Neutral Citation Number: [2023] EWCA Civ 809

Case No: CA-2022-002463

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
TIMOTHY CORNER KC (SITTING AS A
DEPUTY HIGH COURT JUDGE)
CO/824/2022

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 July 2023

Before:

SIR KEITH LINDBLOM
(Senior President of Tribunals)
LORD JUSTICE MOYLAN
and
LORD JUSTICE STUART-SMITH

- -

Between:

THE KING
(ON THE APPLICATION OF ANDREW PLANT)

Claimant/
Appellant

-and-

LONDON BOROUGH OF LAMBETH

Defendant/
1st Respondent

-and-

(1) REMEDIOS ROSARIO

1st Interested Party/
2nd Respondent

-and-

(2) HFL BUILD LIMITED

2nd Interested Party/
3rd Respondent

- -
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Richard Harwood KC (instructed by **Harrison Grant Ring**) for the **Appellant**
Matthew Reed KC (instructed by **LB Lambeth Legal Services**) for the **1st Respondent**

Hearing date: 8 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11 July 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 Stuart-Smith:

Introduction

1. On 25 January 2022 the respondent planning authority ["Lambeth"] issued a grant of planning permission for the redevelopment of part of the Cressingham Gardens Estate at Trinity Rise/Ropers Walk ["the Site"]. The permitted development involves felling four mature trees. Lambeth gave permission on the basis that the application and, specifically, the felling of the trees was not contrary to the Lambeth Local Plan ["LLP"]. By this appeal the appellant, Mr Plant, challenges Lambeth's decision to grant planning permission on the single ground that Lambeth misinterpreted the LLP and that, because of the proposed felling of the trees, the application was contrary to the relevant policy on its proper interpretation.

2. The first interested party was originally a resident on the Site called Ms Nieves Dotimas. She had objected to the planning application. Shortly before the hearing of this appeal her nephew, Mr Remedios Rosario, was substituted as first interested party in her place because she had died in January 2023. Mr Rosario has inherited Ms Dotimas' home on the Site, which will be demolished if the challenged decision stands and the permitted redevelopment is implemented. The second interested party, HFL Build Limited ["HFL"], is the developer named in the planning application: it is a company that is wholly owned by Lambeth.

3. The policy in question was LLP policy Q10 ["Q10"] on trees which, so far as material, provides:

> "A. Proposals for new development will be required to take particular account of existing trees on the site and on adjoining land.
>
> B. Development will not be permitted that would result in the loss of trees of significant amenity, historic or ecological/habitat conservation value (including veteran trees), or give rise to a threat, immediate or long term, to the continued wellbeing of such trees.
>
> C. Where trees are located within a development site, the proposal will be supported only where it has been demonstrated that:
>
> i) trees of significant amenity, historic or ecological/habitat conservation value have been retained as part of the site layout …
>
> …
>
> G. Where it is imperative to remove trees, adequate replacement planting will be secured. The amount and nature of the replacement planting will be based on the existing value of the benefits of the trees removed, calculated using cost/benefit

> tools such as i-tree or CAVAT as set out in London Plan policy G7 C." (emphasis added – see [6] below)

4. By a judgment delivered on 2 December 2022 ([2022] EWHC 3079 (Admin)), Mr Timothy Corner KC, sitting as a Deputy High Court Judge, dismissed Mr Plant's challenge and refused to quash Lambeth's decision. Mr Plant now appeals against that decision. The issue in this appeal is whether, on the proper interpretation of Q10, the felling of the trees is contrary to paragraphs B and C(i) even if it is "imperative" to remove them and suitable replacement planting that satisfies paragraph G of Q10 is secured. Mr Plant submits that it is, because paragraphs B and C(i) are absolute requirements that are not and cannot be circumvented by reference to paragraph G. Lambeth submits that it is not, because paragraph G provides a policy-compliant exception to paragraphs B and C(i).

5. The Judge accepted Lambeth's interpretation of Q10. For the reasons that I shall set out below, I consider he reached the correct conclusion, essentially for the reasons he gave.

