Neutral Citation Number: [2020] EWHC 3388 (Admin)

Case No: CO/1727/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2020

Before:

MR JUSTICE SWIFT

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Between:

THE QUEEN
on the application of
COVENTRY GLIDING CLUB LIMITED **Claimant**

- and –

HARBOROUGH DISTRICT COUNCIL **Defendant**

- and –

G & P GARNER AND SONS **Interested Party**

- and –

SECRETARY OF STATE FOR HOUSING COMMUNITIES & LOCAL GOVERNMENT **Intervener**

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Jenny Wigley (instructed by Keystone Law) for the **Claimant**
Stephen Whale (instructed by Harborough District Council) for the **Defendant**
Mark Westmoreland Smith (instructed by The Secretary of State) for the **Intervener**
Hearing date: 2nd November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time of hand-down is deemed to be 10:00 am on Friday 11th December 2020

MR JUSTICE SWIFT:

A. Introduction

1. On 14 November 2019 I handed down my judgment on liability in this claim ([2019] EWHC 3059 (Admin) "the liability judgment"). The Claimant ("the Gliding Club") challenged the decision made by Harborough District Council ("the Council") on an application for prior approval which had been made by Interested Party ("Mr Garner") under article 7 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO") read with paragraph Q.2 of Part 3 of Schedule 2 to the GPDO. Mr Garner made his application because he wished to convert an agricultural building known as Red Brick Barn, to use as a dwelling.

2. My conclusion in the liability judgment was that the Council's decision dated 28 February 2019 on that application was unlawful: (a) because the Council had failed to comply with the requirement at paragraph W(8) of Part 3 of Schedule 2 of the GPDO to give notice of the proposed development; and (b) because in reaching its decision to grant prior approval, the Council failed to have regard to relevant considerations. When the liability judgment was handed down I made an order joining the Secretary of State for Housing Communities and Local Government ("the Secretary of State") as a party to the proceedings because one of the remedies sought by the Gliding Club was a declaration of incompatibility. I also invited the parties to agree directions in anticipation of a remedies hearing.

3. The issues for determination at the remedies hearing have taken shape in light of information provided by the Council to the Gliding Club late in the day on 13 November 2019, the day before the liability judgment was handed down. That information was that although the Council's decision on prior approval had been taken on 28 February 2019 it had not been communicated to Mr Garner until 1 March 2019. That information has since been confirmed in a witness statement made on 19 December 2019 by Christopher Brown, the case officer at the Council responsible for dealing with Mr Garner's application.

4. The significance of this information is as follows. Article 3 of the GPDO grants planning permission for the classes of development listed as permitted development in Schedule 2 to the GPDO. Article 7 of the GPDO provides as follows so far as concerns the types of development in Schedule 2 where permission is stated to be "subject to prior approval".

> "**7. Prior approval applications: time periods for decision**
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> Where, in relation to development permitted by any Class in Schedule 2 which is expressed to be subject to prior approval, application has been made to a local planning authority for such approval or a determination as to whether such approval is required, the decision in relation to the application must be made by the authority –
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> (a) within the period specified in the relevant provision of Schedule 2,

> (b) where no period is specified, within a period of 8 weeks beginning with the day immediately following that on which the application is received by the authority, or
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> (c) within such longer period that may be agreed by the applicant and authority in writing."

Thus, although an application for prior approval is required to obtain the planning permission granted by the GPDO, the Planning Authority is required to make a decision either within the period specified by the relevant provision of Schedule 2, or if no such period is specified and there is no agreement to the contrary, within period prescribed by article 7(b).

5. In this case, the material part of Schedule 2 is paragraph Q. Paragraph Q.2(1) requires the developer (in this case, Mr Garner) to apply "for a determination as to whether prior approval of the authority will be required …" in respect of various prescribed matters. This is the provision that prompted Mr Garner to make his application. His application was received and validated by the Council on 3 January 2019. Although the drafting of paragraph Q.2(1) is somewhat awkward, referring to an application for a determination on whether prior approval will be required rather than an application for prior approval *per se*, it appears to be the general practice that applications made under paragraph Q.1(1) are treated and determined as applications for prior approval. That is certainly what the Council did in this case.

