Neutral Citation Number: [2019] EWHC 3059 (Admin)

Case No: CO/1727/2019

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT (PLANNING COURT)**
**SITTING AT BIRMINGHAM CIVIL JUSTICE CENTRE**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/11/2019

**Before**:

**MR. JUSTICE SWIFT**

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**Between**

**THE QUEEN**

**on the application of**

| | |
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| **COVENTRY GLIDING CLUB LTD** | **Claimant** |
| **- and -** | |
| **HARBOROUGH DISTRICT COUNCIL** | **Defendant** |
| **-and-** | |
| **R & P GARNER AND SONS** | **Interested Party** |

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**JENNY WIGLEY** (instructed by **Keystone Law** for the **Claimant**
**JACK SMYTH** (instructed by **Legal Services, Harborough District Council**) for the **Defendant**

Hearing date: 22nd October, 2019

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# Approved Judgment

**MR JUSTICE SWIFT :**

## A. Introduction

1. Coventry Gliding Club Ltd ("thev Gliding Club") is long-established; it was formed in 1952 and incorporated the following year. At present it has over 400 members. Itstages major competitions each summer: in 2019 it hosted the British Gliding Association UK National Championship, which was held over nine days and attracted some 60 or so pilots; in 2021 it is due to host the Women's World Gliding Championship. Since 1965 the Gliding Club has been based at Husbands Bosworth in Leicestershire. That site is part of a former World War 2 airfield. The site comprises a runway which can be used either east to west or west to east depending on wind direction, and associated buildings (a club house and some hangers). There are also some caravans on the site which are used by visiting pilots. The runway runs parallel to Sibbertoft Road. There are winches at either end of the runway which are used to launch gliders. Four 4mm steel cables are attached to each winch. To launch a glider a cable is drawn out from the winch and attached to the glider. The winch then draws in the cable, at great speed, so that within a matter of seconds the glider accelerates to 60 mph. When the glider is above the winch, the cable is released and falls to the ground. The Gliding Club is open seven days a week April to September, and three days a week October to March. Flying hours are not restricted to the club's opening hours.

2. Airfield Farm is next to the airfield's site, and shares most of the northern boundary of that site. This application for judicial review concerns a decision by Harborough District Council ("the Council") made on 28 February 2019 to grant prior approval to Mr and Mrs Garner, the owners of Airfield Farm, for a proposal to convert a barn on Airfield Farm referred to in the decision letter as "Barn B", and also known as the Red Brick Barn. The Council's decision was in response to an application made on 24 December 2018 (validated on 3 January 2019 when the fee was received by the Council).

3. The change of use was permitted development under Class Q of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO"). It fell within either Class Q(a) or (b). Paragraph Q.2 (1) provides as follows:

> "(1) Where the development proposed is development under Class Q(a) together with development under Class Q(b), development is permitted subject to the condition that before beginning the development, the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to—
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> (a) transport and highways impacts of the development,
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> (b) noise impacts of the development,
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> (c) contamination risks on the site,
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> (d) flooding risks on the site,

> (e) whether the location or siting of the building makes it otherwise impractical or undesirable for the building to change from agricultural use to a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order, and
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> (f) the design or external appearance of the building,
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> and the provisions of paragraph W (prior approval) of this Part apply in relation to that application."

4. Although paragraph Q.2(1) refers to applications to local planning authorities to determine whether prior approval is required, what Mr and Mrs Garner sought in their application was a grant of prior approval; and the decision taken by the Council was a decision to grant prior approval. The decision was taken by Christopher Brown, one of the Council's Senior Planning Officers, in exercise of delegated powers, on the basis of information contained in and attached to an officer's report.

