issues generally in this case, it is not credible that either officers or committee members did not have them in mind when considering the impact on the listed building. The assessment of that impact was a matter for the planning judgment of the

> committee. There is no doubt that the duty was considered and a judgment exercised, and I am not persuaded that any error of law was committed in doing so."

34. I agree. Particularly telling is the observation of the Environmental Health Officer in the course of the meeting that the noise and odour levels would be acceptable, supplemented by the closing remarks of the ward councillor that the odour would rarely be detectable. It is also clear as a matter both of law and planning policy that harm (if it exists) is to be measured against both the scale of the harm and the significance of the heritage asset. Although the statutory duty requires special regard to be paid to the desirability of not harming the setting of a listed building, that cannot mean that *any* harm, however minor, would necessarily require planning permission to be refused. I agree, therefore, with what the judge said at [61]:

> "It is still plainly the case that it is for the decision taker to assess the nature and degree of harm caused, and in the case of harm to setting rather than directly to a listed building itself, the degree to which the impact on the setting affects the reasons why it is listed. Further, it is for the decision taker then to balance that against the benefits of the development. The duty to accord "considerable weight" to the desirability of avoiding harm does not mean that any harm, however slight, must outweigh any benefit, however great, or that all harms must be treated as having equal weight. The desirability of avoiding a great harm must be greater than that of avoiding a small one. The desirability of avoiding harm to a high category heritage asset must be greater than that of avoiding a similar harm to a less important asset."

35. Mr Burton also took exception to the planning officer's comment in his update to the committee, in response to the point raised about odour, that Flag Station was in the control of the applicant and that "it is not unusual for dwellings on poultry units to be in close proximity to the buildings." Like the judge I do not read this comment as concentrating on the ownership of the building. The comment did not in fact mention ownership, but only control. I agree with the judge at [56] that the thrust of the observation was that "it was relevant that the listed building was in an agricultural setting and might be expected to be affected by otherwise acceptable agricultural uses". In other words the setting of the listed building was an agricultural setting in the agricultural unit of which it formed part. As Mr Reed submitted if the point raised about odour had affected the officer's view that policy HBA4 was complied with, his report would have been amended. That seems to me to be a fair point. Moreover, as Mr Reed also submitted since everyone knew that Flag Station was a listed building, and the officer knew (as his report demonstrates) that both the statutory duty and the restrictive policies applied to it, it would have been extraordinary for him to have told the planning committee that they could ignore the listed status of Flag Station. Mr Palmer's planning consultant Ms Hamilton made a witness statement which said that, at the meeting of the committee, members raised the question of noise and smell affecting Flag Station and that they were told by the planning officer that Flag Station was not "considered to be a protected building because it was in the ownership of the applicant and would be inhabited by an agricultural worker". The judge rejected this evidence on the basis that

the words attributed to the planning officer did not purport to be a quotation and that they were inconsistent with the other materials before the court. I am not prepared to say that he was wrong to do so, although it would have been preferable for the Council to have specifically responded to this evidence. In particular I do not consider that this evidence can be taken as meaning that the officer advised the committee that the listed status of Flag Station could be ignored when everyone knew that it could not be.

36. Finally Mr Burton said that the Council had failed to consider the significance of Flag Station and why it had been listed. This was a reference to paragraph 129 of the NPPF which says that:

> "Local planning authorities should identify and assess the particular significance of any heritage asset that might be affected by a proposal (including by development affecting the setting of a heritage asset) taking account of the available evidence and any necessary expertise. They should take this assessment into account when considering the impact of a proposal on a heritage asset, to avoid or minimise conflict between the heritage asset's conservation and any aspect of the proposal."

37. I found it very difficult to understand what difference this made. We are dealing with a building that was originally designed as a railway station, but the most significant impact on its setting was surely the closure of the railway line. It is now in use, as I understand it, as an agricultural dwelling forming part of an agricultural unit. The specialist officers, and the planning officer in overall charge of the application, have all concluded that as things now stand there would be no adverse effects on Flag Station or its setting. That as it seems to me is enough.

38. Mr Burton sought to raise an additional point that was not taken before the judge (and is not one of the grounds of challenge raised in the claim form or the Amended Statement of Facts and Grounds). What is said is that the Council failed to give notice to English Heritage (now Historic England) as required by regulation 5A of the Planning (Listed Buildings and Conservation Areas) Regulations 1980. The reason why it is said that this ground was not raised earlier is that Mr Palmer was unaware that notice had not been given and that the Council ought to have disclosed that omission pursuant to its duty of candour.

39. The officer's reports to the planning committee (both in September and November) had a section headed "Statutory Consultees". The only statutory consultees listed were Natural England and the Environment Agency. In my judgment it should have been apparent to Mr Palmer's team that a third statutory consultee, English Heritage, had been omitted. In addition if this point had been taken in the claim form the Council would have had the opportunity to inquire of Historic England whether it had any objection to the proposed development. If it had none, then that would have been a good reason for refusing to quash the grant of planning permission despite the procedural error: *R (Loader) v Rother DC* [2016] EWCA Civ 795. The late application to amend has deprived the Council of that opportunity. In addition if a challenge were to be permitted on this ground it would be out of time under CPR Part 54.5 and would, moreover, be a ground of challenge for which the Planning Court had not given permission.

40. I would refuse permission to advance the new ground and dismiss the appeal.

Lord Justice Hamblen:

41. I agree.

Lord Justice Moore-Bick, Vice-President of the Court of Appeal, Civil Division:

42. I also agree.