6. Paragraph Q.2 (1) states that the provisions of paragraph W in Part 3 of Schedule 2 apply to applications. Paragraph W(11) provides as follows:

> "(11) The development must not begin before the occurrence of one of the following –
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> (a) the receipt by the applicant from the Local Planning Authority of a written notice of their determination that such prior approval is not required;
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> (b) the receipt by the applicant form the Local Planning Authority of a written notice giving their prior approval; or
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> (c) the expiry of 56 days following the date on which the application under subparagraph (2) was received by the Local Planning Authority without the Authority notifying the applicant as to whether prior approval is given or refused."

7. Paragraph W(11) may not expressly prescribe the period within which a Planning Authority must determine an application for prior approval, but the necessary consequence of paragraph W(11)(c) is clear: if the applicant has not been informed of the decision by the end of 56 days following the date on which the Planning Authority received his application, he is permitted to proceed with the development in accordance with the details set out in his application, and remains able to undertake that development throughout the three year period permitted under paragraph Q2(3).

8. In this case Mr Garner's application was received by the Council on 3 January 2019. The relevant period, whether it is the one under Article 7(b) of the GPDO or under paragraph W(11) in Part 3 of Schedule 2 to the GPDO, expired on the 28 February 2019. Because the Council failed to notify Mr Garner of its decision by 28 February 2019, his right to develop under paragraph Q became unconditional. This is the conclusion that must follow from paragraph W(11).

9. In submissions there was some debate as to whether the circumstances of this case fell into article 7(a) or (b) of the GPDO, i.e. did paragraph W(11) specify the period within which the Planning Authority had to take a decision on an application under paragraph Q.2(1) or did the reference in paragraph Q.2(1) to paragraph W (and thereby to paragraph W(11)) refer only to notification and not to the time within which the Council was required to take its decision. This went to whether or not it was either necessary or appropriate to make a quashing order directed to the Council's decision in this case. I do not consider that this debate gives rise to any matter that is material. Article 7 of the GPDO does not sit easily with paragraph W(11). The former anticipates that either it or a relevant paragraph in Schedule 2 will specify the time within which the prior approval decision must be taken. However, the latter (paragraph W(11)) is not directed to the date when the decision was taken, but to a different event – notification of the decision to the applicant. Since this is so, paragraph W(11) provides no true alternative to Article 7(b); the consequence is that the present case falls within Article 7(b) and not Article 7(a)[1].

10. There is no conflict between Article 7(b) and paragraph W(11). In this case, the Council took its decision on 28 February 2019 within the period prescribed by Article 7(b) GPDO. Thus, *prima facie*, the decision was a valid decision. However, because the Council did not notify Mr Garner of the decision until 1 March 2019, it failed to comply with paragraph W(11), with the consequence that the decision has no bearing on whether or not Mr Garner's right to develop under paragraph Q became unconditional.

11. In these circumstances, the Gliding Club's case on remedies is as follows. *First*, notwithstanding the effect of paragraph W(11) the Council's decision of 28 February should be quashed. *Second*, that there should be a declaration that paragraph W(11) is incompatible with the Gliding Club's Convention rights (article 1 of Protocol 1 to the ECHR). *Third*, the Gliding Club seeks permission to pursue a claim for damages against the Council.

12. In addition, the Council raises two matters: that an injunction should be made to prevent Mr Garner redeveloping Red Brick Barn; and that because its decision on the application for prior approval was ineffective, the order made when the liability judgment was handed down that it should pay the Gliding Club's costs to that date, should be reversed.

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[1] Whether Article 7(a) or (b) is the operative provision as to the time within which the Council was required to take its decision on the approval application is immaterial to the outcome of any of the issues arising in this case.

B. Decision

(1) Should the Council's decision be quashed?