5. The matter primarily put in issue by this claim is the Council's conclusion that the "location or siting" of the Red Brick Barn, did not (in the language of paragraph Q.2(1)(e)) make it *"otherwise impracticable or undesirable for the building to change from agricultural use to a use falling within Class C3 (dwelling house) of the Schedule to the Use Classes Order"*. The Red Brick Barn is one of a number of agricultural buildings on the south side of Airfield Farm, close to the northern boundary of the Gliding Club's airfield. The Airfield stands between the Red Brick Barn and Sibbertoft Road. The barn has access to the road via a track that runs across the airfield. It is accepted that a right of way over this track attaches to the Red Brick Barn. But the track runs across the runway, close to the winches at the eastern end of the runway. Thus, the primary part of the Gliding Club's case is that when granting prior approval, the Council failed to have regard to the safety risks that could arise from the fact that anyone living in the Red Brick Barn or visiting it would have to cross the runway. I have already said a little about the way gliders are launched at the airfield, using winches. Landing also brings with it a risk of hazard. Once a glider is committed to land, it cannot abort the landing since it has no means of regaining altitude or remaining at a fixed height. Gliders start their descent from approximately 800 feet and then descend at a rate of at least 200 feet per minute. Once on final approach there is very limited scope for manoeuvre. The approach speed is likely to be in the region of 60 miles per hour. If a glider tried to make a turn when close to the ground, for example to take evasive action, it would almost certainly crash.

6. As part of its case, the Gliding Club has referred to two previous decisions by the Council to refuse applications for planning permission to convert the Red Brick Barn to residential use. Both applications pre-dated the GPDO. The first, in June 2002, was refused on the ground that noise caused by the Gliding Club's activities would be detrimental to the amenity of any future occupants of the property. The reasons stated in the Notice of Refusal (dated 21 August 2002) were as follows:

> "The development, if permitted, would result in the creation of residential accommodation in a location where the use of the surrounding land as a gliding club would be incompatible with

> the proposed residential use and, as such, would be detrimental to the amenities of any future occupants of the property in respect of noise and disturbance, contrary to advice contained within PPG24 "Planning and Noise" "

The second application was made on 10 September 2002. That application was refused (on 30 April 2003) both on grounds of noise, and to the risks to safety arising from using the track to go to and from the property. The reasons on that occasion were as follows:

> "1. The proposed development would intensify the use of the access to the site and increase its usage by persons unfamiliar with the safety risks present. It is considered that such changes to its use would increase the likelihood of accidents to the detriment of public safety.
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> 2. The noise access assessment fails to take into account fully the "worst case scenario" which could occur at the Gliding Club and therefore provides insufficient evidence on which the impact of the existing airfield use upon the potential occupants of the proposed barn conversion can be assessed."

7. The particular grounds of challenge to the Council's prior approval decision are: (1) that the Council failed to give notice of the application for prior approval as required by paragraph W(8) of Part 3 of Schedule 2 to the GPDO; (2) that the Council (a) failed to have regard to material considerations, namely safety of access, and the impact on the property of noise from the Gliding Club's activities; and (b) had regard to an immaterial consideration, namely the use to which land on Airfield Farm could lawfully be put by reason of Class B of Part 4 of Schedule 2 to the GPDO[1]; and (3) that the Council failed to give sufficient reasons for its decision and /or reached a conclusion that was irrational.

8. The Council opposes each of the above grounds, and further contends that the application for judicial review was commenced late, and that time to commence the proceedings ought not to be extended. The Council contends these proceedings fall within the scope of CPR 54.5(5) and are subject to the requirement that a Claim Form must be filed no later than 6 weeks after the date when the claim first arose. That was on 28 February 2019, the date of the Council's decision to grant prior approval. The six week period expired on 12 April 2019. The Claim Form was filed on 25 April 2019. The Gliding Club contends (a) that the claim is subject to the time limit at CPR 4.5(1) (to commence proceedings promptly and in any event within three months) and for that

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[1] This ground (b) was pleaded as a separate Ground 4. However, it seems to me to be more convenient to consider it as part of an expansion of Ground 2. Class B of Part 4 of Schedule 2 to the GPDO permits use of any land for any purpose for not more than 28 days per calendar year, save that the land may only be used for 14 days each year for either holding markets or the purpose of motor racing.

reason was not brought out of time; alternatively (b) that if CPR 54.5(5)does apply, time for filing the Claim Form should be extended under CPR 3.1(2)(a)

## B. Decision

*(1) Ground 1: was notice of the proposed development displayed near the land to which the application relates?*

9. The obligation on local planning authorities to give notice is set out at paragraph W(8) of Part 3 of Schedule 2 to the GPDO.

> "(8) The local planning authority must give notice of the proposed development—
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> (a) by site display in at least one place on or near the land to which the application relates for not less than 21 days of a notice which—
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> (i) describes the proposed development;
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> (ii) provides the address of the proposed development;
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> (iii) specifies the date by which representations are to be received by the local planning authority; or
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> (b) by serving a notice in that form on any adjoining owner or occupier."