The Development Plan Policy on Trees

6. The development of the relevant policies was set out by the Judge at [41]-[44] and is not controversial. I adopt his description with minor adaptations. The LLP, including Q10, was originally adopted in 2015. In January 2020 Q10 was published in a draft revised form which was subsequently adopted in September 2021 as set out above. The 2021 version differed from the original by the inclusion of the words "(including veteran trees)" in paragraph B, and the addition of paragraph G. Following the example of others, I have underlined the changes to Q10 at [3] above.

7. The London Plan March 2016 addressed trees in policy 7.21. This read:

> "Planning decisions
>
> B Existing trees of value should be retained and any loss as the result of development should be replaced following the principle of 'right place, right tree'. Wherever appropriate, the planting of additional trees should be included in new developments, particularly large-canopied species."

8. Policy G7 C of the London Plan 2021 says, as relevant:

> "Development proposals should ensure that, wherever possible, existing trees of value are retained.[140] If planning permission is granted that necessitates the removal of trees there should be adequate replacement based on the existing value of the benefits of the trees removed, determined by, for example, i-tree or CAVAT or another appropriate valuation system."

9. Footnote 140 says "Category A, B and lesser category trees where these are considered by the local planning authority to be of importance to amenity and biodiversity, as defined by BS 5837:2012".

The course of the planning application

10. In 2016 Lambeth's Cabinet authorised the redevelopment of the entire Cressingham Gardens Estate. There is no masterplan for the redevelopment. In July 2020 HFL submitted the present application to develop the Site, which covers a relatively small corner of the estate. The intention of the application is to replace 12 homes (of which eight are council-owned and four are market housing) comprising 59 habitable rooms with 20 homes (of which fourteen would be low cost rented and six intermediate with shared ownership) comprising 70 rooms.

11. As presented in the application for planning permission, the development of the 20 homes necessarily involves the felling of the four mature trees. Put another way, the proposed development cannot be implemented without felling them. It would of course be possible for a development to be proposed which did not necessitate the removal of the trees; but that would be a different development and it has not been suggested, at least in this appeal, that the same number of dwellings and rooms or the same benefits as arise from the present application could be achieved by a different development which did not necessitate felling the trees.

12. The application was reported to the Committee in February 2021 with a recommendation to approve despite the fact that it was acknowledged that the application involved a departure from Policy Q10 of the LLP as it then stood (i.e without paragraph G). The report recommended approval on the basis that there were material considerations that outweighed the departure from development plan policy. The applicable development plan was identified as the LLP 2015 and the London Plan 2016. The report noted that Policy Q10 as it then stood did not provide for compensatory payments but proposed that approval should be subject to there being a contribution and replacement planting to the value of the felled trees, which was determined by the application of CAVAT to be £182,564.

13. Planning permission was originally granted on 19 March 2021. That grant was challenged by Mr Plant on the grounds that Lambeth had wrongly considered itself to be precluded from deciding that the Cressingham Gardens Estate, including the Site, was a non-designated heritage asset and that Lambeth had failed to take account of the precedent effect of the application on the future of the rest of the estate. After permission to bring Judicial Review proceedings had been granted, Lambeth submitted to judgment on the first of these grounds and the grant of planning permission was set aside.

14. The application was reported back to Committee on 23 November 2021. The application was unchanged. On this occasion the report said that (a) the application was not contrary to (the amended version of) Q10, but that (b) the application would cause harm to the estate as a non-designated heritage asset. Approval was again recommended and members accepted the recommendation.

