Neutral Citation Number: [2022] EWHC 2148 (Admin)

Case No: CO/4229/2021

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

The Civil Justice Centre
Manchester

Date: 12 August 2022

Before :

His Honour Judge Bird (sitting as a judge of this court)

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Between :

THE QUEEN on the application of

JOANNE CATHIE — **Claimant**

- and –

CHESHIRE WEST AND CHESTER BOROUGH COUNCIL — **Defendant**

-and-

(1) ANDREW GARNETT
(2) JOHN ANTHONY AND PAMELA GARNETT — **Interested Parties**

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Richard Wald QC and Katherine Barns (instructed by **Birketts**) for the **Claimant**
Piers Riley-Smith (instructed by **Legal Services Cheshire West and Chester Borough Council**) for the **Defendant**

Hearing dates: 31 May 2022

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Approved Judgment

His Honour Judge Bird :

Introduction

1. On 6 April 2020, the defendant granted retrospective conditional planning permission (ref: 19/03679/FUL) for a reception pit and slatted yard at Hale Pastures Farm ("the Farm"). Condition 2 (set out at paragraph 28 below) required the interested parties to submit an odour management plan ("OMP") for approval. On 3 November 2021, the defendant discharged condition 2. This is the claimant's challenge to that decision.

The Background

2. Mr and Mrs Cathie live at Hales Pasture House ("the House") in Allostock in Cheshire. It has a paddock, stables and a garden. Until 1987 it was part of the Farm. Mr and Mrs Cathie bought the House in 1996 and have lived there since then. Until 2017 the Farm (which is owned by the interested parties) caused them no particular issue. In 2017 the farming business changed. A herd of 80 cows was acquired. They are housed, fed and milked in newly developed buildings.

3. The new buildings were constructed without planning permission. In planning terms, the new development comprised:

> "*a portal-framed shed with single-storey side extension for a mix of agricultural and B8 uses, change of use of an area of hardstanding to a mix of agricultural and B8 uses, construction of reception pit and erection of two adjoining buildings for dairy farming, with extensions and alterations to yard and access track*".

4. The reception pit is covered by concrete slats and is 6m wide, 26m long and 2.2m deep. It therefore has a capacity of around 343 cubic metres. It sits southwest of the House, between 68.9m and 76.7m from it. It is between 81m and 101m from the garden (see Table 2 in the first OMP referred to below).

5. The pit is designed to contain both solid and liquid waste generated by the cows. The emptying regime for the pit has changed over time:

    a. The pit is now emptied every week or so. This is a more regular pattern than was previously the case. The change was brought about as a result of the recommendations made by Smith Grant in their report of November 2019. Before the change, it would be emptied every 2 to 3 months all year round. The liquid slurry is then spread on fields which are some distance away. The emptying process including slurry spreading can take about 3 hours. It takes between 5 and 10 minutes to fill a tanker. The remaining time is taken driving to the fields and spreading the slurry.

    b. Solids are emptied in the summer months only and at a frequency of between 2 and 5 times per year.

The Abatement Notice

6. Mr and Mrs Cathie found the foul smell generated by the dairy farming operation at the Farm difficult to put up with. They reported matters to the defendant in March 2018. On 12 September 2018, after on-site investigations and in accordance with its duties under section 80(1)(a) of the Environmental Protection Act 1990, the defendant served a statutory abatement notice on the interested parties. The defendant was satisfied that "a statutory nuisance" (see section 79(1)(d) of

the 1990 Act which provides that "*any…. smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance*" is a statutory nuisance) existed. The interested parties were required to abate the nuisance within 14 days and to provide an OMP to the Defendant which was to demonstrate "*best practicable means*" to minimise the odours. There was no appeal against the notice.

7. By section 80(4) of the 1990 Act it is an offence for any person served with an abatement notice (in the absence of a reasonable excuse) not to comply with it. Section 80(7) of the Act provides that a person able to "*prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance*" (emphasis added) has a defence.

