Neutral Citation Number: [2015] EWCA Civ 800

Case No: C1/2014/3586

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE MRS JUSTICE PATTERSON DBE
CO/1830/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2015

Before:

LORD JUSTICE SULLIVAN
LADY JUSTICE SHARP
and
SIR COLIN RIMER

- -

Between:

THE QUEEN ON THE APPLICATION OF TESCO STORES LIMITED	**Appellant**
- and -	
FOREST OF DEAN DISTRICT COUNCIL	**Respondent**
-and-	
(1) JD NORMAN LYDNEY LIMITED	**Interested Parties**
(2) ASDA STORES LIMITED	
(3) WINDMILL LIMITED	
(4) MMC LAND & REGENERATION LIMITED	

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Tim Straker QC and Gwion Lewis (instructed by **Berwin Leighton Paisner LLP**) for the **Appellant**
Paul Stinchcombe QC and Jon Darby (instructed by **Eversheds LLP**) for the **Third Interested Party**
The Respondent and the First, Second and Fourth Interested Parties did not appear, and were not represented.

Hearing date: 14th July 2015

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Approved Judgment

Lord Justice Sullivan:

Introduction

1. This is an appeal against the Order dated 14th October 2014 of Patterson J dismissing the Appellant's claim for judicial review of the Respondent's grant of planning permission dated 11th March 2014 for the development of a site known as Federal Mogul Camshaft and Casings Limited, Land South of Cambourne Place, Lydney, for:

> "Demolition of existing finishing shop and erection of new finishing shop, offices with car parking and associated works. Erection of retail store of 3827 sq. m. gross internal floor area (Class A1), petrol filling station, car parking, service areas and associated development. Erection of 4 No. B1 units and 4 No. B1/B8 units."

A section 106 agreement to provide a shuttle bus service between the new retail store and Lydney town centre, and £380,000 to provide town centre management advice, town centre improvements, a market square, additional CCTV camera coverage, and shop front improvement grants in the town centre, was executed on the 11th March 2014 prior to the grant of permission.

Background

2. The background to the claim is set out in some detail in the judgment of Patterson J [2014] EWHC 3348 (Admin). The Appellant does not take issue with those passages in the judgment in which Patterson J discusses the legal framework (paragraphs 15-26), identifies the relevant planning policies (paragraphs 27-33), sets out the relevant extracts from the officers' report (paragraphs 34-53), and summarises the basis upon which the Planning Committee at its meeting on 12th November 2013 decided that planning permission should be granted subject to the satisfactory completion of a section 106 agreement (paragraphs 54-61). I gratefully adopt, and will not repeat, these parts of Patterson J's judgment.

3. In policy terms the proposed mix of uses was like the proverbial curate's egg: good in part, and bad in part. The "bad" part – the large out of centre retail store with its associated petrol station and car parking which would have a significant adverse impact on Lydney town centre contrary to both the NPPF and the development plan – would fund both the "good" part – the erection of the new finishing shop and offices – and a section 106 agreement containing a package of measures to mitigate the adverse impact on the town centre. The Respondent's planning officers recommended that planning permission should be refused because the wider advantages of the proposal, principally the retention of existing and the creation of new employment on a brownfield site did not outweigh the conflict with the NPPF and the development plan, and the proposal failed to make provision for the necessary contributions to mitigate the impact on the town centre. The Members disagreed, and by the Chairman's casting vote passed a motion that the application be approved "as this development of a brownfield site would safeguard existing and create new jobs and

that impacts arising from the development would be mitigated by the Section 106 obligations offered."

The grounds of challenge

4. Before Patterson J the planning permission was challenged on four grounds (see paragraph 14 of the judgment). There was no appeal against her decision to reject grounds 2 and 3. While Mr. Straker QC did not abandon a submission in the Appellant's Grounds of Appeal that Patterson J had erred in rejecting the first ground on which the permission was challenged – that the Council had breached its statutory duty under section 38(6) of the Planning and Compulsory Purchase Act 2004 – he did not press this point in his oral submissions. He was right not to do so. It was common ground that in respect of this issue the advice given to Members by the officers, both in their written report prior to the meeting and in their oral advice at the commencement of the meeting on 12th November 2013, was impeccable. In their report the officers had advised Members that "a great deal of weight" could be attached to the "wider benefits" of the proposal. Those "wider benefits" were, principally, securing existing jobs at the town's biggest employer, JD Norman Lydney Ltd., and the creation of new jobs. Members were advised at the start of the meeting that the proposal was contrary to both the NPPF and the Core Strategy in the development plan, but they were:

> "…entitled to consider whether there are any other material considerations that justify a decision which would be contrary to the development plan and also to consider any mitigation offers through section 106 contributions and to decide if they offer a degree of mitigation that if when considered with all the other material considerations reduce the harm arising from the proposal to an acceptable level."