13. Both the Gliding Club and the Council contend that an order should be made quashing the 28 February 2019 decision. I consider this matter is somewhat academic. Ordinarily, a quashing order is the precursor to the relevant public authority reconsidering the matter in issue and reaching a new decision. For the reasons set out above, there is no prospect that will happen in this case. By reason of the application of paragraph W(11) in Part 3 of Schedule 2 to the GPDO the planning permission pursuant to paragraph Q has become unconditional. Mr Garner has the benefit of that permission until February 2022. There is no decision that the Council could take that will affect that state of affairs. All this being so, I do not see what practical benefit would flow from a quashing order. Nor do I see why a declaration that for the reasons given in the liability judgment, the Council's decision of 28 February 2019 was unlawful, would not be sufficient. In the premises I decline to make a quashing order. There will be instead a declaration to the effect just explained.

(2) Is paragraph W(11) in Part 3 of Schedule 2 to the GPDO incompatible with Convention rights?

14. The Secretary of State's submission on this part of the Gliding Club's case is that in light of the reasoning of the Court of Appeal in *R(Nunn) v First Secretary of State* [2005] Env LR 32, there is no incompatibility between the GPDO and the Gliding Club's Convention rights. In *Nunn* the Interested Party (a mobile phone company) had erected a mobile phone mast in reliance on a permission granted under the Town and Country Planning (General Permitted Development) Order 1995, in circumstances where it had made an application for permission for prior approval which had not been determined by the relevant planning authority within the permitted time (in that case also, 56 days). The planning authority issued an Enforcement Notice requiring removal of the mast, but the Interested Party's appeal against that notice was allowed by an Inspector on the basis that there had been no breach of planning control. Before the Inspector Dr. Nunn had sought to argue that the mast should be removed because of its likely impact on her health and/or on the value of her home. The Inspector had not ruled on these matters because he had concluded that permission to erect the mast arose under the 1995 Order. Dr. Nunn challenged the Inspector's decision contending that the material provision of the 1995 Order could be read so as to permit a hearing of her substantive objections to the mast, and that the Inspector should have considered her arguments. Dr. Nunn also contended that the planning authority's failure to take a decision on the application for prior approval within the time specified in the 1995 Order was a breach of her Convention rights.

15. The material parts of Waller LJ's judgment are paragraphs 21-23 and 29-31

> "21. By the end of the hearing before us there was no real issue that the failure of the LPA had had the effect of depriving Dr Nunn of Article 6 rights … The concession made by Mr Mould for the Secretary of State in his skeleton was that Dr Nunn's rights under Article 8 and Article 1 of the First Protocol were engaged but, because the attack by Mr Wolfe was concentrated on the decision of the Inspector on appeal from the

enforcement notice, there was no clear concession that Dr Nunn's Article 6 rights had been infringed. But in his oral argument he began by making that concession but submitted that any remedy lay against the LPA. Mr Katkowski also was prepared to assume for the purposes of this claim that Dr Nunn had been deprived of her Article 6 rights, and submitted that any remedy lay against the LPA.

22. It seems to me clear that Dr Nunn's Article 6 rights were here infringed. She and others affected had the right to make representations to the LPA on the effects on health and on the appearance of the mast as it affected them and the value of their homes. T-Mobile of course contested that their health could be affected and contested that the appearance affected the value of their homes. Both T-Mobile and Dr Nunn had, under Article 6, the right to expect that those points would be determined by the LPA, by an effective decision which might be the subject of an appeal to an Inspector, controlled by the court by Judicial Review or even such as to be under the direct control by the court by Judicial Review. In this instance she was deprived of her right under Article 6 to such a determination.

23. The key issue became, and is, what should be the consequence? The consequence suggested by both Mr Mould and Mr Katkowski was that Dr Nunn's remedy lay against the LPA alone, either in damages under Section 8 of the HRA or in a claim before the Ombudsman for maladministration. Mr Wolfe submitted that Dr Nunn's Article 6 rights had been infringed in relation to the issue whether the mast should be sited where it was proposed. He submitted that the remedy she should have, should restore to her her entitlement to attempt to uphold the LPA's original view that the mast should not be sited where it is. Damages were not a sufficient remedy. He submitted that the Inspector hearing the appeal from the enforcement notices should have noted the deprivation of Article 6 rights and that, by one route or another including writing words into the statutory scheme or the statute itself under Section 3 of the HRA, the Inspector was obliged to hold that T-Mobile did not have lawful planning permission, and then go on to consider the merits under Section 174(2)(a).