15. I adopt the Judge's description of what happened and the most relevant passages of the November 2021 report, which he set out at [24]-[35], as follows:

> "24. The November 2021 summary said on trees:
>
> "xii The proposal would result in the loss of 4 mature trees. Three of these trees are considered to be trees of significant amenity value. Officers have used the CAVAT system to

> calculate the value of the trees to be lost and to secure a financial obligation of £182,564 to be spent on planting trees in the vicinity of the site, this includes street trees along Trinity Rise and Brockwell Park Gardens as well as within the nearby Brockwell Park. This could fund the planting of an estimated 200 trees in the wider area. Subject to conditions securing a scheme of onsite tree planting and the financial contribution towards tree replacement the proposal is considered to meet the requirements of LP Policy G7 and LLP Policy Q10."
>
> 25. …
>
> 26. The 2021 versions of the London Plan and the Lambeth Local Plan were identified as part of the development plan.
>
> 27. On trees, the November report began:
>
> > "17.1 National policy acknowledges the important contribution that trees [sic] to the quality and character of urban environments and states that existing trees are retained wherever possible and that the long term maintenance of newly planted trees is secured (NPPF para. 131). This is continued in local policy under LLP Policy Q10 which states that proposals for new developments will be required to take particular account of existing trees on site and adjoining land. Development will not be permitted that would result in the loss of trees of significant amenity, historic or ecological/habitat conservation value, or give rise to a threat, immediate or long term to the continued wellbeing of such trees. Where appropriate the planting of additional trees should be included in new developments. Where it is imperative to remove trees, adequate replacement planting will be secured. The amount and nature of the replacement planting will be based on the existing value of the benefits of the trees removed, calculated using cost/benefit tools such as i-tree or CAVAT as set out in London Plan policy G7 C.
> >
> > 17.2 Policy G7 of the LP states if planning permission is granted that necessitates the removal of trees, there should be adequate replacement based on the existing value of the benefits of the trees removed, determined by, for example, i-tree or CAVAT or another appropriate valuation system."
>
> 28. The report maintained the Defendant's previous view that three trees were of significant amenity value and the trees would be lost if the proposed quantum of development was to be secured.

16. I interpose here that the Judge could have but did not set out paragraph 17.5 of the Report, which said:

> "17.5 It is acknowledged that there is an element of subjectivity to the visual importance of T1 and T2 in the streetscene. However, the wording of Policy Q10 of the LLP does not refer to British Standard tree categorisation but seeks to avoid the loss of trees of significant amenity or ecological/habitat conservation value. It is agreed that the proposal would result in the loss of trees T1, T2 and T4 which are of significant amenity value. However, as set out earlier in this report officers are satisfied that the proposed layout represents the optimum use of the site and will deliver a number of urban design, housing and regeneration benefits. Retaining these trees would require the footprint of the existing building to be retained on site, which would reduce the number of units that would be delivered and prevent a number of the key advantages of the proposal from being brought forward. Officers are satisfied that the substantial benefits of the proposal could not be delivered without the removal of these trees."

17. Returning to the judgment, the Judge continued as follows:

> "29. The November 2021 report departed from the earlier advice at para 17.6:
>
> > "LP Policy G7 and LLP Policy Q10 allows for the removal of trees where necessary provided that there is adequate replacement based on the existing value of the benefits of the trees removed, determined by a CAVAT based calculation. Mitigation in this form was not provided for in Policy Q10 under the superseded Local Plan (2015) and the application was previously advertised **[sic]** a departure for this reason. As Q10 under the current Local Plan (2021) does allow for such mitigation, the proposal complies with current development plan policy and is no longer considered to be a departure for this reason from the development plan."
>
> 30. The section on trees concluded (paragraph 17.8):
>
> > "Subject to the financial contributions and suitable replacement tree planting on the site the proposal is considered to meet the requirements of LP Policy G7 and LLP Policy Q10."
>
> 31. The conclusion to the report said (paragraph 25.12):
>
> > "The proposal would result in the loss of 4 mature trees. Three of these trees are considered to be trees of significant amenity value. Officers have used the CAVAT system to calculate the value of the trees to be lost and to secure a financial obligation of £182,564 to be spent on planting trees in the vicinity of the site, this include [sic] street trees along

> Trinity Rise and Brockwell Park Gardens as well as within the nearby Brockwell Park. This could fund the planting of estimated 200 trees in the wider area. Subject to conditions securing a scheme of onsite tree planting and the financial contribution towards tree replacement the proposal is considered to meet the requirements of LP Policy G7 and LLP Policy Q10."