The first OMP

8. The interested parties instructed Resource and Environmental Consultants Limited ("REC") to prepare an OMP to comply with the abatement notice. As a preliminary step REC carried out an odour impact statement. The results were then used to inform the OMP, which set out steps to put an end to the statutory nuisance. These include:

    a. Emptying the pit from a bottom feed pipe to reduce "agitation" on the surface of the slurry and so reduce the release of odours.

    b. Minimising the stirring and agitation of slurry.

    c. The use of a low protein diet for the cows to reduce the nitrogen and sulphur content of the manure which in turn would reduce odours.

    d. A regular cleaning regime.

9. Under the heading "prevailing meteorological conditions" the OMP accepts that wind direction is an important factor in considering the impact of odour emissions. The predominant wind direction was noted to be from the south.

10. The OMP concludes with an odour risk assessment. It considers the impact of odour (from stored slurry, from stirring, mixing and spreading the slurry, from discharging contents into tankers and from cow cubicles) at the House, its garden and the paddock once the proposed mitigation is in place. In each case the risk was assessed as "low" with the probability of exposure in each case assessed as "low" and the severity of the consequences of exposure in each case at "medium."

11. It is important to note that since the OMP was submitted, and the steps set out in it were implemented, there has been no recurrence of the statutory nuisance and no fresh abatement notice has been served. It seems therefore to follow that the mitigation measures put in place have had a positive impact on the lives of Mr and Mrs Cathie.

12. At or about the time the first OMP was prepared, the interested parties applied for retrospective planning permission in respect of the development at the Farm. It was accompanied by the first OMP.

The second Odour Impact Assessment ("OIA")

13. The second OIA was prepared by Redmore, not for the interested parties, but for Mr and Mrs Cathie. A copy was sent to the defendant on 5 November 2018 in support of their opposition to the grant of retrospective planning permission.

14. The report concludes that overall odour impacts at the House are "significant" and that odours "*attributable to existing sources at the farm have the potential to adversely affect currently and future amenity levels at [the House]*."

The first retrospective planning application

15. The Defendant's Environmental Protection team ("the Team") reviewed the application for planning permission on or about 1 February 2019 and raised "*significant concerns*". It was not satisfied that residential amenity would be "*adequately and consistently protected from unacceptable impacts of odour*."

16. The first OMP was good enough to satisfy the requirements of the abatement notice (to stop the statutory nuisance) but not good enough to deal with issues of residential amenity. The interested parties withdrew the application for planning permission on 25 March 2019.

The second retrospective planning application

17. The interested parties submitted a fresh application (this time in respect of the reception pit, the slatted yard above it and the erection of 2 robot milking sheds) on 4 October 2019. This time they were better prepared and did not rely on the first OMP. They submitted a new OIA dated November 2019 prepared by Smith Grant LLP.

18. The Smith Grant report is comprehensive and impressive. It expressly addresses planning issues. In addition to considering reports and information available at the time it was written, it is based on an "*odour dispersion modelling exercise*." That exercise involved the collection of foul samples from various locations and an analysis of the "odour concentration" for each sample. That concentration was then used to calculate odour emission rates. The report therefore sets out an empirical analysis of the impact of odours.

19. The concrete slats that cover the pit are said to "*substantially reduce*" odour emissions from the pit itself. The primary source of odour is identified as cow waste on the slatted yard (see paragraph 6.1.4).
20. Having set out the mitigating measures included in the first OMP, at paragraph 7.7.3 the report notes:

"Key aspects that would serve to minimise the risk of odour impacts at [the House] due to the reception pit would be the regular emptying of the pit to minimise the anaerobic decomposition of the slurry and ensuring, when possible, pit emptying is not undertaken during conditions when dispersion would be towards the property." (emphasis added)

21. Two important points arise from this paragraph. First, the recommendation of "regular" emptying is a suggestion that the pit be emptied more often (paragraph 7.1.3 of the report describes the previous regime of emptying the pit typically every 2 months) and secondly, decisions about when to empty the pit should take account of weather conditions.