There is no good reason to suppose that, having been given that advice, the Members failed to follow it.

The section 106 agreement

5. I turn to the remaining ground on which the permission was challenged before Patterson J: ground 4 in which it was contended that the section 106 agreement did not comply with regulation 122(2) of the Community Infrastructure Levy Regulations 2010, which states that:

> "A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is –
>
> (a) necessary to make the development acceptable in planning terms;
> (b) directly related to the development; and
> (c) fairly and reasonably related in scale and kind to the development."

Patterson J dealt with this ground of challenge in paragraphs 89-128 of her judgment.

6. At the heart of Mr. Straker's submissions was the proposition that it was not possible for the Members at the meeting on 12th November 2013 to reach an informed view as to whether the section 106 agreement was "fairly and reasonably related in scale and kind to the development" because they had been advised by the officers in the report that:

> "Overall, due to the lack of detail within the offer, it is not possible to make an informed judgment as to how far the package would mitigate the impacts of the proposal, either in whole or part."

He submitted that there was no discussion by the Members (unsurprisingly, because there was no material which could have formed the basis for such a discussion) of the relationship, whether in scale or kind, between the obligations imposed by the section 10 agreement and the development. He fairly accepted that when considering whether there was such a relationship in this case, the focus would be upon the scale and kind of the relationship between those elements of the proposed mix of uses which would have an adverse impact in planning terms (the large retail store and its associated car parking) and the proposals to mitigate that adverse impact, although he submitted that it was still necessary to have regard to the scale and kind of the permitted development as a whole.

7. Although it was contended in the Appellant's Skeleton Argument that the section 106 agreement did not comply with requirements (a), (b) and (c) in regulation 122(2), the focus of Mr. Straker's oral submissions was upon requirement (c): it was impossible to say that the obligations imposed by the section 106 agreement were fairly and reasonably related in scale and kind to the permitted development because there was no information upon which an informed judgment could be made as to the scale of those obligations. In my judgment, there is no difficulty with requirements (a) and (b) in regulation 122(2). Unlike the position in *R (on the application of Midcounties Co-operative Ltd) v Forest of Dean District Council and Trilogy* [2015] EWHC 1251 (Admin) (see paragraph 116 of Singh J's judgment in that case), this is not a case in which either the officers or the Members were saying that, even in the absence of any mitigation, the significant adverse impact on the town centre was outweighed by the wider benefits of the proposed development. In the Members' view some mitigation of the adverse impact on the town centre was necessary in order to make the development acceptable in planning terms, and that could be achieved by the package of measures included in the section 106 agreement. The section 106 agreement was directly related to the development in that the obligations imposed by the agreement would, in the view of the Members, mitigate the harmful effects of the "bad" part of the curate's egg.

8. Did the section 106 agreement comply with requirement (c) in regulation 122(2)? The Members had been advised in the report that the retail element of the proposed development would have "a significant adverse impact on the health of Lydney Town Centre." They were further advised that the applicants for permission "acknowledged that the adverse impact could not be entirely overcome by the package [of financial contributions contained in the section 106 agreement], but it is a case of mitigating the impact." It was common ground that the officers were not advising Members that there would be no mitigation of the impact on Lydney Town Centre as a result of the package of measures in the section 106 agreement. Officers were advising Members

that the package "could mitigate in part the harm to the town centre that would result from the proposal", but that, due to the lack of detail, it was "not possible to make an informed judgment as to how far the package would mitigate the impacts of the proposal, either in whole or in part." (my emphasis). Although there were uncertainties as to whether all of the elements of the package could be implemented, e.g. it might not be feasible to provide a market square, or there might be a poor take-up of the shop front grants, I do not accept Mr. Straker's submission that the prospect of there being any mitigation had to be dismissed as mere "speculation". The application, including the package of measures in the section 106 agreement, was supported by the Town Council which had said that it was "best placed at grass roots level to shape its own future". Whether the prospect of mitigation was too speculative to amount to a material consideration was a matter of planning judgment. The officers' conclusion that the package could mitigate in part the harm to the town centre although they could not say how far the harm would be mitigated, was not *Wednesbury* unreasonable.