10. The Council's case it that it complied with subparagraph (a) by displaying a relevant notice opposite the entrance to the Gliding Club on Sibbertoft Road. It is common ground that the contents of the notice displayed met the requirements at subparagraph (a) (i) – (iii). No point is taken as to the period for which the notice was displayed. What is in dispute is whether the notice was displayed "near the land to which the application relates". The Gliding Club relies on the following matters: the notice was displayed some 900 metres from the Red Brick Barn; there was no reason why the notice could not have been displayed significantly nearer the property – for example where the access track to the Red Brick Barn meets Sibbertoft Road. The Gliding Club makes the further point that the notice was not even put next to the entrance to the Gliding Club but only opposite, on the other side of Sibbertoft Road. There is no pedestrian footpath on either side of Sibbertoft Road. I am told that the speed limit on the road is 60mph and that traffic tends not to dawdle. Mr John Inglis, the chairman of the Gliding Club says that he did not see the notice, so that the first time he was aware of the application was on 14 April 2019 when Mr Garner told him that the Council had granted prior approval. Mr Inglis also says that to his knowledge, no other member of the Gliding Club saw the notice. He points out that when the two applications for planning permission were made in 2002 the Council served notice of the applications on the Gliding Club. The Gliding Club submits that while the information on the notice was not defective, by reference to the matters required by paragraph W(8)(a)(i) – (iii), nor was it particularly helpful in identifying which property was the subject of the application. The property was described only as *"… agricultural barn off Sibbertoft*

*Road"*, without saying which side of the road. Apparently, there are barns on both sides of this stretch of Sibbertoft Road.

11. I have not been referred to any authority on the meaning or the application of the requirement to display a notice *"near the land to which the application relates"*. Whether or not a notice has been displayed near the land is a question of objective fact to be determined by the court. The question is not whether the local planning authority reasonably concluded that the notice was near the land; rather, it is whether in fact the notice was near the land. It is important not to conflate the requirement that the notice be near the land with a requirement that the notice be sited, for example, in the most suitable location. The requirement that the notice be near the land to which the application relates could, depending on the circumstances of the land itself, be met by siting a notice in any of a number of positions. No hard and fast rule can be formulated by reference to the absolute distance between the notice and the land: in a rural location such as Husbands Bosworth, what is near may extend over a greater distance than an urban area. Purpose is the last of the general considerations. Paragraph W(8) (a) and (b) are alternative provisions. The planning authority can either serve the notice on any adjoining owner or occupier (subparagraph (b)) or display the notice on or near the relevant land (subparagraph (a)). In each instance the object is to put neighbours on notice of the application for prior approval. If a local planning authority opts to comply with its obligation by way of subparagraph (a) rather than subparagraph (b), and to do so by placing the notice near to the land, when deciding whether that action meets the requirement it is relevant to have regard to the extent to which by acting in that way, neighbours ought reasonably to be put on notice. All these considerations will weigh in the balance, no doubt in different ways and to different extents, from case to case.

12. My conclusion in this case is that the Council failed to comply with the requirement to display the required notice near to the Red Brick Barn site. The Council put its case on the basis that the relevant land for the purposes of paragraph W(8)(a) was the site of the Red Brick Barn only, and not Airfield Farm. This, said the Council, explained its choice to comply with the notice requirement by way of paragraph W(8)(a), since the only adjourning owners or occupiers were Mr and Mrs Garner, who were the applicants for prior approval. No point is taken by the Gliding Club on the Council's decision to proceed by way of subparagraph (a) rather than subparagraph (b). Given that under the GPDO these subparagraphs are presented as simple alternatives, the circumstances in which a local planning authority might be criticised for proceeding under one subparagraph rather than the other are likely to be rare, if they exist at all. Yet on the facts of this case, placing the notice opposite the entrance to the Gliding Club was not good enough. That was some 900 metres from the Red Brick Barn; even in the context of a rural location that is a considerable distance. Further, putting the notice there was far from being an obvious way of complying with subparagraph (a). The entrance to the Gliding Club was not the way to the Red Brick Barn. Access to the Barn from Sibbertoft Road was via the access track. Since the barn is set back from the road, I accept that displaying the notice at a suitable point on the side of the road would be good enough for subparagraph (a). I also have in mind the point above that the requirement to display the notice near the land to which the application relates is not a requirement to display the notice at the nearest possible location. But though the notion of near is flexible, it must have a breaking point. In this case the end of the axis track is significantly closer, and it is the point of access from Sibbertoft Road to the Red Brick Barn. The combination of those matters is sufficient to conclude that a notice put

