Neutral Citation Number: [2023] EWCA Civ 723

Case No: CA-2022-002401

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
THE HONOURABLE MRS JUSTICE LANG DBE
2022 EWHC 2984 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2023

Before:

SIR KEITH LINDBLOM
(Senior President of Tribunals)
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between:

THE KING (on the application of SAVE BRITAIN'S HERITAGE)	**Appellant**
- and -	
HEREFORDSHIRE COUNCIL	**Respondent**
GERARD DAVIES	**Interested Party**

- -
- -

Richard Harwood KC OBE (instructed by **Harrison Grant Ring**) for the **Appellant**
Jack Parker (instructed by **Herefordshire Legal Services**) for the **Respondent**
The Interested Party did not appear and was not represented.

Hearing date: 25 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This is an appeal against a decision of Lang J. dismissing a claim for judicial review of a decision of the respondent, Herefordshire Council, that the proposed demolition of the Old School in Garway in Herefordshire ("the School") was permitted development.

THE LEGAL FRAMEWORK

2. Planning permission is required for the demolition of a building: see section 55 of the Town and Country Planning Act 1990. Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the Order") provides that planning permission is granted for certain classes of development. Class B, Part 11 of Schedule 2 to the Order provides for the following class of permitted development:

> "**B. Permitted development"**
>
> Any building operations consisting of the demolition of a building.

3. There are exclusions to Class B. The material exclusion for present purposes is paragraph B.1(a) of Class B which provides

> **"B.1. Development not permitted.**
>
> "Development is not permitted by Class B if –"
>
> the building has been rendered unsafe or otherwise uninhabitable by the action or inaction of any person having an interest in the land on which the building stands and it is practicable to secure safety or health by works of repair or works for affording temporary support."

4. There are essentially three elements, or limbs, to the exclusion, namely (1) the building must have been rendered unsafe or be otherwise uninhabitable (2) by the action or inaction of a person having an interest in the land and (3) it is practicable to secure safety or health by works of repair or works for affording temporary support. "Unhabitable" in this context means unusable. All three elements must be present for the building to fall within the scope of the exclusion in paragraph B.1(a) to permitted development rights. Unless all three elements are present, the demolition of the building is permitted development within the meaning of Class B.

THE FACTUAL BACKGROUND

<u>The School</u>

5. The School was built in 1877 and served as the village primary school until 1980. In the delegated decision report dated 7 March 2022, the planning officer described the School as follows:

> "The Old School, Garway is an attractive Victorian stone built, former school house located in a visually prominent roadside location at the western end of the village and in close proximity to the school and community hall.
>
> It is unlisted but is certainly of sufficient architectural quality to be considered a non-designated heritage asset and it occupies a prominent roadside location at the western end of the village close to the Primary School and Community Centre."

6. The School was purchased by Mr Davies, the interested party, in 1980. It was used as agricultural and commercial workshops. This use ceased in 2002. The School has remained vacant since that date and has suffered vandalism. In 2013, planning permission was granted for the conversion of the school rooms to two dwellings but that permission expired without being implemented.

The 2021 Application

7. In May 2021, Mr Davies applied for prior approval for the proposed demolition of the School. The planning officer undertook a site visit and prepared a report. The report considered whether the School did in fact qualify as permitted development under Class B or whether the exclusion in paragraph B.1(a) applied. The material part of the report dated 16 June 2021 said this:

> "*Does the building qualify*?
>
> "The first consideration relates to whether there is any evidence to suggest that the building has been intentionally rendered unsafe or uninhabitable by inaction. I note that a number of objections refer to this but in my view, this provision would only be relevant were the building in a more deleterious state that might be prevented by works to stabilise it. From my observations that building is in good structural condition and gives no impression of being neglected. It continues to make a positive contribution to the site and wider locality. As such, I do not consider that the proposal falls outside the scope of this definition. In [other] respects, the proposal does not qualify as relevant demolition and neither is the building a specified building."
>
> As such, subject to being satisfied with the method of demolition and the restoration of the site, I consider that the works to demolish can be reasonably considered to be permitted development under the provisions of Schedule 2, Part 11, Class B of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended."

8. An application for the listing of the School was refused by the Secretary of State on 15 July 2021. The planning officer reconsidered the matter. He did not make a further site visit. The material parts of his report 3 December 2021 are in the following terms:

> "*Does the building qualify*?
>
> In the light of a number of well-made objections, I have revisited my initial assessment and sought further legal advice. This has corroborated [the] position already taken that with all due respect to many of the objections raised, it is not the case that the building has been rendered unsafe and in my view whilst it may not be habitable in its current condition, it could be made so with limited works that would amount to what might be rationally described as repairs and maintenance outside the scope of planning control As such, I do not consider that the proposal falls outside the scope of the definition."