32. There was a low degree of harm to the significance of the Cressingham Gardens Estate as a non-designated heritage asset, conflicting with Lambeth Local Plan policy Q23, although considerable importance and weight should be attached to that. However, it was considered that there was no departure from the development plan as a whole.

33. Introducing the item at the Committee meeting, the planning officer said:

> "It should be noted that when the application was first assessed it was considered to be a departure from our Local Plan policy on trees as the provision of a financial contribution was not provided for in the previous policy but our current policy on trees now allows for financial contributions, so it is no longer a departure in this respect."

34. At the meeting Mr Plant spoke in objection, referring to 'removal of 3 mature trees over 80 years old' and other matters.

35. Planning permission was issued on 25 January 2022. A Judicial Review Pre-action Protocol letter was sent on behalf of Mr Plant on 17th February 2022 and the Defendant replied substantively on 3rd March 2022."

The judgment

18. Having set out the background and provided an uncontroversial summary of the legal principles to be applied, the Judge summarised the parties' submissions at [45]-[53]:

    i) Mr Plant submitted that Lambeth had concluded incorrectly that Q10 permitted the removal of any tree for a development provided that its value was replaced and should have concluded that paragraphs B and C(i) prohibited the removal of trees of significant value. Addressing the meaning of "imperative" in paragraph G of Q10 the Judge recorded that "according to the Claimant, "imperative" here means simply that it is necessary to remove a tree in order for a proposed scheme of development to proceed". Mr Plant submitted that the planning authority was not permitted to balance the importance of the scheme against the value of the tree. Lambeth should therefore have acknowledged a breach of Q10 and put that harm into the judgment whether the scheme complied with the development plan and the overall planning balance;

ii) Lambeth submitted that Q10 "contains a cascading series of requirements and exceptions". Paragraph A applies to all trees, requiring them to be positively considered, protecting them as appropriate. Paragraphs B and C(i) address significant trees particularly, requiring them to be retained and protected. Paragraph G applies to all trees, including but not limited to cases where the aims of Paragraphs B and C(i) cannot be achieved. Paragraph G provides a narrow exception to paragraphs B and C(i): the exception can only be established if it is "imperative" to remove the tree and there is adequate replacement planting, which is determined by reference to the value of the tree in question adopting cost/benefit tools. The test of "imperative" is a high one: the normal meaning of imperative is "of vital importance", "crucial", or "essential". The grant of permission was sound.

19. The Judge identified that the consequence of Mr Plant's submissions would be that Q10 always requires retention of significant trees, whatever justification there might be for their removal or whatever benefits removal might bring. Mr Plant's case is that the planning authority cannot within policy strike a balance between the importance of the scheme and the value of the tree proposed for removal in deciding whether removal is "imperative" under paragraph G of Q10. On his submissions Q10 imposes an absolute prohibition on removal of significant trees and the importance of the scheme is to be brought into account as a material consideration outside the LLP, which may indicate a decision "otherwise" than in accordance with the development plan: see s. 38(6) of the Planning and Compulsory Purchase Act 2004.

20. The Judge considered Mr Plant's approach to be an unrealistic one that depended on an artificial constraint on the considerations which the planning authority can take into account in deciding whether removal of a tree is "imperative". He considered that, if the intention of the first clause of paragraph G had been that a tree could only be removed to make way for a new development, he would have expected it to say so rather than resorting to the use of the word "imperative". He considered that the hurdle presented by the word "imperative" would be higher or lower depending upon the value of the tree, that his interpretation was consistent with paragraph 180(d) of the NPPF, and that it left a role for paragraphs B and C(i) of Q10 since they "clearly seek retention and protection of significant trees" even though paragraph G provided a limited exception. He rejected the submission that Lambeth had failed to consider paragraphs B and C(i) and concluded that it had considered Q10 entirely correctly.

The present appeal

21. The issue in the present appeal involves a short point of construction. The submissions made by the parties to this Court are essentially the same as those before the Judge below. Mr Plant submits that paragraphs B and C(i) of Q10 provide an absolute prohibition so that any felling of mature trees is contrary to policy. On this interpretation, paragraph G does not provide an exception to the prohibition: it merely provides for there to be replacement planting to be secured if the prohibition (and therefore the policy) is breached by felling a tree and it was "imperative" to remove the tree. He submits that the Judge's approach sets aside a specific prohibition and, in its place, substitutes a general approach to the felling of trees which omits any meaningful criteria since the meaning of "imperative" is vague and unclear.

