



Neutral Citation Number: [2019] EWHC 1203 (Admin)

Case No: CO/4385/2018

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**PLANNING COURT**  
**IN THE MATTER OF A PLANNING STATUTORY REVIEW**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/04/2019

**Before :**

**THE HONOURABLE MRS JUSTICE ANDREWS DBE**

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**Between :**

**(1) Great Hadham Country Club Ltd**

**(2) Neil Morgan**

**- and -**

**(1) Secretary of State for Housing, Communities  
and Local Government**

**(2) East Hertfordshire District Council**

**Claimants**

**Defendants**

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**The Second Claimant**, acting in person, as a director of the First Claimant, for the **Claimants**  
**Jack Parker** (instructed by **Government Legal Department**) for the **First Defendant**  
**The Second Defendant** did not appear and was not represented.

Hearing date: 10 April 2019  
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**Approved Judgment**

**Mrs Justice Andrews:**

1. This is a claim for review brought under section 288 of the Town and Country Planning Act 1990 challenging a decision made by the Secretary of State's Planning Inspector, communicated in a decision letter dated 2 October 2018, dismissing the First Claimant's appeal against a refusal by the local planning authority, East Herts District Council, ("the Council") to grant planning permission for a change of use of land at the Great Hadham Golf and Country Club.
2. The first claimant, Great Hadham Country Club Limited ("GHCCCL") is a limited company which operates a golf club on the land in question. The second claimant, Mr Neil Morgan, is a director and shareholder of GHCCCL.
3. The proposals under consideration were to site 26 leisure lodges, (which were "caravans" within the meaning of the relevant legislation), on part of the golf club's land, for use as holiday accommodation. The site of the lodges was within an area within the local plan identified as "the rural area beyond the green belt." The purpose of the change of use was to enable the operation of the club to become financially viable. It was expressly stated in the description of the proposed development that operation as a golf course alone was not financially viable.
4. The design, access and planning statement made it clear that the proposal was for the lodges to be used only for leisure and holiday accommodation; a point that was reinforced in the grounds of appeal that were put before the Planning Inspector, which also proposed a condition to secure this. The claimants could not have made it clearer that their application was not for residential development. They said that they had a number of strict controls in place to prevent any permanent residential dwelling use, which included, for example, requiring a potential occupant to prove, by way of production of council tax account bills, that they were permanently resident elsewhere.
5. Despite this, the Inspector regarded and assessed the proposal as one for a normal permanent residential development. The normal residential use of the lodges would have very different planning implications from their use as leisure/holiday accommodation. He justified this approach, inter alia, by reference to paragraph 3.16.1 of the local plan. I shall return to that provision later in this judgment.
6. There were originally three grounds of challenge set out in the claimants' statement of facts and grounds. These were summarised by counsel who was then instructed on behalf of the claimants in paragraphs 13, 14 and 15 of that document. Ground 1 was summarised in the following terms:

"The inspector erred in law in concluding that the proposed leisure lodges should be regarded as 'normal residential development' and assessing them as such rather than as leisure lodges, including by misinterpreting a provision of the 2007 local plan. Further, the inspector erred in concluding that a condition could not be imposed to restrict the occupation of the lodges to holiday accommodation as the claimants proposed, in that:

(1) the conclusion was wholly misconceived and flew in the face of government guidance on holiday occupancy conditions;

(2) he misinterpreted the Planning Practice Guidance ("PPG") on the enforceability of conditions in considering the conditions that would be merely impractical or unclear were unenforceable, and thus incapable of being imposed at all;

(3) despite being (wrongly) concerned about the enforceability of the claimants' proposed condition, he failed entirely to consider the conditions proposed by the Council, or indeed any other form of condition which could have addressed the problem that the inspector (wrongly) considered existed."