22. The report is summarised at section 8. The two points set out at paragraph 7.7.3 are repeated. The report accepts that odours will be generated at the site and may on occasion adversely impact the amenity of those at the House. It is however the author's view that:

> "*with appropriate management of the reception pit in accordance with the OMP and best practice and in particular the minimisation of disturbance of the pit contents, regular emptying of the pit liquid content and endeavouring to ensure liquid and solid removal are only undertaken during suitable weather conditions (unless conditions mean this would not be*

possible such as during a prolonged adverse period of weather) the potential for odours to significantly impact the surrounding environment can be managed and mitigated." (emphasis added)

23. Finally, the report recommends that the OMP should be "revised and updated in light of this OIA."

The Officer's Report

24. The case officer (Mrs Reay) recommended the application for approval. Plainly, she was aware of the Smith Grant report and took its contents into account. From her report, it appears the Team this time did not object to the application, and indeed (see paragraph 6.15) believed that the Smith Grant OIA "*robustly*" demonstrated that odour concentration levels at the House are unlikely to have a "*greater than slight adverse effect*."

25. At this stage, the pit and farming operation had been operating in accordance with recommendations set out in the first OMP and there had been no repetition of the statutory nuisance (see paragraphs 6.11 to 6.13 of the officer's report). The further mitigating steps suggested by Smith Grant, could only lead to further improvements.

26. At paragraph 6.25 of the report, the officer recommends that a condition, requiring a revised OMP taking into account relevant matters raised in the Smith Grant report, be imposed.

27. Planning permission was granted on 6 April 2020.

The condition

28. The permission was subject to 2 conditions. The first required the development be carried out in accordance with specified approved plans. The second was as follows:

> *"Within one month of the date of this permission, a revised Odour Management Plan shall be submitted to the Local Planning Authority. This Plan shall be agreed with and approved by the Local Planning Authority and should take into account relevant matters raised in the [Smith Grant report]. The OMP shall also include, but not be limited to, details of all measures to be employed to minimise odorous emissions from the reception pit, slatted area about it and hard-standing adjacent to it, such measures demonstrating best practice. Other aspects to be included include details of obtaining and recording meteorological details to inform removal of liquids and solids from the reception pit; odour mitigation measures to be employed in relation to emptying the reception pit; handling complaints; recording inventory (including feedstock) and process controls. As well as covering both normal operations, the OMP should anticipate and plan for abnormal events and foreseeable accidents and incidents. The OMP should also retain measures intended to monitor and control flies associated with the reception pit." (emphasis added)*

29. The reason given for the condition was "*to protect the residential amenity that neighbouring occupiers can reasonably expect to enjoy*." I deal with the proper interpretation of the condition below.

The Discharge of Condition 2

The first application

30. On 5 May 2020, the interested parties applied to discharge the condition. As required, they produced a new OMP. It was dated 1 May 2020 and was prepared by REC. The Team were far from impressed. They felt it was "*substantially similar to*" the first OMP. In essence it failed to take account of the Smith Grant report.

31. The Team note that the OMP makes no reference to wind conditions and that it would expect a full and proper OMP to specify that:

> "*the pit should only be emptied when winds are from directions other than south, south-west or west….this would seem to be one of the fundamental ways that the OMP can demonstrate best practice in minimising odour exposure*."

32. It is important to note that these comments and expectations are at odds with paragraph 7.7.3 of the Smith Grant report (which stops short of requiring that the pit should be emptied in favourable weather conditions, instead advising this be done "*where possible*") and go beyond what the condition requires (that the weather conditions be monitored to "*inform*" – not "dictate" – when emptying will take place).

33. The application to discharge appears to have been withdrawn.

The second application

34. A new application was submitted on 3 May 2021. Another OMP was submitted on 4 May 2021 and commented on by the Team in an email dated 14 May 2021. They describe the OMP as "*a clear improvement*." Nonetheless, they raise a number of queries.

35. A further OMP was submitted on or about 30 September 2021. Dealing with the slurry and solids removal process it says this:

"The slurry within the pit will be emptied into a tanker, approximately once a week, via a gravity-fed bottom pipe. This will reduce agitation to the top layer of slurry and as such, will minimise the release of odour emissions."