22. In oral submissions Mr Harwood KC, who appears for Mr Plant, clarified and developed those submissions. He accepts that the reference to "trees" in the first sentence of paragraph G is unqualified and refers to all trees, whether or not they fall within paragraph B or C(i). He reminded us that interpretation of local plans needs to bear in mind that they have to be applied by planning officers and committees, statutory agencies, developers and local residents. When pressed on what meaning should be given to the word "imperative" in paragraph G, he said that it would be "imperative" to remove trees if the scheme could not proceed without felling them.

23. Lambeth responds that the Judge's approach was coherent and correct. On its interpretation, paragraph G provides both an exception to the prohibitions in paragraphs B and C(i) where their objective cannot be achieved and a mandatory direction that adequate replacement planting must be secured when that limited exception applies. Lambeth's interpretation of "imperative" would accommodate a case where the tree occupies a space where the development is to be built or where it is necessary to remove a tree in order for a proposed scheme of development to proceed; but it goes wider.

24. In oral submissions Mr Reed KC, who appears for Lambeth, submitted that Mr Plant's interpretation gave no meaning to the word "imperative." He submits that the word "imperative" commonly implies that something is of overriding importance or is essential, and that the conclusion that something is "imperative" generally implies an evaluative judgment based on all relevant considerations. In a planning context, therefore, the word "imperative" connotes the conclusion reached on the basis of an evaluative assessment of all matters relevant to a planning decision. He submits that Mr Plant's more restricted interpretation of "imperative" is both arbitrary and too limited – there is no justification for interpreting "imperative" as covering only those cases where a tree stands in the way of a development while ignoring all other relevant planning considerations.

The legal framework

25. The basic legal principles that apply to the treatment of officers' reports to committees were set out by the Judge by reference to the well-known passage at [42] of *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314. It is not suggested that the Judge erred in his application of those principles and it is not necessary to set them out again here. We are concerned with the proper interpretation of Q10. As to that, it is well established that Lambeth was required to have regard to "the provisions of the development plan, so far as material to the application" and to "any other material considerations": see section 70(2) of the Town and Country Planning Act 1990. It is also common ground that policy statements in local plans such as those being considered in this appeal should be interpreted objectively in accordance with the language used, read as always in their proper context: see *Tesco Stores Ltd v Dundee* City Council [2012] PTSR 983 at [18]. I agree with the judgment of Sir Keith Lindblom, the Senior President of Tribunals, which I have seen in draft.

Discussion and conclusion

26. Whichever is the correct interpretation, it must be acknowledged at the outset that Q10 is not drafted as well or as clearly as it could have been. If Q10 means what Mr Plant says it means, it would have been easy to clarify that paragraphs B and C(i)

admitted of no exceptions and that paragraph G applied to trees that fell within paragraphs B and C(i) only as a potentially material planning consideration *outside* Q10. Conversely, if Q10 means what Lambeth says it means, it would have been easy to clarify that paragraph G provided an exception to paragraphs B and C(i), e.g. by adding the words "subject to paragraph G …" at the start of those paragraphs. Neither of these simple expedients were adopted. We are therefore required to interpret Q10 in accordance with the principles stated in *Tesco v Dundee City Council*.

27. To my mind, Lambeth's proposed interpretation does less violence to the wording of Q10 and provides a more natural interpretation of Q10 as a whole than does Mr Plant's. If Mr Plant is right, the other paragraphs of Q10 are concerned with the need to take account of trees and when they may be removed, but paragraph G is not – it is concerned with what should happen in the event of breach of B or C(i) rather than the circumstances in which the felling of trees may be permissible. This division of purpose seems to me to be counter-intuitive. Reading Q10 as a whole, it is a more natural interpretation to treat the relevant paragraphs, including paragraph G, as delineating and defining the circumstances in which trees (including significant trees) may or may not be removed.