opposite the entrance to the Gliding Club did not meet the obligation under subparagraph (a). The Council said it decided to put the notice opposite the entrance to the Gliding Club because it would be more conspicuous there. Even putting to one side the evidence of Mr Inglis that no member of the club saw the notice, I do not see how opposite the entrance to the Gliding Club is a more conspicuous location for a notice of proposed development of the Red Brick Barn, than a notice placed at the end of the barn access track. Moreover, what the Council did on this occasion looks distinctly odd when compared with what it did for both the applications for planning permission in 2002. On each those occasions the Council sent notice of the application directly to the Gliding Club. Be that as it may, the notice displayed this time was not close enough to meet the requirement paragraph W(8)(a) of Part 3 of Schedule 2 to the GPDO.

*(2) Ground 2: did the Council have regard to relevant considerations, and disregard irrelevant matters?*

13. The Gliding Club's case is that the decision to grant prior approval was taken without regard (a) for the impact of noise from the Gliding Club on those living in the property; and/or (b) for the risk to safety to those living in the property or visiting it presented by the fact that the barn access track crossed the runway used by the Gliding Club.

14. The starting point for a public authority taking a decision in exercise of a discretionary power is that, subject to the confines of *Wednesbury* reasonableness, it is able to decide for itself which matters are relevant considerations. However, that in-principle position gives way both to any requirement on the face of the relevant power either to take account of or disregard any specific matter, and to any similar requirement arising as a matter of implication. In the context of Class Q of Part 3 of Schedule 2 to the GPDO, paragraph Q.2(1)(a) – (f) identify matters to which a local planning authority must have regard. This includes, at (e), whether the location or siting of the building makes it either impracticable or undesirable for the building to change from agricultural use to use as a dwelling. Given that requirement, given the proximity of the Gliding Club to the Red Brick Barn, and given also that access to the Barn was by means of the access track across the runway, I am satisfied that each of the matters identified by the Gliding Club was a relevant consideration. That conclusion is underscored by the outcome of the two applications for planning permission made in 2002. The first was rejected because of the impact of noise from the Gliding Club on the amenity of occupiers of Red Brick Barn; the second was rejected for that reason and because of safety risks arising if the access track was used by those going to and from the property. There have been no matters drawn to my attention arising between 2002 and 2019 which might render either of these matters immaterial. In the premises, there is no escape from the conclusion that both the likely impact of noise from the Gliding Club on those living in the property, and the risks to the safety of persons using the access track to go to and from the property, were relevant matters that the Council had to consider when deciding the application for prior approval. Mr Smyth for the Council referred me to paragraph 109 of the National Planning Practice Guidance, under the heading *"What is meant by impracticable or undesirable for the change to residential use"*. That paragraph contains a narrative discussion of things that could render change of use either impracticable or undesirable. It is apparent that the officer who wrote the report in this case had this paragraph of the guidance well in mind. However, I see nothing in this guidance which militates against my conclusion that in this case the noise and the safety issues were relevant considerations.

15. Did the Council have regard to these matters? The contemporaneous evidence is in the form of the undated officer's report prepared for Mr. Brown for the purposes of his decision. This is a clear and carefully structured document that works its way through each of the matters listed at paragraph Q.2(1) of Schedule 2 to the GPDO. When it comes to the condition at paragraph Q.2(1)(e) the report states as follows:

> "(e) whether the location or siting of the building makes it otherwise impracticable or undesirable for the building to change from agricultural use to a use falling within Class C3 (dwelling houses) of the Schedule to the Use Classes Order.
>
> The building is isolated but has an existing access and it would be reasonably be serviced by electricity, water etc. The building will not change in footprint or overall appearance."