9. The officer further advised that the proposal still contained inadequate details of the method of demolition and the proposed restoration of the site and so should be refused. On 3 December 2021, the Council decided to refuse prior approval, for the following reason:

> "In the continued absence of any of the information required in its previous determination that Prior Approval was Required, and in view of the visual prominence of the site, its close relationship with sensitive receptors; the potential implications/risk associated with the contamination of land within the application site and the potential impact on protected species the Prior Approval is Refused."

The 2022 Application

10. On 9 February 2022, Mr Davies submitted a further application for prior approval for the proposed demolition of the School. The planning officer did not carry out a site visit as the site had been visited previously. The planning officer prepared a report dated 7 March 2022. The material parts of the report are in the following terms:

> "Appraisal
>
> …. [The] starting point for this proposal is that that the legislation permits the demolition of the building, unless it falls outside the legal scope of Part 11 of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended. Class B of Part 12 [that should read 11] expresses quite clearly that the demolition of a *qualifying* building is permitted development subject to the submission of an application for the prior approval of the proposed works and the legislation also establishes that the only matters for consideration are the method of demolition and the restoration of the site.
>
> *Does the building qualify?*
>
> The first consideration relates to whether there is any evidence to suggest that the building has been intentionally rendered

> unsafe or uninhabitable by inaction. This provision would only be relevant were the building in a more deleterious state that might be prevented by works to stabilise it. From my observations the building is in good structural condition and gives no impression of being neglected to the level inferred by the legislation. It continues to make a generally positive contribution to the site and wider locality and it is explained in the supporting submission that the site owner has simply sought to secure the building to a limited extent but it has been subjected to some vandalism. As such, and whilst acknowledging the sheer volume and strong views of the local community, I do not consider that the proposal falls outside the scope of this definition.
>
> As such, subject to being satisfied with the method of demolition and the restoration of the site, I consider that the works to demolish can be reasonably considered to be permitted development under the provisions of Schedule 2, Part 11, Class B of the (General Permitted Development) (England) Order 2015 as amended "

11. The planning officer was satisfied that the proposed method of demolition and restoration of the site was acceptable. He recommended that prior approval be granted. On 22 March 2022, prior approval was granted.

THE CLAIM FOR JUDICIAL REVIEW AND THE JUDGMENT OF LANG J.

12. The appellant, Save Britain's Heritage, applied for judicial review of the decision that demolition was not excluded from the benefit of permitted development rights by paragraph B.1(a) of the Order. For present purposes, it is only necessary to deal with the first ground of challenge, namely that the respondent erred in its interpretation and application of paragraph B.1(a) of Schedule 2 to the Order.

13. Lang J. concluded that the reasons for the respondent's decision were contained in the planning officer's report dated 7 March 2022. The material parts of Lang J.'s judgment are at paragraphs 60 to 61 where the judge said this:

> "60. Each limb of the statutory test required the Council to make an evaluative judgment, based upon the available evidence, namely, the application, the objections and the site visit. I agree with the Council's submission that the officer clearly concluded, in the exercise of his planning judgment, that the School was not unsafe or uninhabitable, and therefore the first limb of the statutory test was not met. It is noteworthy that the officer reached this conclusion on each of the three occasions when he assessed the evidence.
>
> 61. I do not accept the Claimant's submission that in the report of 3 December 2021, the officer made a finding that the School was uninhabitable. On my reading of the report, he was raising this as a hypothesis or possibility, in response to the objections

> that had been made. In my view, if the officer had found that the School was uninhabitable he would have made an unequivocal finding to that effect, in all three reports, as he was clearly well aware that the first limb of the statutory test was that the building had been "rendered unsafe or uninhabitable".

14. Lang J. further held that the planning officer erred in including the word "intentionally" when he was paraphrasing the statutory test since intention was not part of the test. However, that error was not material, as the officer had found the School was not unsafe or uninhabitable and so the first limb of the test was not met.

APPEAL AND SUBMISSIONS

15. Permission to appeal was granted on two grounds, namely that the judge was wrong to find that the respondent's conclusion that proposed demolition was not excluded from permitted development was lawful as:

> "(i) The Council either did not conclude that the building was not uninhabitable but if it did any such conclusion was infected by the identified error of requiring there to be an intention to render the building unsafe or uninhabitable;
>
> (ii) In saying "This provision would only be relevant were the building in a more deleterious state that might be prevented by works to stabilise it" the Council was in error. Whether stabilising works are required is relevant, but the report was in error in applying that as a threshold: a building may be unsafe or uninhabitable where lesser works are required than stabilisation."