36. This partial emptying regime adopts the recommendation at paragraph 7.7.3 of the Smith Grant report and ensures (as the first OMP and the Smith Grant report recommend) that surface agitation is minimised.

37. Paragraphs 2.3 and 2.4 of the OMP (under the heading "operations" and "hygiene") deal with steps to be taken in respect of cow waste in and about the yard (identified as the primary source of odour in the Smith Grant report).

> *"The hardstanding and yard areas are scraped using specialist equipment twice daily…..Scraping of the hardstanding areas will be undertaken twice daily as noted above. The robotic equipment have timed wash sequences to ensure a sterile milking environment for the cows. The area will be kept in a tidy manner, washed down daily in addition to periodic deep cleans to ensure best practice. These processes are all in accordance with existing stringent Farm assurance requirements"*

38. The OMP goes on (page 5) to note that the interested parties cannot dictate when the pit is emptied. The process requires contractors whose availability will depend on factors beyond the control of the interested parties.

> *"As with most dairy herds nowadays, but in particular smaller units, the farm is reliant on contractors to undertake most of the field and slurry removal work. The scale of the dairy unit, limited to just 80 milking cows, does not afford the investment in the modern*

> *machinery and extra permanent labour to allow the enterprise to operate commercially with owned equipment. As such, the contractors form an important part of the farm's team. This does limit the ability to determine the timings of all operations, with discretion needed by the contractors to allow them to efficiently serve all their customers' needs, usually within small weather windows for specific activities required of various farmers at the same time. On occasions, rented equipment may be used from the contractors, with employees undertaking the processes, but this still has a limitation in terms of availability of equipment."*

39. It is therefore clear that the OMP did not meet the apparent expectation of the Team expressed in respect of the 1 May 2020 OMP that "*the pit should only be emptied when winds are from directions other than south, south-west or west*".

40. Dealing with weather conditions (see table 4) the OMP notes:

> *"Meteorological conditions i.e., wind direction to be obtained and recorded on spreadsheet to inform solid removal of material from reception pit. Data to be obtained from phone weather App. If forecast indicates wind blowing in the direction of receptors, a discussion will be undertaken between team members to consider the operational options. These considerations and the decision-making process will be documented, to further evidence the informed removal of solids from the reception pit." (emphasis added).*

41. The OMP therefore mirrors the condition by making it clear that meteorological conditions will be taken into account when decisions about emptying are made.

Team Comments October 2021

42. The Team commented on the latest version of the OMP in its report (written by Jim Candlin a Senior Regulatory Services Officer) dated 15 October 2021. The report was addressed to Mrs Reay who had delegated authority to deal with the application to discharge the condition. At the time Mrs Reay considered the report she was of course very familiar with the background and context of the matters addressed.

43. The claimants point out that the report refers more than once to "best practicable means" (or "BPM"). As this point is central to the present claim, I set out each reference to BPM in the report:

    a. In the introductory section under the heading "Background" there is reference to the OMP required by the abatement notice to reflect BPM.

    b. Under the heading "purpose of the [latest version of the] OMP" the report suggests that the standard of BPM would be met if the interested parties carries out " all reasonably practicable measures in the operational management of the facilities" It notes that adverse impacts may occur even if BPM have been used. (emphasis added).

    c. Under the heading "conclusion" it notes that the OMP demonstrates that BPM will be employed. In other words, that the interested parties has adopted "*all reasonably practicable measures*" to comply with the condition.

    d. Under the heading "advisory 1" the report notes that the interested parties would be at risk of prosecution should they not be able to demonstrate a defence of BPM for any breach of the extant abatement notice.

44. In the section headed "chapter 2" the report comments on the removal of liquids and solids from the pit. It notes that odours from liquid removal will be limited to "*negligible emissions from the relief valve on the tanker*." It follows that the Team is satisfied that unreasonable odour levels are not likely to occur during liquid removal.