28. A further consequence of Mr Plant's proposed interpretation is that, on the assumption that felling any tree falling within paragraphs B or C(i) will be in breach of policy, the obligation to secure replacement planting under paragraph G arises if it was "imperative" to remove the trees but not otherwise. There seems no obvious logic that would require replanting to be secured if it had been imperative to remove a tree but not if the tree was removed even though it was not imperative to do so. A more internally coherent approach is to say that paragraph G bows to the inevitable and permits the removal of trees where it is "imperative" that they be felled, but only on terms that notionally equivalent benefits are secured by replanting based on the existing benefits of the trees removed, calculated using established cost/benefit tools. The default position for significant trees is established by paragraphs B and C(i): departure from the default position is only permissible within policy in the limited circumstances that it is "imperative" to do so. While it would be unwise to become fixated by a single word, I would accept Lambeth's submission that Mr Plant's interpretation pays inadequate attention to the word "imperative" in this context.

29. What then is meant by the use of the word "imperative" in paragraph G? If I am right that paragraph G operates to permit removal of trees while remaining within policy, I would accept the thrust of Lambeth's submission that the use of the word "imperative" implies the conclusion reached as the result of an evaluative process in which all relevant planning considerations should be taken into account. It therefore involves an exercise of planning judgment. Plainly, the requirement that the removal of the tree is "imperative" establishes a high bar that should act as an effective limitation upon the paragraph G exception to paragraphs B and C(i). It is not desirable or possible to attempt any further definition or paraphrase of "imperative", though it may be thought to be broadly synonymous with necessity. "Imperative" is, after all, a normal English word that is well understood even if its application may be flexible. That flexibility arises because there may be any number of relevant variables to be taken into account depending upon the circumstances of the given case. That said, I would accept that the relevant variables may include (a) the significance,

quality and value of the tree or trees that are to be removed, (b) whether or not the proposed development can be implemented without removing the tree or trees, (c) the benefits that are sought to be achieved by the implementation of the scheme, and (d) whether an alternative scheme could achieve the same or similar benefits without necessitating the removal of the tree or trees. This is *not* intended to be an exhaustive list: the categories of potentially relevant planning considerations are never closed.

30. My conclusion is not dependent upon consistency with policy G7 of the 2021 London Plan policy G7 or paragraph 180(d) of the NPPF. I accept that different policy documents need not and may not necessarily be congruent either in their terms of their effect. However, I draw some further support for the conclusion I have reached from the fact that Lambeth's interpretation is consistent both with the London Plan and the NPPF.

31. For these reasons I would dismiss the appeal.

Lord Justice Moylan:

32. I agree with both judgments.

Sir Keith Lindblom, Senior President of Tribunals:

33. I agree that the appeal should be dismissed, for the reasons given by Stuart-Smith LJ.

34. This case turns on the proper interpretation of a single policy in the development plan. No legal novelty arises. Well established principles are engaged (see the judgment of Lord Reed in *Tesco v Dundee City Council*, at paragraphs 17 to 22). Development plan policies must be interpreted with realism and common sense, and with a proper understanding of their practical purpose. The court must keep in mind that this exercise is not the same as construing provisions in a statute or the terms of a contract. The formulation of the policy in question may not be perfect, especially perhaps if it is the product of re-drafting in successive processes of plan-making. But whatever shortcomings there may be in its drafting, the object in interpreting the policy is always to ascertain the true meaning of its language and the effect it is intended to have in guiding planning decision-making. A policy must, of course, be seen in its context. And it is also essential to view the policy itself in its entirety, avoiding a disjointed reading of individual criteria or phrases within it, and thus gain a true sense of how its constituent parts fit with each other and work together as a whole. A practical and coherent interpretation, if that is possible, should be the aim.

35. When those basic things are kept in mind here, I am satisfied that the interpretation of Policy Q10 favoured by the judge, and confirmed by Stuart-Smith LJ in his judgment, is correct. And the council's application of the policy to HFL's proposal was consistent with that interpretation, and lawful.