Although the two previous planning applications are listed on the first page of the report under the heading *"Relevant planning history"* no mention is made of the reasons why those applications were refused. Mr. Smyth has taken me to the judgment of the Court of Appeal in *R(Mansell) v Tunbridge and Malling Borough Council* [2017] EWCA Civ 1134 at paragraph 42. In that paragraph, Lindblom LJ emphasises that officer's reports should not be read as if they were exercises in statutory drafting; he points out that it must be recognised that such reports are written for an audience (either councillors or in this case other council officers) who will be familiar with many local issues and who will bring that knowledge to bear when reading the report; finally he makes it clear that officer's reports should be read benevolently and reasonably, there is no excuse for nit-picking. But in this case, benevolent reading of the officer's report cannot change the fact that there is no mention at all either of the possible impact of noise from the Gliding Club, or of the safety risks that could arise because the access to the Red Brick Barn is across the runway used by the Club.

16. The other part of the evidence is Mr Brown's two witness statements. It is striking that Mr Brown does not say anywhere in his statements that he did have regard to the matters now in issue. He refers to the consultation response received from the highway authority (Leicestershire County Council) and the point made in that response that the Red Brick Barn was considered to be *"sufficiently located away from a noise nuisance"*. I cannot see those specific words in the response from the County Council. Nevertheless, it is clear to me that the response provided concerned matters arising in connection with the use of highways. Nothing in the response is directed to the effect of noise from the Gliding Club's activities or the safety of access across the runway; there is no reason why those matters need to have been the concern of the highway authority. Mr Brown says he was aware of the applications for planning permission from 2002. But rather than seeking to explain how the reasons given on those occasions were taken in to account by him in 2019, he states only that the existence by 2019 of the permitted development right under Class Q of Part 3 of Schedule 2 to the GPDO amounted to a relevant change in circumstances. Thus, he appears to be suggesting that matters considered relevant in the context of the 2002 applications had ceased to be relevant in 2019. I do not agree; nor can I see any logical basis for such a suggestion. The changes consequent on the GPDO are not material for the purposes of the point now in issue. For these reasons I accept the Gliding Club's submission that the Council failed to have regard to relevant considerations.

17. The other part of the Gliding Club's case under this heading is the contention that the Council took account of an irrelevant matter. This submission rests on paragraph 21 of Mr Brown's first statement where he says this.

> "In consideration of the prior approval application consideration was also given to the fall-back position of the applicant in terms of the criteria of Class Q.2 where the applicant may use of the agricultural land for high-traffic events such as weddings, music festivals, circuses, country fairs etc. with vehicular access across the runway for up to 28 days per year (including all set up and take down days) under Schedule 2, Part 4, Class B of the GPDO. Any such event as above would generate significantly more vehicular traffic to access the site than the permitted change of use to a small singular dwelling."

This part of the witness statement is somewhat anomalous since there is no mention of this matter at all in the officer's report, or (although in context this is less important) on the face of the decision. I assume the relevance of it is: (a) that even if the application for prior approval were refused it would have remained possible for Mr and Mrs Garner to use land at Airfield Farm (not just the site of the Red Brick Barn) for any of the wide range of purposes permitted by Class B of Part 4 of Schedule 2 to the GPDO for the periods of time specified in that Class; and (b) that such usage could equally engage the noise and/or safety concerns relied upon by the Gliding Club in this case. If that is the point Mr Brown seeks to make it is one that needs to be treated with care. As observed by Sullivan LJ in *Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government* [2019] EWCA Civ 333, whether or not fall-back positions are relevant is very fact-specific. That point applies with even greater force when the fall-back use relied on rests on the Class B generic provision rather than (as in the *Tadcaster Brewery* case, or in *South Buckinghamshire District Council v Secretary of State for the Environment* [1999] PLCR 72 to which I was also referred), when the fall-back argument arises from a specific former use of the property. For the fall-back argument to be a point of substance, the possible use must be more than merely theoretical; and there should some realistic possibility that the property would be used for the purpose relied on. I cannot see that in the circumstances of this case the theoretical availability of Class B use was a consideration to which any sensible weight could attach. First, if the possibility of the Class B uses mentioned by Mr Brown existed at all, it existed in relation to Airfield Farm generally not the Red Brick Barn site alone. The chance that any of a circus, country fair or music festival could have taken place on the Red Brick Barn site alone must have been vanishingly small. Secondly, and in any event, there was no history of any such use of the land. Absent evidence either of some sort of past use, or specific evidence of intended future use (neither being present in this case) it would not be rational to attach any material weight to the fall-back position.