45. As might be expected, the Team address the fact that the latest OMP does not provide for emptying of the pit only when the wind is blowing in the right direction. It squarely addresses the point raised in the OMP about reliance on contractors and refers to the fact that the interested parties have approached contractors to explore the possibility and concludes:

> *"….. this Unit considers that it would be unreasonable to expect the OMP to commit to not undertaking solids removal during certain specified meteorological conditions. This Unit is satisfied that the farm is doing all that is reasonably possible and practicable to manage and minimise odour emissions during solids removal and has made reasonable additional enquiries to explore further minimising odour emissions."*

46. It is important to see this point in context. As I have set out, the terms of the condition do not require the OMP to "*commit to not undertaking solids removal during certain specified meteorological conditions*." The Team's view on the reasonableness of such a requirement is therefore of no relevance. It seems to me that this is simply a justification for the Team's change of view that it no longer "expected" the OMP to require emptying be carried out only in certain weather conditions (see paragraph 31 above).

47. The condition was discharged on 3 November 2021. The Defendant accepts that in reaching its decision, it relied on the Team's comments of October 2021.

The grounds

48. The claimants bring these proceedings for judicial review on 3 grounds:

> Ground 1: The Defendant made the Decision on the basis that the relevant odour management plan demonstrated that the First Interested parties ("the First IP") was exercising "best practicable means" ("BPM") to avoid unacceptable odours arising from the Farm. The Defendant misdirected itself in applying the BPM test since this does not form part of the planning regime but instead relates to the separate statutory nuisance regime (BPM is a defence to the criminal offence of failing to comply with an abatement notice). Rather, as per *Proberun Ltd v Secretary of State for Environment and Medina Borough Council* (1991) 61 P & CR 77 and paragraph 130(f) of the NPPF, the Defendant was required to consider whether the odour management plan under consideration was the best means of ensuring that neighbouring properties continued to enjoy a high standard of amenity. Therefore, in misdirecting itself as to the relevant test, the Defendant wrongly focussed on the efforts of the landowner rather than whether the result of those efforts was in fact the achievement of an acceptable standard of amenity. (Emphasis added).

> Ground 2: In making the Decision the Defendant had regard to (and went on to attach significant weight to) the business model and financial circumstances of the First IP landowner of the Farm. These factors are unrelated to the character of the use of the land and they were therefore immaterial considerations that the Defendant erred in taking into account.

Ground 3: Condition 2 required the odour management plan to include "details of all measures to be employed to minimise odorous emissions from the reception pit, slatted area about it and hard-standing adjacent to it, such measures demonstrating best practice." It was irrational for the Defendant to find that the measures in the submitted odour management plan amounted to best practice on the basis of the business model and financial circumstances of the First Interested Party. The latter are logically unrelated to best practice, the whole point of which is to impose a recognised and uniform standard against which the measures should be judged.

The Submissions

49. The claimant submitted that:

a. The Team's report of 15 October approved the updated OMP only because it adopted BPM. This showed not only a "stunning *volte face*" on their part but also led the Planning Officer into error. She adopted a flawed approach by relying on the report (and so on BPM). BPM is not a relevant planning consideration.

b. In any event the OMP does not set out BPM.

c. The correct approach is derived from ***Proberun***: was the OMP "satisfactory" in the context of the reason for the imposition of the condition? The only basis for the "*volte face*" of the environmental team was the introduction of the BPM test. This is a change of position not reflected in the grounds.

d. The Defendant wrongly took into account the personal circumstances of the interested parties (the steps it could afford to take). Such circumstances, save in very limited circumstances, are not relevant planning considerations.

50. The Defendant submitted that the claimant's argument was predicated on the basis that the pit was only to be emptied in certain weather conditions (when "*the winds are from directions other than south, south-west or west*" see the Team's response to the OMP of 1 May 2020). The argument was misplaced; no such requirement was set out in the relevant condition. The condition required that "meteorological details" be used "to inform" (not dictate) removal of liquids and solids from the reception pit." In respect of the grounds, the Defendant submits:

a. The Planning Officer took account of the October 2021 report. That was appropriate. In doing so she did not override or misapply the terms of the condition. The Officer exercised planning judgment in such a way that no valid challenge arises.

b. The Defendant was entitled to take account of practical, on the ground difficulties that the interested parties would face when operating the development. This is clear from the 6 tests set out for conditions in the NPPF and from PPG 120. Imposing conditions about weather would impose an unreasonable burden. It is a material consideration that ignoring the on-the-ground position would prevent the condition from working.

c. The Defendant's exercise of planning judgment cannot be criticised on the basis of irrationality.