16. Mr Harwood KC submitted that the planning officer in the March 2022 report did not separate out the three limbs of paragraph B.1(a). Rather he combined the first and second limbs and, erroneously, imported a test of intention. He then, wrongly, assessed the building by reference to that test and asked whether or not the building had been intentionally rendered unsafe or uninhabitable. He submitted that the planning officer did not consider the state of the building but, rather, he considered (wrongly) whether there was an intention to render it unsafe or uninhabitable. Secondly, Mr Harwood submitted that the planning officer set the need for works to stabilise the building as a threshold for determining whether the exemption was satisfied and that was erroneous. Further, a reading of the material paragraph in the March 2022 report does not demonstrate that the planning officer did apply the correct test, or even reach a conclusion, on the question of whether the School was uninhabitable.

17. Mr Harwood submitted that the history might be relevant context in interpreting the 2022 report. In that regard, he submitted that the June 2021 report demonstrated the same error. Further, in the December 2021 report, the planning officer said that "whilst it may not be habitable in its current condition, it could be made so with limited works". That was a clear finding that the building was uninhabitable.

18. Mr Parker, for the respondent, submitted that the report identified that the question was whether the building qualified as permitted development under Class B. The planning

officer, therefore, had the relevant legal test in mind. The language the planning officer used was different from the language in the Order but that did not make the decision unlawful. Mr Parker submitted that, on a proper reading, the planning officer had found that the School was not unsafe or uninhabitable. The reference to the provision only being relevant "were the building in a more deleterious state" was a reference to an assessment of the building and a finding that it did not fall within the exclusion. Similarly the reference to it being in good structural condition and not neglected to the level required by the legislation was a finding that the state of the building was not so bad that it fell within the exclusion. He submitted that the reference to intentionally rendering the building unsafe was an error but it was not material. That would be relevant to the second limb of the exclusion. But the building had to meet all three limbs for the exclusion to apply and the planning officer had found that the first limb was not met.

DISCUSSION AND ANALYSIS

19. The material document is the March 2022 report. That report does refer to the relevant provisions of the Order and explains that the legislation permits demolition of the building unless it falls outside the scope of permitted development. The material section is headed "Does the building qualify?" and that is clearly a reference to the need to determine whether the building is within the scope of Class B or is taken outside the scope of permitted development. The opening sentence, with its reference to the building being intentionally rendered "unsafe or uninhabitable" is again a clear indication that the planning officer had the test in paragraph B.1(a) well in mind, although he used different language from that used in the Order. He, nevertheless, made an error when he referred to the building being "intentionally" rendered unsafe or uninhabitable.

20. The first two sentences of the material paragraph of the report, set out above at paragraph 10, are, in my judgment, an attempt by the planning officer to summarise the statutory test. The first sentence is referring to the first two limbs, the building being rendered unsafe or uninhabitable and that being by action or inaction. The second sentence is summarising the third limb, whether it would practicable to secure safety or health by works of repair or for affording temporary support. Again, the planning officer's summary of that requirement, referring to works to stabilise the building, is not legally accurate. I do not accept that the second sentence is in fact making an assessment of the state of the building. It is explaining how the statutory provision operates.

21. It is the third sentence of the paragraph that gives the planning officer's assessment of the building. That is clear from the opening words "From my observations". It is at that stage that he is considering his assessment of the building based on his observations of it. That is made clear by the following words. He considers that "the building" is in good structural condition and the building "gives no impression of being neglected" to the level referred to in the legislation. The report could have been better worded and it would have been preferable to use the language of paragraph B.1(a) (itself simple and easy to apply). Nonetheless, read fairly and in context, that is a clear finding by the planning officer that the building is not unsafe or uninhabitable. As Mr Parker put it, it was a finding that the building was not in such a bad state as to fall within the exclusion. That is made clear from the penultimate sentence of that paragraph – "I do not consider that the proposal falls outside the scope of this definition" – and the planning officer's

conclusion in the next paragraph that the works to demolish "can be reasonably considered to be permitted development". The planning officer did address the right question, namely had the building been rendered unsafe or uninhabitable and he reached an evaluative judgment on that issue.

22. It is correct that the planning officer erred by referring to whether the building had been "intentionally" rendered unsafe. But that was not a material error. It is clear that his conclusions are based on his observation of the site (undertaken in June of the previous year). That is what the third sentence of the material paragraph says. He reaches his conclusions on the first limb "From my observations", that is, from his observations of the building, not from any consideration of the intentions of the person with an interest in the land. That is reinforced by the next sentence. The planning officer is considering whether "the building" is in a good structural condition or whether the building "gives the impression of being neglected". The decision on the first part or limb of paragraph B.1(a), whether the building had been rendered unsafe or uninhabitable, was not, therefore, infected by any belief that the building had to have been intentionally rendered unsafe or uninhabitable. As all three limbs of the test had to be satisfied, and as one was not, the proposed demolition did not fall within the exclusion in paragraph B.1(a) and retained permitted development rights.