18. Drawing these matters together, although given the absence of any reference to the fall-back position in the officer's report I am reluctant to conclude that it was taken into account at all, on the assumption that Mr Brown's statement is accurate, my conclusion is that in this case the fall-back position was an irrelevant consideration.

19. Overall therefore, the Gliding Club succeeds on Ground 2 of the claim.

*(3) Ground 3: failure to give reasons; irrationality*

20. In this case these grounds of challenge are subsidiary to Ground 2 of the challenge. The reasons challenge is a mirror image of the failure to take account of relevant consideration argument. If, contends the Gliding Club, regard was had to the noise issue and the safety issue, and on the assumption the Council did decide that neither was such as to render it either impracticable or undesirable for use of the Red Brick Barn to change to use as a dwelling house, then the Council provided no reasons for its conclusions on those points. Since the Gliding Club has succeeded on Ground 2, I do not need to address the reasons challenge.

21. The same goes for the rationality argument. Here too, the premise of the Gliding Club's case is that it has failed on Ground 2. From that premise the Gliding Club contends that the decision to grant prior approval was irrational in light of the noise and safety considerations. Since the Gliding Club has succeeded on Ground 2, the rationality submission does not arise for consideration. Whether or not a decision to grant prior approval could be rational cannot be known until the Council has paid proper attention to the noise and safety considerations.

*(4) Was the claim commenced out of time?*

22. The decision under challenge was taken on 28 February 2019. The proceedings were filed on 25 April 2019. The Gliding Club's first submission is that this claim does not fall within CPR 54.5(5) and therefore is not subject to the requirement to file Claim Form not later than 6 weeks after the grounds to make the claim first arose, because it is not a claim in respect of a decision made *"under the planning acts"*. In CPR 54.5 "the planning acts" has the meaning stated in section 336 of the Town and Country Planning Act 1990[2]. The Gliding Club contends that this claim does not concern a decision made under any of the relevant Acts because the decision to grant prior approval was a decision under Part 3 of Schedule 2 to the GPDO.

23. Although the Council's decision was made under Schedule 2 of the GPDO, that does not take it outside the scope of CPR 54.5. Section 58(1) of the Town and Country Planning Act 1990 ("the TPCA 1990") provides that planning permission may be granted by a development order; by section 59(1) the Secretary of State is required to provide for the granting of planning permission by a development order; by section 60(1), planning permission granted by a development order may be granted *"… subject to such conditions or limitations as may be specified in [a development order]"*; section 60(2A) then provides as follows:

> "(2A) Without prejudice to the generality of subsection (1), where planning permission is granted by a development order for development consisting of a change in the use of land in England, the order may require

[2] i.e. the Town and Country Planning Act 1990; the Planning (Listed Building and Conservation Area) Act 1990; the Planning (Hazardous Substances) Act 1990; and the Planning (Consequential Provisions) Act 1990.

> the approval of the local planning authority, or of the Secretary of State, to be obtained—
>
> (a) for the use of the land for the new use;
>
> (b) with respect to matters that relate to the new use and are specified in the order."

Article 3 of the GPDO grants planning permission for the classes of development specified in Schedule 2, subject to the limitations and conditions in Schedule 2 which include, for present purposes, the conditions at paragraph Q.2(1) of Part 3 of Schedule 2. Overall, and entirely unsurprisingly, there is a single thread running from the material provisions in the TPCA 1990 to the Council's power to decide whether any of the conditions set out in paragraph Q.2(1) applied vis-a-vis the Red Brick Barn.

24. Returning to CPR 54.5(5) I am entirely satisfied that the Council's decision to grant prior approval was a decision *"under the planning acts"*. Although the immediate premise for the decision was the power at paragraph Q.2(1) of the GPDO, that power is expressly anticipated by section 60 of the TCPA 1990. The notion of a decision made under the planning acts is more than sufficient to cover not only decisions made pursuant to powers in the TPCA 1990 itself but also decisions pursuant to provisions in the GPDO. As a matter of ordinary language, a decision on the issue at paragraph Q.2(1) of Part 3 of Schedule 2 to the GPDO is just as much a decision made under the planning acts to one taken pursuant to an express provision in the TPCA itself. It follows that this claim was filed late.

25. The Gliding Club's further submission is that I should extend time for filing the claim in exercise of the power at CPR 3.1(2)(a). It is common ground that I should exercise that power in accordance with the principles stated in the judgment of the Court of Appeal in *Denton v TH White* [2014] 1 WLR 3926 – i.e. taking account of the seriousness as significance of the failure to comply with the rules; why the default occurred; and all the circumstances of the case, see per Lord Dyson MR at paragraphs 24 to 44.