Discussion

51. Two questions lie at the heart of this application. First, what does the condition require the OMP to do? Secondly, did the Defendant apply the correct test when it decided to discharge the

condition?

52. The first question requires me to determine what the condition means (see the approach taken by Jay J in *R (Smith-Ryland) v Warwick DC* [2018] EWHC 3123 paragraph 40). The proper approach to that exercise is set out by the House of Lords in *Trump International v Scottish Ministers* [2016] 1 WLR 85 and described by Jay J as "*an objective, purposive approach which cannot ignore the application of basic common sense*."

53. The second question requires some brief consideration of authority.

What does the condition mean?

The approach

54. Plainly the court will approach the exercise of interpretation on the basis that the condition imposes no greater obligation on the interested parties than the law allows. NPPF 55 and 56 sets out the 6 requirements that must be met by any condition: it must be necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.

55. Further guidance on the imposition of (and so lawfulness of) conditions and the 6 requirements is set out in "Planning Practice Guidance" on the use of planning conditions. Under the heading "are there any circumstances in where planning conditions should not be used?" 6 principles are set out. Prohibited conditions include those that: "….*unreasonably impact on the deliverability of a development*". Further, conditions that "….*place unjustifiable and disproportionate financial burdens on an applicant will fail the test of reasonableness….*"

56. When considering the meaning of the condition I am also entitled to take account of the content of the Smith Grant report and of the stated purpose of the condition. The proper approach is an objective one. I am therefore not concerned with what the subjective views of the parties but with the view of an informed bystander possessed of all relevant background material available at the time the condition was formulated.

The meaning

57. Against the background I have set out, the following key points on interpretation can be made.

58. The condition makes it clear that decisions about emptying the pit will be "*informed*" by the weather. The condition therefore proceeds on the basis that other factors can properly be taken into account. There is nothing in the condition to suggest that the pit can only be emptied in certain weather conditions or when the wind is blowing in a particular direction. This is entirely in line with common sense (wind directions might change without notice) and with the Smith Grant report. Further, there is nothing in the condition which can be read so as to limit the factors that the interested parties are entitled to take into account.

59. The need to demonstrate "*best practice*" in respect of "*all measures to be employed to minimise odorous emissions from the reception pit, stated area about it and hard standing adjacent to it*" cannot be read in a way that imposes unreasonable requirements on the interested parties.

What is the proper test to apply when considering discharge?

60. Ground 1 as set out above proceeds on the basis that the Defendant ought to have asked itself if the OMP set out "the best means" of ensuring that neighbouring properties enjoyed an appropriate

standard of amenity.

61. As the Defendant points out, the claimants have now adopted a different test in their skeleton argument. They have re-phrased their ground 1 and dropped all reference to "best means". They now suggest that the appropriate question is whether the OMP was "satisfactory."

62. The grounds make it clear that the claimants rely on *Medina BC v Proberun* (1991) 61 P & CR 77 in support of their original proposition that "*when considering whether to discharge a condition requiring the approval of details, the decision maker must …ask whether the submitted details are "satisfactory". What is satisfactory must logically be assessed by reference to the purpose of the condition. If the decision maker does not consider the details to be satisfactory, he or she should consider whether they are nonetheless the best that can be achieved in light of the constraints of the site*."