9. On behalf of the Third Interested Party, Mr. Stinchcombe QC accepted that, on the basis of the information before them, the Members were not able to, and did not, quantify the extent to which the adverse impact on the town centre would be mitigated by the section 106 obligations, but he submitted that this did not mean that there was a failure to comply with requirement (c) in regulation 122(2). The weight to be attributed to the "wider benefits" was a matter for the Members' planning judgment. They would have been entitled to conclude as a matter of planning judgment that the employment benefits of the proposal so outweighed the significant adverse impact on the town centre that, even in the absence of any measures to mitigate that impact, permission should be granted. It followed that the Members could lawfully decide that, provided they were satisfied that the impact on the town centre would be mitigated to some degree, albeit unquantified, then the employment benefits of the proposal would outweigh the adverse impact on the town centre and justify a permission contrary to the NPPF and the development plan. The basis of the Members' decision in this case was not that the mitigation measures had to reduce the impact on the town centre to a particular level. In their view, the employment benefits of the proposal were so weighty that they tipped the balance in favour of granting permission provided there would be some mitigation of the impact on the town centre. The members were satisfied that the package of measures in the section 106 agreement was the best that could be achieved by way of mitigation. Accordingly, it was unnecessary for them to seek to quantify the extent of the mitigation that would be achieved by the section 106 agreement.

10. Mr. Stinchcombe further submitted that since it was acknowledged by the applicants for permission, the officers and the Members that the significant adverse impact of the retail element of the proposed development on the town centre would be only partially mitigated, and not entirely overcome, by the package of measures in the section 106 agreement, it followed that the agreement was "fairly and reasonably related in scale and kind" to the development. This was not a case where the local planning authority was seeking planning benefits which were either excessive or unrelated to any adverse impact of a proposed development, contrary to the statutory purpose underlying the Community Infrastructure Levy provisions contained in the Planning Act 2008 under which the 2010 regulations were made: see sections 205(2) and 223(1)(a) of that Act.

11. I accept Mr. Stinchcombe's submissions. The package of measures in the section 106 agreement is fairly and reasonably related in kind to the development because it seeks to mitigate what is acknowledged to be a significant adverse impact of one of the major elements of that development. This is not a case of a local planning authority seeking funding through the imposition of a section 106 agreement for some extraneous planning benefit that is unrelated to any adverse impact of the development for which permission is sought. In terms of scale, measures that merely mitigate, but do not obviate, a significant adverse impact that would be caused by a proposed development are likely to be fairly and reasonably related in scale to that development. Each case will be fact sensitive. There might well be cases where the cost of such mitigation measures would be so excessive that the obligation would be out of scale with the proposed development even though they would not obviate its adverse effects, but there is nothing to suggest that the overall cost of these particular mitigation measures (£380,000) is out of scale with this substantial employment/retail proposal. It is the large scale of the retail element of this out of centre proposal which results in the significant adverse impact on the town centre.

12. Mr. Straker recognised that there might be cases, such as the present case, in which it would not be possible to express in numerical terms the relationship between the scale of the benefits to be provided under a section 106 agreement and the scale of the development which had been permitted. He nevertheless submitted that some form of "quantification" of the benefits and their relationship to the development had to be undertaken by the decision-maker, even if that was done only in words rather than figures. I do not accept that regulation 122(2) places the decision-maker in such a strait-jacket. I endorse the approach adopted by Patterson J in paragraph 111 of her judgment: while a planning decision-maker must approach the assessment of the three requirements in regulation 122(2) with appropriate rigour, what is appropriate will vary depending on the circumstances of each case. There will be cases where some form of quantification will be necessary because the decision-maker will have concluded that an adverse impact has to be reduced by a certain amount, or to a particular level, or in a certain way, if it is to be acceptable in planning terms; but it does not follow that "quantification" will be necessary in every case, or that it was necessary in this case given the basis upon which the Members' decided that this application should be approved.

13. In the Appellant's Skeleton Argument it was submitted that Patterson J had erred in distinguishing the judgments in *R (Mid Counties Co-operative Limited) v Forest of Dean District Council* [2013] EWHC 1908 and *R (Mid Counties Co-operative Limited) v Forest of Dean District Council* [2014] EWHC 3059. This submission was not pursued in oral argument. There was no criticism of Patterson J's analysis of the two *Mid Counties* decisions in paragraphs 97 – 110 of her judgment. I agree with her conclusion in paragraph 111 of the judgment that those two decisions (to which must now be added the third *Mid Counties* decision referred to in paragraph 7 above) turned upon the need, if permission was to be granted for large out of centre retail proposal, to find some rational basis for disagreeing with the conclusions reached by the Secretary of State in a decision dated 28th June 1999 that because of the weakness and vulnerability of Cinderford town centre the mitigation measures put forward in a section 106 agreement would not be effective in mitigating the impact of the out of centre proposal on that town centre. The circumstances in the present case are materially different for the reasons set out above.

Conclusion

14. I would dismiss this appeal.

Lady Justice Sharp

15. I agree.

Sir Colin Rimer

16. I also agree.