26. As to the application of CPR 3.1(2)(a), the Council relies on the decisions of the Court of Appeal in *R(Gerber) v Wiltshire Council* [2016] 1 WLR 2593, and *R(Thornton Hall Hotel Ltd) v Wirral Metropolitan Borough Council* [2019] EWCA 737. The judgments in both cases emphasised the importance attaching to time limits in the context of challenges to planning decisions: see in *Gerber* per Sales LJ at paragraphs 46 to 49; and *Thornton Hall Hotel* per the Court at paragraph 21.

27. In the circumstances of the present case I have decided to extend time for filing the Claim Form with the consequence that the Gliding Club claim is not time – barred. It is material that I have already concluded the Council failed to comply with the requirement to give notice at paragraph W(8)(a) of Part 3 of Schedule 2 to the GPDO. That being so, based on the evidence given by Mr Inglis to the effect that prior to 14 April 2019 the Gliding Club was unaware of Mr and Mrs Garner's application for prior approval, I am satisfied that there is a sufficient explanation for the delay occurring until that point. Mr. Smyth submitted that the consequence of Sales LJ's reasoning at

paragraph 49 of his judgment in *Gerber* is that when a local planning authority complies with statutory notice requirements an in-principle barrier arises to any application for an extension of time to commence proceedings. I am not entirely satisfied that is the correct reading of that part of Sales LJ's judgment, since in the remainder of the same paragraph he emphasises the considerable period of delay that had occurred in that case. Likewise, the judgment in *Thornton Hall Hotel* which considered Sales LJ's judgment in *Gerber* suggests that striking the required fair balance may depend not simply on whether or not the local planning authority complied with notice requirements, but may also require weight to be attached to the extent to the delay itself, together with all other relevant circumstances. Given my conclusion that the Council did not in this case comply with the notice requirements, this is not a matter on which I need to dwell.

28. So far as concerns the period from 14 April 2019 to 25 April 2019, Alistair Benjamin Garbett the solicitor instructed by the Gliding Club, has made a statement that sets out, step by step, almost day by day, the steps that were taken. I am satisfied that in that period the Gliding Club pursued matters speedily and efficiently. The Council contended that even if the period prior to 14 April 2019 were disregarded, the Gliding Club took too long thereafter to start these proceedings. In particular, it was submitted that e-mails between the Council and the Gliding Club from the period show that by the 15 April 2019 the Club had all the information reasonably necessary to decide whether a claim existed such that issuing the Claim Form on 24 April 2019 was simply too late. I disagree. The Gliding Club did not obtain copies of documents evidencing the two planning applications in 2002 until 18 April 2019. This information was a material piece of the jigsaw. That day was Maundy Thursday. The Claim Form was filed on the third working day after the Easter weekend. Overall, I do not consider that the delay was either unexplained, or too long. Mr Smyth accepted that this was not a case where the delay that occurred gave rise to any prejudice. Applying the *Denton* principles, considering the circumstances in round, it is appropriate to grant an extension of time.

## C. Conclusion

29. In these circumstance the Gliding Club's claim succeeds. The remedy that will be ordered will need to be considered at a further hearing and be the subject of a further judgment. The Gliding Club considers that by reason of the provisions of Article 7 of, and paragraph W(11) of Part 3 to Schedule 2 to the GPDO, a quashing order may be insufficient to afford it an effective remedy. That remedy alone, contends the Club, would result only in breach of its Convention rights under Article 6 read together with Article 1 of Protocol 1 to the ECHR. In these circumstances the Gliding Club submits that I should, in reliance on the interpretive obligation at section 3 of the Human Rights Act 1998 read-in words to paragraph W(11) (c) of Part 3 of Schedule 2 to the GPDO, or in the alternative declare that provision as it stands incompatible with its Convention rights. These are arguments that must be brought to the attention of the Secretary of State. Section 5 of the Human Rights Act 1998 applies. No section 5 notice had been given at the time of the hearing of this claim. At the hearing, the Gliding Club undertook to give notice to the Secretary of State. A remedies hearing can be listed once that has happened and the Secretary of State has had the opportunity to decide whether or not to intervene.