63. *Proberun* in my judgment does not support this approach. It concerned the discharge of a condition attached to an outline planning permission requiring approval of details of an access route to the development site. Outline planning permission had been granted by the Secretary of State on appeal notwithstanding the fact that no satisfactory access could be provided over land forming part of the site or otherwise in the ownership of the developer. The application to discharge the access condition was refused (by the Planning Inspector) because he considered "*the submitted design [was] seriously flawed*." The Inspector's decision was appealed to the High Court and the appeal allowed. It considered that the "*proper test [of] whether the submitted details met the requirements of [the access] condition was whether the means of access shown on the plans was the best means of vehicular access that could be achieved on the site*." The Court of Appeal upheld the decision of the High Court but explained the High Court decision in this way:

> *"In saying that the proper test was whether the means of access was the best that could be achieved on the site [the High Court] was obviously formulating that test in relation to the facts of this case. If a satisfactory access is proposed, nobody should be concerned to inquire whether it is the best that could be achieved. But here it was asserted by the county council and effectively, though not formally, accepted by the applicants that their proposals for the junction were less than satisfactory. Therefore, the test became: what is the best which can be achieved within the limits of the site?"*

64. *Proberun* makes the point that a planning authority must (as it was put in *Smith-Ryland* at paragraph 45) "*be strictly loyal to the terms of the parent permission*" at the subsequent approval stage. The Encyclopaedia of Planning Law and Practice (at P62.01) puts it in this way: "*the planning authority are not entitled to refuse to approve reserved matters on grounds going to the principle of the development itself and which are therefore already implicit in the grant of the outline permission*." The decision provides an example of a situation where a condition might be discharged even if the relevant solution proposed is insufficient. In that case, the applicant must make the solution as good as it can be. Using "best means" in this context does not change the "*satisfactory*" test for discharge, instead it requires the applicant to ensure that the (necessarily unsatisfactory) alternative is as good as it can be.

65. I am satisfied that the test for discharge in the present case is whether the OMP proposed a "satisfactory" solution to the impact of the farming operations on residential amenity at the House. It is plain that a satisfactory solution does not need to be an ideal solution.

66. I turn to the grounds.

Ground 1

67. The claimant now argues that the Defendant applied the wrong test. It should have asked if the OMP was satisfactory, but instead (directed by the Team's response to the OMP) it asked if the OMP employed BPM. In my view there is nothing in this ground.

68. I have set out above how the Team deals with BPM. It concludes that the OMP shows that "*all reasonably practicable measures in the operational management of the facilities to minimise adverse impacts*" will be taken. That is the basis on which the Defendant discharged the condition. In my judgment, once it is understood that the condition must be read so as to impose no more than "reasonable" obligations on the interested parties, this formulation is sufficient to justify the conclusion that the steps set out in the OMP are sufficient. It follows that the condition could lawfully be discharged.

69. In any event, there is clear overlap between steps that employ BPM and steps that are satisfactory. At one extreme it may be that BPM are wholly ineffective to mitigate problem odours and so are not "satisfactory". On the other hand, BPM might be more than enough to meet the "satisfactory" criterion. Whether in a given case steps that comply with BPM are "sufficient" to discharge a condition is a matter of fact and degree. Given the matters I have set out above it is in my judgment plain that the Defendant was entitled to conclude that the OMP was satisfactory. I am satisfied that the Defendant considered the substance of the Team's recommendation and not just the label the Team attached to their conclusion.

70. Further, the Team apply the BPM standard to the pit emptying regime. In my view, whilst useful context, that clearly goes beyond what the condition requires. It imposes no limit on the matters that can be taken into account when the decision to empty is made, it simply requires that weather conditions "inform" the decision. The BPM standard therefore applies to matters which are unconstrained by the condition.

71. In reaching the conclusion that the Defendant did not apply the wrong test and so was entitled to discharge the condition I take account of the fact that the Team was clearly aware that it was being asked to give a view on a planning matter. It had been involved in the matter for some considerable time and was well aware that it was not being asked to express a view on whether a section 80(7) defence would be available to the interested parties. There was never (at least since compliance with the first OMP) any question that there was a statutory nuisance capable of giving rise to a prosecution in any event.

72. The claimant suggests that the Defendant wrongly concentrated on the efforts of the interested parties rather than on the result of those efforts. But the latter is a function of the former and the condition requires actions to be taken.

73. If the claimant's position was correct it would mean that it in order to discharge the condition, the interested parties would take on a "disproportionate or unjustifiable financial burden" because the scale of the farming operation was such that it was simply not possible for the interested parties to invest it their own equipment to empty the pit. The condition would be unreasonable and so unlawful. It would have been wrong (an error of law in misdirecting itself) for the Defendant to conclude that it should read the condition so that it imposed an obligation that was impossible to meet.