7. The statement of facts and grounds went on to divide Ground 1 into three issues:
  - 1(a) nature of the development;
  - 1(b) para 3.16.1 of the local plan; and
  - 1(c) conditions;and developed the claimants' submissions in relation to each of those issues in turn.
8. The Secretary of State filed an acknowledgement of service on 27 November 2018 together with summary grounds for resisting the claim. The Council, which is named as a second defendant rather than as an interested party (as strictly speaking it should have been) acknowledged service indicating that it did not intend to contest the claim. It has not actively participated in these proceedings.
9. It was contended in para 11 of the summary grounds of defence that Ground 1 turned upon whether the Inspector was justified in finding that the condition proposed by the claimant would not be enforceable. After expanding upon the Inspector's reasoning and defending it, in paragraph 14, the Secretary of State contended that this ground of challenge was not even arguable.
10. The claimants served a short reply on 4 December 2018, which joined issue with the points raised in the summary grounds of defence. They contended that it was wrong in law to say that the lodges would have been permitted for residential use without a condition being imposed, but also that it was wrong to characterise Ground 1 as turning on the ability to impose an enforceable condition.
11. On 23 January this year, Holgate J granted permission to bring the claim, limited to Ground 1. He refused permission in respect of the remaining grounds. Although the application for permission on Ground 3 was renewed to this hearing, for reasons that will become apparent that has not been pursued before me, and it is unnecessary to say anything more about it. Holgate J therefore considered that far from being unarguable, as the Secretary of State had contended, Ground 1 had a real prospect of success on all three of the issues that it raised.
12. On 19 February 2019, at 10.35 am, a solicitor at the GLD, representing the Secretary of State, sent an email to the claimants which was marked "without prejudice save as to costs". That rubric is a well-known shorthand which reserves the right of the party sending the communication to refer to its contents at a costs hearing. Without that reservation, a communication marked "without prejudice" is protected by the rule that

nothing said or done with a view to entering into a bona fide settlement of the dispute can be relied on by either party in evidence, see *Unilever plc v The Proctor & Gamble Co* [2000] 1 WLR 2436, especially per Robert Walker LJ at pp.2444-2445. It signifies that what is being said in that communication is or concerns a proposal for settlement of the dispute.

13. The email, which was addressed to Mr Morgan, said as follows:

"I have now taken instructions from my client, who is no longer seeking to defend ground 1. Accordingly, our client only intends to be liable for reasonable costs up until today...

I will prepare draft consent orders outlining same. However, due to other commitments, I do not expect that I can circulate them until Friday at the earliest."

Mr Morgan responded by email the following day at 9.04 am in these terms:

"Thank you for your email and that is a relief to hear. It is good that some common sense (and some business sense) has finally prevailed. We obviously accept the government's statement/offer to no longer defend ground 1 and to pay reasonable costs to date. Okay, please circulate draft consent orders on Friday, as you mention."

Mr Morgan then made some practical suggestions about a timetable to be inserted in the order for filing and serving the claimants' schedule of costs and any response to that schedule, and for the assessment of those costs to be decided on the papers.

14. However, when the draft consent order was circulated, it recorded that the decision should be quashed for the reasons set out in paras.45-51 of the claimants' statement of facts and grounds, which related only to part of issue 1(c), not the whole of Ground 1. Those paragraphs take two points: first, that the conclusion of the Inspector on the enforceability of the proposed condition was misconceived, and that it flew in the face of the Government's guidance on holiday occupancy conditions contained in Annex B to the Government's Good Practice Guide on planning for tourism; and secondly, that the Inspector made an error of law in his interpretation of the PPG.
15. Mr Morgan understandably thought this was a mistake, and he sent a message back at 16:26 on 1 March, saying:

"As we previously agreed, you concede Ground 1, rather than just discrete elements of it, so it is paragraphs 25-58 of the grounds, rather than 45-51."

The Government lawyer sent an email in response at 16:43, which said:

"Apologies if I was unclear in my earlier email. However, paragraphs 45-51 are the only paragraphs which I am instructed to concede on."

This engendered a dispute between the parties as to whether an agreement to settle this claim had been reached on the basis that the Inspector's decision should be quashed for all the reasons given in Ground 1.