23. I do not consider that the planning officer did wrongly apply a threshold that works had to be stabilising works before the exclusion could take effect. The reference to stabilising work, although again not legally accurate, was an attempt to summarise the third limb of the test (the practicability of securing safety or health by works of repair or temporary support). That, again, was not a matter that affected the planning officer's assessment of the first limb, namely whether the building had been rendered unsafe or uninhabitable.

24. I doubt whether it is appropriate to seek to interpret the March 2022 report by reference to earlier reports on an earlier application. Assuming that they may be relevant as providing context, they do not assist the appellant. The June 2021 report was the only one made after a site visit. The key sentence in that report is this: "From my observations that building is in a good structural condition and gives no impression of being neglected". Read fairly and in context, that is a finding that the building is not unsafe or uninhabitable and is consistent with the March 2022 report. The December 2022 report did not involve any further site visit or further observations. It appears to have been a re-assessment prompted by the objections received. The report clearly states that the building was not unsafe. On balance, like Lang J., I read the words "whilst it may not be habitable in its current condition" as raising a hypothesis or possibility in the light of the objections. That is, it means something like "even if it were uninhabitable" rather than a finding or expression of view that it was uninhabitable. But in any event, the material report is the March 2022 report which provides the reasons for the decision that the proposal to demolish the School benefitted from permitted development rights. In that report, the planning officer did come to an evaluative judgment that the building had not been rendered unsafe or uninhabitable.

25. For those reasons I would dismiss this appeal.

LADY JUSTICE ELISABETH LAING

26. I agree.

THE SENIOR PRESIDENT OF TRIBUNALS

27. I also agree that the appeal should be dismissed, for the reasons given by Lewis L.J.

28. As the Court of Appeal has recently said, the court's approach to construing statutes and statutory instruments in the sphere of town and country planning is no different from, and no less rigorous than, its approach to the interpretation of other legislation. When questions of interpretation arise, the court will seek to ascertain the true meaning and effect of the provisions in question, and it will do so on conventional and well known principles (see the judgment of the court in *Tidal Lagoon (Swansea Bay) Plc v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 1579, at paragraphs 30 and 31, and the leading judgment in *CAB Housing Ltd. v Secretary of State for Levelling Up, Housing and Communities* [2023] EWCA Civ 194, at paragraph 22).

29. Where a local planning authority has had to apply the provisions in the legislative scheme for "permitted development" in the Town and Country Planning (General Permitted Development) (England) Order 2015, and the basis for its decision is set out in a planning officer's delegated decision report, the court must satisfy itself that the officer's reasoning corresponds to the true meaning and effect of the relevant provisions and shows they have been lawfully applied. Disagreements about that may best be avoided if the officer not only refers to the legislation but also frames his assessment in the language it contains, rather than a paraphrase or summary of his own. But that is not essential. It will be enough if, on a fair reading of the officer's report as a whole, his assessment leaves no room for genuine, as opposed to forensic, doubt that he has conducted himself lawfully. The operative part of his reasoning must demonstrate that he has understood what the legislation requires the authority to decide, has asked himself the questions he should, and in answering those questions has not committed any error fatal to the decision itself. In establishing whether that is so, the court must read the report, as always, with realism and good sense (see the judgment of Lord Carnwath in *R. (on the application of CPRE Kent) Ltd. v Dover District Council* [2017] UKSC 79; [2018] 1 W.L.R. 108, at paragraphs 35 to 42, citing the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No.2)* [2004] 1 W.L.R. 1953, at paragraph 36, and the judgment of Sir Thomas Bingham M.R., as he then was, in *Clarke Homes Ltd. v Secretary of State for the Environment* [2017] PTSR 1081, at p.1089).

30. In this case there has been no dispute about the correct interpretation of the relevant provisions in the GPDO, including the exclusion in paragraph B.1(a) of Class B, Part 11 of Schedule 2. The true meaning and effect of that exclusion are plain in the words used in the legislation, and not hard to understand. The controversy here concerns the planning officer's grasp of what he had to do in considering whether the test in the first limb of the exclusion – that the building had been rendered unsafe or uninhabitable – was satisfied. Did he misunderstand and misapply that test? That is the central question in the case. And the answer to it is, I think, clear. As Lewis L.J. has explained, despite the mistakes the officer made, the reasoning on which the challenged decision was based did correspond to an accurate understanding of the critical provision. The mistakes are admitted. They are unfortunate. But they are not material errors. On the crucial issue, the officer applied his mind to the right question, performed the necessary exercise of evaluative judgment, and did so lawfully. The argument we heard to the contrary is unsound.