…

29. If Dr Nunn has a complaint it has got to be a complaint that has substance whether or not an enforcement notice was served, and whether or not there was an appeal from that enforcement notice. She has such a complaint which when properly analysed, as I see it, is two-fold (1) the determination that prior approval should be refused was not made effective by virtue of the late service of the decision on T- Mobile; and (2) even though T-Mobile might have appealed that decision, she was

> deprived of the right of making her points on the merits in an appeal from that decision.
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> 30. In relation to those complaints, only the LPA has any responsibility at all. T-Mobile have done nothing to affect or interfere with her Article 6 Rights. The Inspector hearing the appeal against enforcement has no jurisdiction to consider what should flow from the decision of the LPA not being effective. It is furthermore not the scheme as set out in the GPDO which has prevented the determination of Dr Nunn's rights being effective, it is the failure of the LPA to serve their determination on time. That failure provided T-Mobile with rights to begin the development for which the GPDO had given them permission, and T- Mobile had exercised those rights. The Inspector on the appeal against the enforcement notice had no jurisdiction to take away that right. Section 3 simply does not provide the court with jurisdiction to write in words in the Scheme or in the TCPA which would have that effect.
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> 31. The remedy for Dr Nunn appears to lie or to have lain against the LPA who failed to make their determination in her favour effective. The LPA were not represented before us and I will say nothing more other than if Dr Nunn has or had a remedy against them it may not be limited to a claim before the Ombudsman, but may include a claim for damages under Section 8 of the HRA."

Laws and Wall LJJ agreed.

16. For present purposes, the first significant matter is that the court rejected the submission that the provision in 1995 Order that rendered planning permission unconditional if a planning authority failed to determine an application for prior approval within 56 days, was contrary to Convention rights. As Laws LJ stated at paragraph 35 of his judgment, the submission that legislation that could be operated so as to violate Convention rights was for that reason alone repugnant to the Convention is a *non-sequitur*.

17. I consider the reasoning of the Court of Appeal in *Nunn* applies equally to the circumstances of this case. There is no basis on which to conclude that paragraph W(11) is incompatible with the Gliding Club's Convention rights[2].

18. The Gliding Club submitted that the circumstances of this case can and ought to distinguish it from *Nunn* because it does not appear from the report of the judgment in *Nunn* that the 1995 Order required notification of a decision within a prescribed time

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[2] The facts of this case do not require a decision on the effect of paragraph W(11) in a situation where a decision on an application for prior approval has been taken and communicated within the times permitted, but is then challenged and quashed. Before it became apparent in this case that the Council had not communicated its decision to Mr Garner in the time allowed, the Council had stated that its submission would be that where a decision, properly made and communicated, was quashed the effect of paragraph W(11) was that the right to develop became unconditional because the consequence of the quashing order was that an effective decision had neither been made nor communicated within the 56 day permitted period. Even absent section 3 of the Human Rights Act, I have significant doubts that that conclusion is correct. But if those doubts are misplaced, there would remain a serious issue as to whether such a state of affairs was consistent with the Convention rights of the person who had successfully challenged the prior approval decision. In this instance, however, this matter does not need to be resolved.

(in the manner of paragraph W(11) of Schedule 2 to the GPDO) as well as setting a time limit for taking the decision itself. It is possible that the 1995 Order was different from the GPDO, in this regard, but I do not consider any such difference is a matter of any significance.

(3) Should an injunction be granted to prevent Mr Garner from developing Red Brick Barn?

19. The Gliding Club made no submission to this effect. Only the Council submitted that an order should be made preventing Mr Garner from making use of the planning permission he now has pursuant to the terms of the GPDO. Mr Stephen Whale (who appeared for the Council at the remedies hearing, but who did not appear at the liability hearing) submitted that the power existed to make an order. However, he could not point to any legal basis for such an order in this case. As this part of his argument progressed it became apparent that the point was more in the nature of a last ditch attempt to shield the Council from the risk of a claim for damages based on its failure to comply with the notification requirement under paragraph W(11) in Part 3 of Schedule 2 to the GPDO, than in the nature of any well-founded legal submission.