16. The claimants' primary position is that there was such an agreement, and the Secretary of State should not be allowed to resile from the basis on which he had conceded that the claim should be disposed of. However, if the court disagreed with that, they would be prepared to accept that the decision should be quashed on the more limited grounds that are now proposed by the Secretary of State, i.e. those appearing in paragraphs 45-51.
17. The claimants drew the situation to the attention of the court. Supperstone J subsequently directed that the question whether there was or was not an agreement to dispose of the claim on those terms should be determined as a preliminary issue and listed for hearing on the same date as the substantive claim. Thus it is that the matter has come before me for determination.
18. The starting point for consideration of this unhappy state of affairs is that statutory reviews under s.288 have a public law element. This means that even if the claimant and the Secretary of State both concur that the decision should be quashed, and also agree as to the basis upon which it should be quashed, the court must be satisfied that the proposed basis is a proper one. Therefore, even if the parties had signed a consent order disposing of the claim, and setting out the legal basis for doing so, the court would have the final say as to whether it was prepared to make an order in those terms. Therefore, it is inappropriate to look at the question of settlement as if this were an entirely private law dispute in which, as a matter of procedure, separate proceedings would have to be brought to enforce the alleged settlement agreement.
19. A further aspect of this matter relates to the requirement, whenever a planning decision is quashed by consent, to define transparently and with proper particularity the ambit of the error which has been accepted. The importance of that requirement was underlined by Holgate J in two cases, *R(Kemball) v Secretary of State for Communities and Local Government* [2015] EWHC 338 (Admin) at [39] and *Trustees of the Barker Mill Estates v Test Valley Borough Council and others* [2016] EWHC 3028 (Admin) at [111] and [112].
20. In the latter case, Holgate J said this at [112]:

“If [the Secretary of State] considers that a particular decision of an inspector... cannot be defended and so ought to be quashed by the court, there is a public interest in knowing precisely why [the Secretary of State] takes that view. If such reasons are given, the other parties will be better able to appraise their respective positions and to decide whether a challenge, or particular part of a challenge, should be persisted in or defended. It is also necessary that such reasons are given in order to ensure the proper management of the finite resources of the planning court and the efficient listing and resolution of cases in general”.

He observed that an unexplained concession by a defendant that his decision should be quashed is just as unacceptable as a draft consent order put before the court for its approval, where the reasons for seeking the quashing of the decision are unexplained, ambiguous, or lack sufficient detail. I fully endorse those comments by Holgate J. and the reasoning behind them.
21. In my judgment, the problem that arose in this particular case arose because, at the time when the offer to settle was made, there was a failure to articulate clearly the

basis upon which the Secretary of State was prepared to concede the errors adumbrated in Ground 1. On the face of the offer communicated to the claimants, he was prepared to concede the claim for statutory review on the basis that all the criticisms of the decision that were made in that Ground were valid. If the true position was that he was only prepared to accept some of those criticisms, he should have said so at the time of making the original offer, instead of waiting until after that offer had been accepted. If, on the other hand, he had second thoughts about the scope of the concession that had been intimated to the claimants, that should not have happened. The basis for making the concession should have been clearly thought through and articulated before any offer was intimated to the claimants.

22. Mr Parker, on behalf of the Secretary of State, submitted that the court had no jurisdiction to determine whether a concluded agreement was made within the context of these statutory review proceedings, because such a claim would be a claim for breach of contract, and it would have to be made the subject of separate proceedings. That is to put form over substance in a manner which flies in the face of the overriding objective. It also ignores the fact that, as I have said, there are public law issues at stake here. An agreement may be reached in principle between the parties to a claim of this nature, but it cannot bind the court even if it is embodied in a draft consent order.
23. I am satisfied that, in the present case, agreement to concede Ground 1 in full and pay the costs to the date of that agreement (20 February 2019) was reached before the draft consent order was circulated among the parties and it was not dependent upon the signature of a consent order. However, the agreement was subject to the court's approval.
24. This court is ultimately responsible for determining whether the decision of the planning inspector should be quashed or upheld. It is obviously a material consideration in determining that question that the parties have not only agreed that the decision should be quashed but reached a consensus as to the reasons why. In such circumstances, the court is not only entitled but obliged to examine the basis on which the parties have agreed that the decision should be quashed and satisfy itself that it is an appropriate basis on which to allow the claim and quash the decision. If it is an appropriate basis, then, in general, that will be the basis on which the court will dispose of the claim.
25. The court would not usually permit one of the parties to such an agreement to change their position without good reason. The belated recognition that one of the previously conceded grounds was legally unsound might suffice, but it would be for the party seeking to resile from the agreement to persuade the court that this was the case.
26. If the originally agreed basis of disposal of the claim turned out to be inappropriate, in many cases the court would then have to go on to hear argument from both parties on the merits of the claim. However, in the present case, the parties have agreed on an alternative basis for allowing the claim and quashing the decision. Therefore, if it is inappropriate to give effect to the agreement that the decision be quashed on the whole of Ground 1, the court must go on to decide whether the narrower basis that was subsequently proposed and accepted is an appropriate basis for allowing the claim and quashing the decision.