74. The claimant also suggest that the discharge of the condition could only be legitimately achieved if it protected their amenity to a "high standard." She relied on NPPF 130 which appears in the "*achieving well designed places*" section of the NPPF. It provides that planning decisions should (see (f)) "*ensure that developments….create places that are safe, inclusive and accessible and which promote health and well-being, with a high standard of amenity for existing and future users*." I cannot accept the claimant's argument.

75. Amenity is an important planning consideration. It is reflected in the Defendant's Local Plan (Part Two) Policy DM2 which requires that a development should not "*result in a significant adverse impact on the residential amenity of the occupiers of existing properties*". Paragraph 47 of the Defendant's PaP response (dated 6 December 2021) points out at paragraph 47 that at the time part 2 of the local plan was adopted it was found to be consistent with NPPF 130. In any event the claimants are not present or future users of the development. NPPF 130 is about encouraging practical design excellence and creating high amenity through design for those who will use the relevant development. DM2 is about others (non-users) who might be affected by a development.

Ground 2

76. There is in my view nothing in this ground.

77. For the reasons I have set out, the Defendant was required to interpret the condition so that it did not impose a disproportionate or unjustifiable financial burden on the interested parties. That requires a consideration of the claimant's circumstances as far as they are material.

78. The claimants make the point that the permission runs with the land so that the interested parties may sell. If he does so the purchaser may be immensely wealthy and so, may be able to afford to have his own equipment and staff so as to facilitate emptying the pit only when the wind was in the right direction. That new owner would be under no obligation to do so because (it is said) he could rely on the present OMP. I cannot accept that argument. The OMP (as required by the condition) requires that weather conditions be monitored and used to "inform" operations. As the OMP puts it at page 14, weather forecasts will provide additional information to inform "any planned potentially odorous activities". With additional resources and (perhaps) staff and equipment on hand, the result of this exercise is likely to be that operations will take place when conditions are favourable.

Ground 3

79. The use of the "best practice" qualifier in the condition does not mean that the Defendant is entitled to place on the interested parties an unjustifiable and disproportionate financial burden. The condition cannot be read to impose an obligation on the interested party to adopt a "gold-plated" solution. If the condition was read in that way, it would fall foul of the NPPF and the PPG.

80. At least 4 steps are taken to minimise emissions "from the pit" and its surrounds: first the aim is not to agitate or disturb the slurry. The main cause of agitation would be the process of draining the pit. To deal with that the pit is drained from a gravity fed bottom pipe and "stirring and agitation" is generally to be minimised. Secondly, steps are taken (subject to the primacy of animal health) to ensure that the cows' diet does not add to odour issues (see for example pages 6 and 11 of the latest OMP). Thirdly (see the latest OMP at paragraph 4.3) the slatted yard above the pit "*reduces mass exchange between the top layer of slurry and the surrounding air significantly minimising odour*" and finally the slatted and hardstanding areas will be "scraped using specialist equipment twice daily" (see the latest OMP at paragraphs 2.3 and 4.3).

81. I can see no basis to conclude (or evidence to suggest) that the measures taken in respect of odorous emissions from the pit, the slatted area and the hard standing do not comply with "best practice."

Conclusion

82. In my judgment, the Defendant applied the correct test when considering the discharge of condition two. No public law error has been identified. It follows that the claim must be dismissed.

83. The decision to discharge the condition must be seen in the context of steadily improving odour emissions at the Farm. The starting point, in 2018 before the abatement notice was served, represents rock-bottom. Then things improved after the steps outlined in the first OMP were implemented. The Smith Grant report sets out further steps leading to further improvements. Whilst improvement is not necessarily relevant to the discharge question it may offer some comfort to the claimants.

84. A failure to discharge the condition in this case would in my view have amounted to an indirect (and impermissible) attack on the grant of planning permission because it would have prevented the interested parties from making any use of the new (and now authorised) development.

85. I am grateful to counsel for their assistance. If an order can be agreed I will hand down this judgment in the absence of the parties.