20. The short point is that there is no legal basis for any such injunction against Mr Garner. He has obtained planning permission in accordance with the provisions of the GPDO. He is entitled to develop his property to the extent the GPDO permits. He has been assisted in this endeavour by the Council's error but that provides no basis for an injunction.

(4) The costs order following the liability hearing

21. When handing down the liability judgment I made an order requiring the Council to pay the Gliding Club's costs of the proceedings up to and including the date of judgment, to be assessed on the standard basis if not agreed (Order at paragraph 3). This part of the Order was made with the consent of the Council. Mr Whale, on behalf of the Council, now applies for that part of the Order to be set aside and replaced by a new order that the Gliding Club should pay the Council's costs of the liability proceedings. This application is hopeless. Mr Whale submits that before starting the claim the Gliding Club should have asked the Council to confirm the information on its website – i.e. that the decision had been made and notified on 28 February 2019. Had this happened, he submits, the Council would have told the Gliding Club that the published information was wrong to the extent that Mr Garner had not been notified of the decision until 1 March 2019. Implicit in this submission is the further point that it does not matter that after the litigation commenced the Council did not, until the day before the liability judgment was due to be handed down, say that Mr Garner had not been notified of the decision within the time permitted.

22. The submission on this application is detached from reality. First, when the Gliding Club commenced its claim, it had no reason to doubt the accuracy of the information the Council had published on its website. The Council's website stated (and for that matter still states) that the decision was "issued" on 28 February 2019. It is common ground that the reference to the date of "issue" is reference to the date stated by the Council to be the date of notification for the purposes of paragraph W(11) of the GPDO. Second, as explained in the liability decision, the proceedings were commenced late. There was no formal pre-action correspondence. However, while the claim was being

prepared, the Gliding Club and its solicitor were in contact with Mr Brown (the relevant officer at the Council) on various matters relating to the Council's decision. No direct question was raised requesting confirmation that the information on the Council's website as to the date the decision was issued was correct. Yet it is striking that none of Mr Brown's replies mentioned that the Council had published incorrect information relating to the date that the decision had been issued. If the matter really was as obvious as Mr Whale's submission suggests why did the Council not when faced with the possibility of this litigation take the opportunity to correct the position and state the date on which Mr Garner had been notified of the decision. Third, after the claim had been commenced the Council took no steps to explain the true situation. It did nothing until the day before the liability judgment was due to be handed down. Taken together these matters give the lie to any suggestion that the correct information would have been provided had the Gliding Club, before starting the proceedings, asked the Council to confirm that the information on its website was correct.

23. There is one final point. The Council first raised the date of notification issue the day before the liability judgment was due to be handed down. But even then, it still maintained its consent to the part of the Order that required it pay the Gliding Club's costs of the proceedings to date. That simply renders the application that the Council now makes all the more inexplicable.

24. For all these reasons I refuse the Council's application to vary the costs provision at paragraph 3 of the Order dated 14 November 2019.

(5) The Gliding Club's proposed claim for damages against the Council

25. In its judgment in *Nunn*, the Court of Appeal suggested that the remedy available to Dr. Nunn was a claim for damages for breach of her Convention rights (see per Waller LJ at paragraph 31).

26. At the beginning of the remedies hearing the Gliding Club sought permission to amend its Claim Form to add a claim for damages. At my suggestion the Gliding Club agreed that, before that application is considered, it should file and serve a draft pleading in support of the proposed damages claim. I also directed that after service of that draft Amended Claim Form, the Council should file and serve its response to the application to amend. Once those documents are available, I will determine the application to amend on the papers.

27. Even though those steps remain pending, the Gliding Club invited me to state conclusions both as to whether a damages claim is available in principle, and as to the measure of damages that can be claimed. Conversely, the Council made a range of submissions to the effect that in principle no claim for damages is available, and that if any such claim does exist that it is not a claim of any significant value. I do not consider it is appropriate to state any view on any of these matters in advance of the properly formulated and pleaded version of the proposed damages claim. When that is available and the Council's response to the application to amend has been filed, I will consider whether to permit the application to amend the claim.