27. It would not be fair to the claimants for the court to accede to Mr Parker's submission that it should ignore the earlier consensus and simply quash the decision on the narrower basis on which it is still common ground that the planning inspector fell into error, even if the court agrees that he fell into error in those respects and that would suffice to justify a quashing order.
28. Since I was satisfied on the basis of the exchange of emails to which I have referred that the Secretary of State unambiguously agreed to concede the whole of Ground 1 and to settle these proceedings on that basis (provided of course that the court was satisfied that this was a proper basis for quashing the decision) I heard argument from Mr Parker as to why it was now contended by the Secretary of State that the aspects of that Ground not referred to in paras 45-51 of the statement of facts and grounds are not a proper basis for quashing the decision.
29. Mr Parker referred to paras.35-44 of his skeleton argument, in which it is contended that the Planning Inspector was entitled to regard the leisure lodges or caravans as ordinary residential accommodation. He submitted that there was nothing in the description of the development for which planning permission was sought that would prevent the residential use of the caravans from being permanent as opposed to temporary. In the absence of a condition restricting the ways in which the caravans could be used, it would have been possible for some or all of them to be used for both short-term and long-term residential accommodation.
30. Those submissions appeared to me to require the Planning Inspector to shut his eyes to what the Claimants were seeking to achieve, and treat the application as being an application for permanent residential accommodation, when it was plainly nothing of the kind. As Mr Morgan pointed out, the description of what was intended was plain. The Inspector was not being asked to approve the use of these caravans/lodges as permanent residences, but as *holiday accommodation*. He was not being asked to allow the development without the proposed condition. Standing back and looking at the matter in the round, essentially the question he had to address was whether there was a proper legal basis on which planning permission could be granted to enable the owners of the Golf club to put leisure lodges on the land for use as holiday accommodation. In other words, he had to ask himself whether, by one means or another, it was possible to define the grant in terms of what GHCCCL was asking for. Once a condition could be imposed which was capable of enforcement (which it is now conceded was the case) the only other question for him was whether there was anything in the policies which inhibited or prohibited that course from being taken.
31. Viewed in that way, grounds 1(a) and 1(c) are facets of the same complaint. In my judgment, the Inspector plainly fell into error in treating this application as if it were an application for planning permission to erect permanent residential accommodation on GHCCCL's land. The claimants themselves had proposed conditions which would preclude it from being used that way, and those conditions were wrongly considered by the Inspector to be unenforceable.
32. I also consider that there is force in the aspect of Ground 1(c) that the Secretary of State initially conceded and then decided he was not prepared to concede; namely, that having (erroneously) come to the conclusion that the conditions proposed by the claimants were unenforceable, the Inspector then failed to consider whether there were any other conditions, specifically, the conditions put forward by the Council or

the conditions suggested in the Good Practice Guide, which might have addressed the concerns about enforceability that he had raised.

33. Mr Parker submitted that it was not for the Inspector to cast around for other forms of condition that were not put before him. But that is not the way in which the claim was articulated. In para.55 of the statement of facts and grounds, the claimants state in terms that while an inspector is not under an obligation to cast about for conditions not suggested before him, he is obliged to consider conditions raised in government guidance and those suggested by parties to the appeal (which, of course, the Council was). In support of that submission, the claimants cite the case of *Ayres v Secretary of State for the Environment, Transport and Local Regions* [2002] EWHC 295 (Admin) at [43] A-B. The obligation to consider such alternatives is especially important where, as here, an appellant is not professionally represented in the appeal before the Inspector.
34. If one looks at the decision itself, the Inspector undoubtedly mentioned the conditions that were suggested by the Council. He recorded that the claimants objected, on the basis that these conditions would make the proposal unviable. However, what the Inspector then failed to consider was whether those conditions were fair or reasonable, and whether there was any merit in the objection that they would make the proposal unviable, or indeed to consider the Good Practice Guide. Simply reciting that the Council had proposed conditions, which is what the Inspector did, is not the same thing as considering whether those conditions would be enforceable and would meet his concerns about enforceability of the use of the occupation of the units.
35. Therefore, it seems plain that this facet of ground 1(c) was also an area in which the Planning Inspector fell into error, although I can entirely see why, having concluded that he fell into error in relation to the other facets of ground 1(c), it is perhaps just adding a gloss to the determination of the statutory review to reach that conclusion. However, the fact that the decision is liable to be quashed for other reasons and it is unnecessary to rely on this further error is not a good reason for finding that the Secretary of State should be allowed to resile from his initial, proper, concession that this was a valid criticism. I am satisfied that the whole of this aspect of Ground 1 is a proper basis for quashing the decision.
36. That leaves Ground 1(b). Mr Parker submitted that Ground 1(b) stands or falls with Ground 1(a), because if the Planning Inspector was entitled to treat the application as one for permanent residential development, he was entitled to rely on the aspects of the local plan that relate to using caravans as dwellings. Mr Morgan was disposed to accept this analysis, but I am not so sure that it is right. The Planning Inspector's reliance on the policy did not seem to have been a consequence of his deciding to treat the application as one for residential development, but rather, the policy appears to have been used by him as a justification for treating the application in that way. If that is so, Ground 1(b) is an independent point which turns on the interpretation of the relevant passage in the planning policy.
37. The relevant paragraph is 3.16.1 of the local plan. If one looks at the local plan generally, the paragraph appears in a section which is all to do with housing. It is headed "Special residential uses" and it provides as follows:



"Applications for planning permission are sometimes received by the district council for a number of special residential uses such as caravans, mobile homes, houseboats and other residential institutions. All of these uses will be considered as though they were for a normal residential building and the policies relating to residential development will apply."

38. As is stated in para.38 of the statement of facts and grounds, this provision depends on the proposed use [of the caravan] being a special residential use. It is designed as a matter of policy or purpose to make it clear that where a caravan, a mobile home, a houseboat, or some other building structure of that nature is *proposed to be used for permanent residential usage*, then all of the rules and regulations that apply to a normal residential building will also apply to that structure. It is not a policy decision that any use that is proposed for a caravan which is non-residential, is to be deemed a proposed residential use. These lodges were never proposed to be used as residences; quite the opposite, in fact. Therefore, paragraph 3.16.1 did not lend any weight to the approach that was taken by the Planning Inspector to the appeal before him in considering it to be an application for normal residential development. Insofar as he did so, he fell into error in so treating it. That means that Ground 1(b) is clearly an appropriate ground on which to quash the decision irrespective of the position concerning Ground 1(a).
39. So far as Ground 1(a) is concerned, I appreciate that there is a concern on the part of the Secretary of State that this court should not make a finding in relation to whether, if the condition had not been proposed by the claimants, planning permission could or should have been granted for the lodges to be put on the land for use as "leisure lodges". Mr Parker contended that that simple grant would not have stopped somebody using the lodge as a permanent residence. However, for the purposes of this statutory review, the court does not need to get involved in that debate. The proposal before the Planning Inspector was not a proposal for a simple grant without any conditions attached; it was always envisaged that there was going to be a condition. Therefore, looking at the description "leisure lodge" in isolation is not a valid or necessary exercise. The real thrust of the criticism of the Inspector's approach in Ground 1(a) is that he treated the application as being for something completely different from what GCCHL wanted, instead of considering what GCCHL were actually asking for. That criticism is well-founded, and the initial concession of Ground 1(a) was justified.
40. I therefore conclude that this claim should be allowed and the decision should be quashed; and that it should be quashed essentially on the basis that the Planning Inspector erred in law in treating this development as a normal residential development and applying policies appropriate for normal residential developments to it. He erred in relying on para.3.16.1 of the local plan to justify taking that approach, and he erred in finding that the claimants' proposed condition to ensure use of the lodges was restricted to holiday accommodation was unenforceable. All three of the criticisms by the claimants that related to his approach to the imposition of conditions were well-founded. First, the Inspector's approach flew in the face of the Government's guidance in the Good Practice Guide on planning for tourism; secondly, there was a misinterpretation of the PPG; and thirdly, the Inspector failed to consider the conditions that were raised by the other party to the appeal, and those in

the Government's guidance as alternatives to the condition which he had wrongly found to be unenforceable.

41. I have reached that conclusion in the context of deciding whether or not it was appropriate for a concession to be made by the Secretary of State that the decision be quashed on all aspects of Ground 1, as I am satisfied it was. If this review had been argued out in full, I would, no doubt, have reached the same conclusion. But all I need to do for these purposes is to satisfy myself that the basis on which it was agreed in principle, subject to the court's view, that the matter should be disposed of, was an appropriate basis on which to reach such a consensus.
42. For all those reasons, the claim is allowed.